Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 159)

Discussion Paper on Compulsory Purchase

discussion paper

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December 2014

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The Stationery Office

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The Commission would be grateful if comments on this Discussion Paper were submitted by 19 June 2015.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Chapter 16 Consequential loss - disturbance

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Glossary and list of abbreviations

Legislation

English 1845 Act. Lands Clauses Consolidation Act 1845 (c. 18).

1845 Act. Lands Clauses Consolidation (Scotland) Act 1845 (c. 19).

1845 Railways Act. Railways Clauses Consolidation (Scotland) Act 1845 (c. 38).

1919 Act. Acquisition of Land (Assessment of Compensation) Act 1919 (c. 57).

1945 Act. Town and Country Planning (Scotland) Act 1945 (c. 33).

1946 Act. Acquisition of Land (Authorisation Procedure) Act 1946 (c. 49).

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1947 Planning Act. Town and Country Planning (Scotland) Act 1947 (c. 53).

1949 Act. Lands Tribunal Act 1949 (c. 42).

1959 Act. Town and Country Planning (Scotland) Act (c. 70).

1961 Act. Land Compensation Act 1961 (c. 33).

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Other terms

A1P1. Article 1 of Protocol 1 to the Convention.

ASP, asp. Act of the Scottish Parliament.

Acquiring authority. The body seeking to acquire the land under the compulsory purchase order. This may be a local authority, Government Ministers (whether Scottish Ministers or UK Ministers) or a statutory body such as a roads authority or Transport Scotland. An acquiring authority may be a private entity empowered by a special Act to carry out a development. See "promoter" and "special Act".

Blight. The detrimental effect on property values which results from public sector actions or decisions.

Bona fide. In good faith, honest and genuine.

CAAD. Certificate of appropriate alternative development. See Chapter 14.

Convention. European Convention on Human Rights.

CPO. Compulsory purchase order. A legal authorisation which allows certain bodies to acquire land, without the need for consent by the owner of that land.

DPEA. Directorate for Planning and Environmental Appeals.

ECtHR. European Court of Human Rights.

[to] **Expede.** [to] Draw up a (legal) document.

Ex hypothesi. In accordance with or following from the hypothesis stated.

[to] **Gloss.** [to] Read a different sense into.

GVD. General Vesting Declaration. One of the two methods by which a CPO may be implemented (the other being a notice to treat). See Chapter 7.

Injurious affection. The adverse effect on the land retained caused by the construction and use of the works on the land acquired. See Chapter 15. See also "severance".

Intra vires. Within the legal powers of a body. See also "*ultra vires*".

Land Register. A newer register of land, regulated by the Land Registration etc. (Scotland) Act 2012. See "Register of Sasines".

Lands Tribunal. Lands Tribunal for England and Wales. (http://www.justice.gov.uk/tribunals/lands).

Law Commission. Law Commission for England and Wales.

Liferent. A right to use someone else's property for life.

LTS. Lands Tribunal for Scotland. (http://www.lands-tribunal-scotland.org.uk/).

Mining Code. A group of provisions in the 1845 Railways Act which regulate exploitation of minerals under the land being acquired. See Chapter 9.

Notice to treat. One of the two methods by which a CPO may be executed (the other being a GVD). See Chapter 7.

Pertinent. Right pertaining to a piece of land which is automatically transferred with that land. For example, a right of way over neighbouring land.

***Pointe Gourde* principle.** "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition." See paragraph 12.17, below.

Private Act. A legislative Act which applies to a particular individual or group of individuals, or corporate entity. In contrast, a public Act applies to everyone within the jurisdiction of the legislature. See also “special Act”.

Promoter. A nineteenth-century term, referring usually to a private company which has particular compulsory purchase powers under a special Act. Superseded by and interchangeable with “acquiring authority”. See “acquiring authority”.

Real burden. An obligation affecting land, which normally requires something to be done or not to be done by the landowner.

Register of Sasines. The older register of land, established by the Registration Act 1617. Full name is the General Register of Sasines. Gradually being replaced by the Land Register. See “Land Register”.

RICSS. The Royal Institution of Chartered Surveyors, Scotland. (http://www.rics.org/uk/about-rics/where-we-are/uk/scotland/).

SCPA. Scottish Compulsory Purchase Association. (http://www.compulsorypurchaseassociation.org/scottish-committee.html).

Servitude. A right of a landowner to enter or make limited use of neighbouring land.

Severance. A particular example of injurious affection where the value of the land retained is reduced because it has been separated from the land compulsorily acquired. See “injurious affection”.

Scott Committee. Committee set up towards the end of World War I. Its terms of reference were: “To consider and report upon the defects in the existing system of law and practice involved in the acquisition and valuation of land for public purposes, and to recommend any changes that may be desirable in the public interest.”

Special Act. A legislative Act which applies exclusively to a particular person situation, or area. For example the Forth Crossing Act 2011 (asp. 2). See also “private Act”.

Standard Security. A right in security in land is called a “heritable security”. The only type of heritable security competent in modern law is the standard security. Created by registration in the Land Register. (The English equivalent is a mortgage).

Ultra vires. Outwith the legal powers of a body. If a statutory authority is acting *ultra vires* it is purporting to carry out acts which it does not have the power to carry out. See also *“intra vires”.*

PART 1: INTRODUCTORY AND GENERAL

Chapter 1 Introduction

Genesis of compulsory purchase project

1.1 This project is undertaken as part of our Eighth Programme of Law Reform.[1] We had it in mind to include a project on a public law matter, and there was a great deal of support for a project on compulsory purchase. RICSS and the Royal Town Planning Institute in Scotland strongly urged us to review the law in this area[2], and Mr Alex Neil, MSP, the then Minister for Housing and Communities, said:

> "I should like to note my strong support for such a review. Simplified legislation would bring much needed clarity to an important area of the law, to the benefit of both those whose property might require to be purchased and to promoting authorities. Such a review could only be welcomed."[3]

1.2 In May 2014 the Report of the Land Review Reform Group stated that it considered:

> "[T]here is a clear need to update Scotland's system of compulsory purchase. The Group recommends that the Scottish Government should take forward the modernisation and reform of Scotland's compulsory purchase legislation, with a clear timetable for introducing a Bill to achieve this into the Scottish Parliament."[4]

1.3 We are pleased now to issue a Discussion Paper, and to invite the views both of professionals in the field, and of members of the general public, as to what the law on compulsory purchase in Scotland should be, and how it should be set out.

Terminology

1.4 This project is essentially about legislation because compulsory purchase is a creature of legislation. The Discussion Paper therefore makes very frequent references to the Acts of Parliament which deal with the matter. It would be tedious and wasteful to set out the names of these Acts in full on every occasion; and anyone who has the interest and the stamina to read the whole document will quickly become familiar with references to the principal statutes.

1.5 Further, we appreciate that many of the terms used by professionals, from whatever discipline, will be obscure to the ordinary reader. We are also conscious that much of the discussion in this Paper is technical. It may therefore not be easily comprehensible to such a reader. Regrettably, that appears to us be inevitable, since the legislation, and hence the courts' treatment of it, is technical. Nevertheless, our aim is to make this Discussion Paper as accessible as possible.

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[1] See SLC 220, para 2.26.
[2] In a letter of 24 July 2009 to the Chief Executive of this Commission.
[3] In a letter of 10 September 2009 to the Chief Executive of this Commission.
[4] Report of the Land Reform Review Group: *The Land of Scotland and the Common Good* May 2014, s 8, para 14. Available at: http://www.scotland.gov.uk/Publications/2014/05/2852.

1.6 We have accordingly inserted, at the beginning of this Paper, a Glossary and List of Abbreviations, which should enable the reader to find out which legislation is being referred to, and the meanings of the most important terms used.

Background

1.7 The statutory framework within which compulsory purchase is carried out is both a consequence and a catalyst of the great expansion of the national transport infrastructure in the late eighteenth and early nineteenth centuries. In particular, when railways became a practicable mode of transport, a large number of different companies sought Parliamentary approval for new lines up and down the country. The manner in which this was done was by seeking a private Act of Parliament. Every Bill for such an Act had to specify the course of the proposed railway. In order to prevent private landowners either blocking development completely, or holding the promoter to ransom, it was also necessary to provide for the compulsory acquisition of the necessary land, with appropriate arrangements for the assessment of compensation.[5]

1.8 Since the procedural and compensation arrangements, once refined in some of the initial statutes, did not alter much, Parliament was repeatedly being asked to debate and pass legislation, large parts of which were more or less identical from Bill to Bill. Accordingly, the 1845 Act set out the procedures for implementing compulsory purchase, the authorisation for which had previously been made by a separate piece of legislation directed specifically at a particular project.[6] The application of a common set of procedural provisions is achieved by providing that the 1845 Act is incorporated into the authorising legislation. It is possible for later legislation to adjust the terms of the 1845 Act, as they apply to a particular project.[7] But it would require a specific provision in an authorising Act to disapply the terms of the 1845 Act from the project in question.

1.9 Many such Acts do in fact disapply large parts of the 1845 Act, and replace them with other provisions. Often that is done because the procedures set up in the first half of the nineteenth century no longer seem appropriate in modern circumstances. It is our hope that our Final Report, and the draft legislation which we intend to attach to it, will obviate that requirement in the future.

Our general aim

1.10 The present system of compulsory purchase can be and is being made to work. The statutory structure, combined with the subordinate legislation made under it, the decisions of the courts and the guidance issued by the Scottish Government,[8] have produced an operable method of compulsorily acquiring land in the public interest. The operation of the system is, however, hindered rather than assisted by the legislative framework. The age and complexity of the primary legislation may well discourage its use by those who would

[5] See, for example, the "Act for making a Railway from Edinburgh to Glasgow, to be called 'The Edinburgh and Glasgow Railway', with a Branch to Falkirk." (1838 c. lviii.).
[6] Similar legislation was enacted for England and Wales at the same time.
[7] See, for example, s 21 of the Forth Crossing Act 2011 (asp 2).
[8] A number of useful and informative circulars on the subject were issued in October 2011, and are available on the Scottish Government website.

otherwise wish to initiate the process. That said, professionals in the relevant disciplines should be able, albeit with difficulty, to find their way through its complexities.

1.11 That will not be the case for the ordinary citizen whose property is being acquired. The only contact such a citizen will have with the system is in the peculiarly disturbing circumstances of losing his or her property under a statutory process. It is of the highest importance that, as it affects ordinary people, the legislation should be as clear as possible.[9]

1.12 We have considered the current statute law on compulsory purchase in Scotland, and we have discussed the state of the legislation with the SCPA, our Advisory Groups and others. We have formed the clear view that the legislation is not fit for purpose. It makes the work of those seeking to use the system more difficult, and it does not provide those affected by it with a clear view of how it operates.

1.13 Our intention in undertaking this project is therefore to replace the diverse, overlapping and confusing layers of primary legislation – much of which survives on the statute book long after any use of it has ended – with a modern, comprehensive, statutory restatement.[10]

1.14 We should make it clear that we do not seek merely to consolidate the current statutes, that is, to reproduce the existing statute law in modern language. Our intention is that the proposed new statute will reflect not only the effect of the current statutory provisions but also, where appropriate, the effect of the courts' decisions on those provisions. It will fill any gaps in the current statutory scheme. In addition, we seek views on whether the current law works satisfactorily, so that we can take those views into account in preparing our final recommendations. To sum up, we propose that:

1. The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

Structure of Discussion Paper

1.15 In order to do justice to the complexity and volume of the subject, we have had to prepare a Discussion Paper which is lengthy. Compulsory purchase, even with the omission of various related topics, is a very large subject. We hope that many of our consultees will take the time to read the whole of this Paper, and respond to all of our questions and proposals. Indeed, we have extended our usual consultation period of three months to six months with a view to helping to accommodate this. Nevertheless, we appreciate that, for practical reasons, many will not be able to do so. We emphasise that we welcome responses to any of the matters raised.

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[9] We acknowledge the excellent guidance produced by the Scottish Government on the operation of the compulsory purchase system, which sets out how a person affected by the process can deal with the matter (Compulsory purchase and compensation: 2011). But such guidance is, necessarily, in general terms in relation to what is a very difficult and frequently obscure mixture of statutory provisions and judicial decisions.

[10] As always, in relation to a statutory code, decisions will have to be made as to which matters should appear in primary legislation, and which should be left to a later exercise of Ministerial discretion.

Partial responses are welcome

1.16 Because the subject is large, we have divided the Discussion Paper into four Parts. We are aware that different topics will be of interest to different groups, who will wish to look at the Paper with a particular eye to their own specific concerns. Thus, a chartered surveyor may wish to spend more time considering the Chapters on compensation (Chapters 10 to 17) than the material on the procedure for making and confirming a CPO (Chapters 5 to 7). It may be that a surveyor might not wish to comment on those procedural matters. Conveyancers, on the other hand, may wish to focus especially on Chapters 7 (implementation) and 8 (conveyancing).

1.17 The summary of the subjects dealt with in particular Chapters, set out in the following paragraphs, is intended to enable practitioners in different disciplines to select, if they so choose, which parts of this Paper they wish to examine in detail and, in consequence, to select which of the questions they wish to answer.

Part 1 – Introductory and General

1.18 Part 1, comprising Chapters 1 to 4, is about general matters. In this, Introductory Chapter, we set out the background to our taking on this project, and describe what it involves. We set out our view, which runs through the Discussion Paper, that the only satisfactory reform of the law is the repeal of the existing primary legislation, and its replacement with a single new statute, the structure and content of which will be informed by the responses to this Paper.

1.19 In Chapter 2, on general issues, we explain why some matters have been included and some excluded from the project – for example, we will not be considering justification for compulsory purchase because our principal focus is procedure. In particular, we describe (briefly) different types of land to which different rules apply, for the purposes of compulsory purchase. We describe the different authorities which can use compulsory purchase powers, and we examine the definition of "land" for the purposes of the relevant legislation. We also refer to rights, less than ownership, which can be acquired by compulsory purchase, and ask whether acquiring authorities should generally have powers to create new rights over land. Finally, we ask whether acquiring authorities should be able to acquire temporary possession of land, for instance, for preparatory construction or storage of materials during the carrying out of the development.

1.20 In Chapter 3 we discuss the effect which the Convention and the 1998 Act have on the operation of the compulsory purchase regime. We come to the conclusion that our current law is broadly compatible with the Convention, but ask whether consultees agree.

1.21 Chapter 4 describes in more detail the statutory framework within which compulsory purchase is carried out. It gives examples of the confusion caused by the failure to carry out legislative housekeeping. It mentions the major enactments governing the system of compulsory purchase but asks no specific questions.

Part 2 – Obtaining and implementing CPO; Mining Code

1.22 Part 2, comprising Chapters 5 to 9, examines some of the practical aspects of obtaining and implementing a CPO, and the Mining Code.

1.23 In Chapter 5 we describe the two-stage process by which national and local authorities (and statutory undertakers) obtain a CPO, and seek views on whether these processes work satisfactorily. In particular we ask whether it is still necessary or desirable to continue with a two-stage process.

1.24 Chapter 6 deals with how the making of a CPO can be challenged in the courts. It discusses the six-week time limit for challenges, and the grounds upon which a challenge can be made. In particular, it seeks views on whether challenges under the Convention should be required to be made during that six-week period.

1.25 In Chapter 7 we describe how a confirmed CPO is implemented. We discuss the two methods by which that can be done at present, and seek views on whether it would be sensible to have a single method in the future.

1.26 Chapter 8 discusses conveyancing procedures. It considers the ways in which ownership of a piece of land which is subject to a CPO can be transferred to the acquiring authority. It then reviews how the acquiring authority can extinguish subordinate rights affecting that land, such as leases and securities. Finally, it discusses how new subordinate rights, such as a new servitude right of way over neighbouring land, can be created. The approach of the Chapter in general is to propose a more simplified approach.

1.27 Chapter 9 describes sections from the 1845 Railways Act which deal with the treatment of minerals under acquired land, so as to preserve the respective rights of the acquiring authority, on the one hand, and the persons entitled to work the minerals, on the other. It suggests that provision along those lines should be included in the proposed new statute.

Part 3 – Compensation

1.28 Part 3, comprising Chapters 10 to 17, deals with compensation. In that Part we examine the various provisions under which compensation of various kinds can be paid and conclude that the present structure is very confused. We suggest that the compensation provisions could be laid out in a more user-friendly, logical way, which reflects the different heads under which compensation is paid. These are: (1) compensation for the land acquired, (2) compensation for consequential loss, and (3) compensation for non-financial loss.

1.29 Chapter 10 sets out a broad description of the matters dealt with in the substantive compensation Chapters.

Valuation of land to be acquired

1.30 In Chapter 11 we examine the basic rules as to the assessment of the value of the land to be acquired. We summarise the development of the law on that matter between 1845 and 1919. We describe the operation of three of the rules made by the 1919 Act (now section 12(2), (4) and (5) of the 1963 Act).[11]

[11] See para 10.8.

1.31 In Chapter 12 we discuss rule 3 of the 1963 Act rules (which limits compensation payments when the acquisition is for a public purpose) and the case of *Pointe Gourde,*[12] the interpretation of which has caused a divergence between the courts' and Parliament's treatment of compensation. We trace aspects of the courts' treatment from 1959 to date, and conclude that the result has been a considerable degree of confusion (which we would hope to bring to an end in our proposed new statute).

1.32 In Chapter 13 we look at further statutory rules and assumptions which must be considered when valuing land. Some of these effectively date from the middle of the twentieth century, and we ask whether they have outlived their usefulness. We consider the amendments which have been made in England and Wales to the equivalent regime, and ask whether similar alterations should be made in Scotland.

1.33 Finally, on the matter of the valuation of the land, in Chapter 14 we examine CAADs, the certificates which may be sought either by the landowner, or by the acquiring authority, to demonstrate that the land being acquired either is, or is not, suitable for development other than that which has occasioned the making of a CPO.

Consequential loss

1.34 The 1845 Act (sections 48 and 61) made specific provision for the payment of compensation in respect of any "injurious affection" of land retained by the landowner, whether generally or by reason of its being "severed" from other land owned by him or her. In the 1959 Act, it was provided that any increase in the value of retained land should be deducted from the valuation of the acquired land.[13] In Chapter 15 we examine these two matters, and question whether the current rules on betterment work equitably between different groups of landowners, whose land increases in value as a result of a development.

1.35 In Chapter 16 we discuss other consequential loss caused to the landowner. This is referred to, in rule 6 of the 1963 rules, as "disturbance" and has been found by the courts to be included in the value of the land acquired, within the meaning of sections 48 and 61 of the 1845 Act, and section 12(2) of the 1963 Act. We look at how the courts have developed the concept of other consequential loss, and the principles which they have applied to assessing which losses can be properly compensated. We suggest that in the proposed new statute the assessment of consequential loss of this kind should be clearly differentiated from the assessment of the value of the land to be acquired.

Compensation payments for non-financial loss

1.36 Section 12(1) of the 1963 Act[14] makes it clear that no allowance is to be made to the compensation paid to a landowner because of the compulsory nature of the acquisition. Nevertheless, the 1973 Act makes provision for the payment of home loss payments, and farm loss payments, which are additional to the other categories of compensation mentioned above, and are not designed to compensate for financial loss. We discuss those payments in Chapter 17.

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[12] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendant of Crown Lands* [1947] AC 565 (PC).
[13] See s 9(4).
[14] See para 11.21 onwards.

Part 4 – Resolution of disputes; Crichel Down Rules; miscellaneous matters

1.37 Part 4, comprising Chapters 18 to 21, deals with incidental and miscellaneous matters.

1.38 Chapter 18 describes how the LTS operates, and discusses other methods of resolving disputes as to compensation. It also discusses the system of advance payments, and asks whether that system works satisfactorily.

1.39 Chapter 19 deals with the (non-statutory) Crichel Down Rules, which currently set out the circumstances in which land, no longer required after the scheme of a compulsory purchase has been carried out, may be sold back to its original owner. It suggests that those rules might usefully be included in the proposed new statute.

1.40 Chapter 20 deals with a number of miscellaneous matters which, while they do not fit readily into the preceding Chapters, are of importance in the context of the project as a whole. It also invites general comments on any matter concerning compulsory purchase which has not been raised in the earlier parts of the Discussion Paper. Chapter 21 is a consolidated list of all our questions and proposals.

Legislative competence

1.41 We are conscious that the current legislation on compulsory purchase in Scotland applies to acquisitions by both Scottish and UK Ministers. While the general law as to compulsory purchase is within the competence of the Scottish Parliament,[15] it would be outwith that competence to alter legislation in reserved areas, even if the only object of such alteration were to reflect the new structure of compulsory acquisition which we intend to recommend. For example, the Land Clauses Consolidation Acts Amendment Act 1860[16] applies the 1845 Act to compulsory purchase by (now) the Ministry of Defence. If the Scottish Parliament were to enact a new statute to replace the 1845 Act, the reference in the 1860 Act will become inaccurate, but it would be outwith the competence of the Scottish Parliament to adjust the 1860 Act. It therefore seems inevitable that an Order under section 104 of the Scotland Act 1998[17] will be required in due course.[18] The content of such an Order will be a matter for discussion with the UK Government.

Human rights

1.42 Any interference with the rights of persons has to be compatible with the United Kingdom's obligations under the Convention as well as, domestically, under the 1998 Act. We examine that matter in some detail in Chapter 3, and reach the conclusion that the present legislative framework for compulsory purchase is compatible with the Convention. It will be necessary, in due course, to ensure that the draft Bill accompanying our Final Report is also compatible with our obligations under the Convention.

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[15] That is, it has not been expressly reserved by Schedule 5 to the Scotland Act 1998.
[16] 1860 c. 106.
[17] 1998 c. 46.
[18] S 104 of the Scotland Act 1998 enables the UK Government to adjust primary legislation to take account of legislation passed by the Scottish Parliament.

Financial justification for project

1.43 There is a continuing cost when legislation is unclear. Lawyers, administrators and members of the public waste time trying to ascertain its meaning. When they cannot agree as to what it means, they may go to the courts; a process which takes time, and costs money. Further, and more immediately, regeneration projects depend on financial resources being available at the time when work is to be done. In many such cases, and in particular when commercial finance is being used, the availability of such resources will depend upon the timescale within which work can be commenced. The predictability of the processes required to acquire the land on which development is to take place, will be a large factor in the planning and carrying-out of such projects. As we have noted, the complexity of the current processes will tend to act as a disincentive to local authorities from undertaking major projects. The corollary is that a modern, clear statute would contribute something to the general willingness among developers and local authorities to make use of the powers provided.

Judicial decisions

1.44 Since 1845, the underlying statute law in Scotland in relation to compulsory purchase has been in very similar terms to that applying in England and Wales.[19] The result is that decisions in one jurisdiction are treated as highly persuasive in the other, and decisions by the Supreme Court (formerly the House of Lords) are treated as binding. We therefore generally refer to Scottish and English case law indiscriminately in what follows.

Comparative material

1.45 Most developed societies have established procedures for the compulsory acquisition of private property. Accordingly, we have also considered how compulsory acquisition is dealt with in other jurisdictions outwith the United Kingdom. In particular, we have looked at how such matters are dealt with in jurisdictions, including Germany, Denmark, Canada, Australia and New Zealand. Comparative material is set out, as appropriate, as we examine different aspects of the system in Scotland.

Advisory Groups

1.46 This project has attracted a great deal of attention from professionals working in the field. The SCPA have been particularly supportive; they have facilitated the discussion of relevant issues at their national conferences and the lead Commissioner has been invited to speak on those occasions. We have also participated in a conference under the auspices of COSLA (Convention of Scottish Local Authorities).

1.47 We have had the advantage of input, both general and particular, from our general Advisory Group whose members are set out in Appendix A. Also listed in this Appendix are the members of our separate Advisory Group on conveyancing issues who attended a meeting which we convened on this subject at the outset of the project. We are most grateful to all those who have participated in this work.

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[19] Although there have been some differences following the 2011 Act, which we discuss at relevant places in this paper.

1.48 We also note the considerable assistance we have had from the various texts on the subject, including in particular the Law Commission reports,[20] and the treatment of the subject in SME and Rowan Robinson & Farquharson-Black.

Consultation

1.49 The introductory pages to this Paper set out how individual comments can be made. We hope that everyone who is concerned with compulsory purchase will take advantage of that opportunity. (We should add that at paragraph 5.18 we specifically mention a separate consultation on whether various non-standard compulsory purchase powers should be assimilated into the general legislation.)

1.50 We anticipate that the comments we receive will assist very greatly in formulating our Final Report and recommendations. As we have already mentioned, that Report will be accompanied by a draft Bill, which will, if promoted by the Scottish Government and passed by the Parliament, give effect to our recommendations.

1.51 Having said that, we are conscious that this is a challenging project, in the sense that we are seeking to incorporate the effect of a large number of existing enactments, and the effect of a large number of judicial decisions, in a single new statute. Even in a Discussion Paper as large as this is, we may have omitted to ask all the relevant questions, and there may accordingly be matters where we will have to formulate policy at a later stage in the project. In the course of preparing our draft Bill, we may therefore seek views of interested parties on draft sections relating to different aspects of the subject.

[20] Law Com 165, Law Com 169, Law Com 286 and Law Com 291.

Chapter 2 General issues

Introduction

2.1 In this Chapter we discuss a number of general matters. First, we set out which aspects of the law on compulsory purchase we intend to examine in detail and, conversely, those which lie outside the scope of this project. Second, we discuss the various acquiring authorities which have powers of compulsory purchase, and what it is that may be compulsorily acquired.

Topics included

2.2 The legislation and practice on the subject of compulsory purchase of land are immensely complex. A project which sought to examine all aspects of the matter, across the whole field of compulsory purchase, and within a reasonable timescale, would be enormous; it would certainly require more resources than this Commission can allocate at present. We accordingly propose to limit the scope of the project to what may be described as the general rules of compulsory purchase. Further, since the focus of the project is, as noted in Chapter 1, on the legislative structure, we intend in general to deal only with those aspects of the matter which are currently dealt with in primary legislation.

2.3 We are conscious that many of the current concerns about compulsory purchase relate to matters of implementation which are governed by subordinate legislation, for example, the level of home loss payments. We do not seek in any way to deprecate those concerns, but we are equally conscious that they can be met by Scottish Ministers without recourse to primary legislation.

2.4 We examine the law and practice relating to the procedure by which a CPO is obtained, the methods by which such an order is implemented, the conveyancing aspects of the transfer of property, and the processes by which compensation is determined and paid. These matters include an investigation of the timing of the various stages, and the means by which disputes, particularly as to compensation, are determined. We seek to find out, by the questions we ask, how the legislation on these matters could be improved.

Topics excluded

2.5 Because of the constraints on our resources, we have decided not to examine in detail a number of matters. We list these, and explain briefly why they are being excluded.

Justification for compulsory purchase

2.6 While we do not intend to examine in depth the rationale underlying the various provisions which authorise compulsory purchase under current legislation, we cannot avoid some consideration of the general issue of justification, in terms of both domestic and Convention law. That discussion is set out at the beginning of Chapter 3.

2.7 In modern times very many authorities, such as local authorities and statutory undertakers of various kinds, have the power to acquire land otherwise than with the agreement of the owner, and for many purposes. Even if it is accepted that compulsory purchase is justifiable in the public interest, questions could, no doubt, be asked as to whether it is right that so many different bodies should have these powers.

2.8 We do not examine those matters in detail, because it appears to us that it is the way in which the various powers are used in some cases, which causes concern, rather than the powers themselves. In any event, our aim in this project is not to examine the legislation which authorises compulsory purchase, but the legislation by which any such authorisation is carried into effect.

Matters peripheral to "core" elements of compulsory purchase system

2.9 Nor do we discuss matters which are not related directly to the core requirements and features of a compulsory purchase system. This effectively excludes consideration of matters such as blight, injurious affection claims where no land is taken, and claims under Part 1 (compensation of depreciation caused by public works) and Part 2 (mitigation of injurious effect of public works) of the 1973 Act. The same considerations apply to the provisions setting out special procedures in relation to particular types of land. For the sake of completeness, we describe these types of land in the next section of this Chapter; but our present view is that a consideration of whether the special procedures are in themselves justified, or whether they are justified in relation to any or all of the types of land described, lies beyond the scope of this project.

Conveyancing matters

2.10 Some conveyancing practitioners have suggested that we should investigate matters such as wayleaves, and the conveyancing implications of the compulsory purchase of airspace; but, in our view, both of those topics would involve more general consideration of fundamental concepts of land ownership, which lie well outwith the scope of this project.[1]

Special rules applying to particular categories of land

2.11 There are a number of categories of land to which special rules apply. In this section we describe them briefly, and explain why we do not intend to examine the detailed rules relating to them.

2.12 Most land in Scotland is held by private individuals or bodies. In such cases, the balance to be struck, for the purposes of compulsory acquisition, is between the public interest in whatever the purpose of the acquisition may be, on the one hand, and the interest of the private person in peaceful enjoyment of the property concerned, on the other. It is often decided that the public interest is to be preferred.

2.13 But the position is different where both the acquiring authority and the landowner can claim to be representing different aspects of the public interest. In the 1947 Act there is

[1] Although see the Scottish Government's recent review of necessary wayleaves in the context of the Electricity Act 1989. The Draft Guidance (published October 2013) is available here: http://www.scotland.gov.uk/Topics/Business-Industry/Energy/resources/Consultations/DraftWayleaveGuidance2013/GuidanceonWayleaves2013.

specific provision[2] to ensure that the competing public interests are adequately considered before compulsory purchase is authorised.[3] These are described as "special parliamentary procedures". Where it is the Scottish Ministers who are to make or confirm the order, then the special parliamentary procedure is as set out in Part 4 of the 2010 Act. For cases where UK Ministers are making or confirming a CPO, it is set out in the Statutory Orders (Special Procedure) Act 1945.[4]

Special procedure under 2010 Act

2.14 Before a special procedure order[5] can be made, confirmed or approved, any provisions in the enabling enactment requiring notice to be served must be complied with and notice must be given by advertisement.[6] If a special procedure order is objected to and that objection is maintained then the order has to be confirmed by an ASP.[7] Any Bill introduced to confirm a special procedure order which has been objected to, will be considered in the Parliament using the Private Bills procedure,[8] unless an alternative procedure is provided for in the Parliament's Standing Orders.

2.15 If no relevant objections are made to a special procedure order (or any relevant objections are withdrawn) the order itself is subject to scrutiny in the Parliament.[9] It is necessary to ensure that the fullest information is available to the Parliament when considering the order. Accordingly, a confirmation Bill, or the order itself, will be accompanied by a statement from the Scottish Ministers giving details of any objections which were not withdrawn, and those which may have been disregarded in terms of section 50(5) of the 2010 Act.[10]

Land to which special procedures apply

2.16 We look briefly at the different categories of land to which such procedures are applied.[11]

(a) Common or open space

2.17 Special procedure is required for the purchase of land forming part of a common or open space.[12] The treatment will be different depending on whether the making or confirmation of the order is to be done by Scottish or UK Ministers.

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[2] 1947 Act, Sch 1, Pt III.
[3] Pt 3 of Sch 1.
[4] 1945 c. 18.
[5] Pt 4 of the 2010 Act sets out the procedure for orders subject to special parliamentary procedure.
[6] S 49 of the 2010 Act.
[7] S 50 of the 2010 Act.
[8] Scottish Parliament Standing Orders, Chapter 9A: "A Private Bill is a Bill introduced for the purpose of obtaining for an individual person, body corporate or unincorporated association of persons ("the promoter") particular powers or benefits in excess of or in conflict with the general law, and includes a bill relating to the estate, property, status or style, or otherwise relating to the personal affairs, of the promoter."
[9] S 51.
[10] S 52.
[11] Note that para 14 of Pt III of Sch 1 provides: "In the case of land falling within two or more of the preceding paragraphs of this Part of this Schedule, a compulsory purchase order shall be subject to special parliamentary procedure if required to be subject thereto by any of the said paragraphs."
[12] 1947 Act, s 1(2)(b) and para 11 of Sch 1. The special procedure will not however apply where Ministers certify that suitable land will be given in exchange, the land is under 250 square yards in extent or it is required for the widening of an existing public road.

2.18 "Common" is defined in section 7(1) of the 1947 Act as including any town or village green. (We suspect that this phrase was lifted from the 1946 Act without too much consideration of whether it fitted with ordinary terminology in Scotland.) "Open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground.

(b) Land held inalienably by National Trust for Scotland

2.19 The same special procedures are applied where land held by the National Trust for Scotland, is held by the Trust inalienably,[13] and the Trust has made, and has not withdrawn, an objection to the order.

(c) Common good land

2.20 Land owned by local authorities in former burghs in their area is frequently held on the common good account of that former burgh. What falls into the common good account has been the subject of a number of court cases. It is now established, however, that everything that the former burghs owned in 1975 was held for the common good unless it had been acquired under statutory powers or was held in a special trust.[14] As Wightman and Penman point out, this means that the property held for the common good across Scotland is extensive.[15]

2.21 Where land is common good land, that status has the effect of limiting a local authority's freedom of action in either disposing of it or changing the purposes for which it is used. Under section 15 of the Local Government (Scotland) Act 1994,[16] common good property transferred to the unitary authorities constituted by that Act is to be administered with regard to the interests of the inhabitants of the area. Under section 73 of the Local Government (Scotland) Act 1973, a local authority may appropriate, for the purpose of any function, whether statutory or otherwise, land vested in it for the purpose of any other such function (excluding land held for use as allotments without the consent of the Secretary of State). Section 75(1) of the Act allows the authority to use section 73 to appropriate "land forming part of the common good of an authority with respect to which no question arises as to the right of the authority to alienate". The Inner House of the Court of Session has accordingly held[17] that this power does not extend to land where there is a question over the authority's power to alienate (in that case, Portobello Park).[18]

2.22 So far as compulsory purchase by bodies *other* than local authorities is concerned, however, common good land is simply land owned by a local authority. While a proposed compulsory purchase of land owned by a local authority was formerly subject to the use of

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[13] 1947 Act s 1(2)(b).
[14] See *Wilson and Others v Inverclyde Council* 2004 SLT 265, and cases there cited.
[15] A Wightman and J Perman, *Common Good Land in Scotland: A review and critique,* Caledonia Centre for Social Development, (2005), p 12. See also A C Ferguson, *Common Good Law,* (2006).
[16] 1994 c. 39.
[17] See *Portobello Park Action Group Association v City of Edinburgh Council* 2013] SC 184.
[18] Following this case, the City of Edinburgh Council (Portobello Park) Act 2014 (asp 15) has changed the status of the park so that the council can alienate it, and change its use by virtue of s 73 of the 1973 Act. The 2014 Act specifically provides that the park can only be appropriated in terms of the local authority's function as an education authority, and the inalienable status of the remainder of the land is unchanged.

special parliamentary procedures, that position was changed by section 120(2) of the 1980 Act, which disapplied those procedures[19] from the compulsory purchase of such land.

2.23 Common good land may also be a common or open space, in terms of section 7 of the 1947 Act. In that event the proposed compulsory acquisition of such land would be subject to special parliamentary procedures, by virtue of paragraph 11 of Schedule 1 to that Act.

(d) Ancient monuments

2.24 The Ancient Monuments and Archaeological Areas Act 1979,[20] which makes comprehensive provision for protection of ancient monuments and areas of archaeological interest, repeals the former provision on ancient monuments.[21] It gives a new definition of ancient monument[22] and provides[23] that compulsory acquisition of an ancient monument by the Secretary of State (now the Scottish Ministers), is to be treated like an acquisition by another Minister or the Secretary of State acting under section 58 of the National Health Service (Scotland) Act 1972 (now section 79 of the National Health Service (Scotland) Act 1978), thus bringing it within Part 2 of Schedule 1 to the 1947 Act.[24] The result is that special parliamentary procedures will no longer be required where the compulsory purchase is by Scottish or UK Ministers.

(e) Crofts[25]

2.25 Generally, crofting land may be acquired compulsorily, and the 1845 Act will apply as it does to other land: but sections 45, 56 and 58 of the 1973 Act make special provision as to the calculation of compensation. Similarly, where the Scottish Ministers are empowered, under the Crofters (Scotland) Act 1993,[26] to acquire crofting land compulsorily, the provisions of the 1845 Act apply and, again, there are special provisions in relation to compensation. Since the law relating to crofts lies outwith the scope of this project, we propose simply to repeal those sections and include provision along the same lines in the proposed new statute.

(f) Crown land - general

2.26 While, as noted above, various kinds of land held in the public interest are subject to more onerous procedures before compulsory acquisition can be carried out, the compulsory purchase legislation does not apply to the Crown. That is in line with the default position that UK statutes do not bind the Crown unless that is specifically provided or necessarily implied.[27] In this context the term "land held by the Crown" may be seen as a somewhat

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[19] Provided in paragraph 9 of Schedule 1 to the 1947 Act.
[20] 1979 c. 46.
[21] Ancient Monuments and Archaeological Areas Act, Sch 5.
[22] See above footnote, S 61(12).
[23] See above footnote, S 10.
[24] See W M Gordon, *Scottish Land Law,* 2nd edn, (1999) para 29-20.
[25] Crofting land is not held in the public interest, but it is a special category of land for the purposes of the compulsory purchase legislation.
[26] 1993 c. 44.
[27] *Lord Advocate v Dumbarton District Council* 1990 SC (HL) 1, per Lord Keith of Kinkel at p 26: "Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be

emotive way of describing property held on behalf of the public by the Executive branch of Government.

2.27 In that connection we note that section 241A of the 1997 Act (inserted by section 90 of the Planning and Compulsory Purchase Act 2004)[28] expressly applies the 1947 Act to the Crown, albeit subject to detailed provision in particular cases. The net effect, as is to be expected, is that there must be consultation between public authorities before one can acquire the property of another.

2.28 Whatever restrictions there may be on the acquisition of rights in land held by or on behalf of the Crown, interests held by third parties in Crown land may be acquired in the ordinary way (for instance where the Crown owns the property and other parties hold leases).[29]

(g) Crown land held by Queen's and Lord Treasurer's Remembrancer

2.29 A particular category of Crown land is that held by the Queen's and Lord Treasurer's Remembrancer (Q&LTR). The Q&LTR is the officer in Scotland who represents the Crown's interests in *bona vacantia* (ownerless property). The office is held by the Crown Agent. For example, when a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be *bona vacantia* and accordingly belong to the Crown.[30]

2.30 Such land, which has fallen to the Crown, will be subject to the same rules as other Crown land.[31] Some members of our Advisory Group have indicated that this may cause difficulties in relation to some projects. We have spoken to the office of the Q&LTR, who inform us that it is a disposal agency, which, when it acquires property as a result of the dissolution of a company, sells it at a valuation made by the District Valuer. In such a case the operation or non-operation of the compulsory purchase legislation would appear to be of little relevance. Nevertheless, if consultees are aware of any particular problems arising out of the operations of the Q&LTR we would be grateful to hear about them.

2.31 We emphasise that, however it comes into the purview of the Q&LTR, land held by that officer is Crown land, and therefore subject to the regime which applies to other Crown land.

(h) Listed buildings

2.32 Special provision is made in section 42 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997[32] for compulsory acquisition of listed buildings in need of repair. This is only authorised where it is "expedient to make provision for the

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bound only by express words or by necessary implication." For ASPs, s 20(1) of the 2010 Act provides that the Crown is bound unless the asp expressly provides otherwise.

[28] 2004 c. 5.

[29] 1997 Act, s 189(2A).

[30] Companies Act 2006, s 1012.

[31] See *Joint Liquidators of the Scottish Coal Co Ltd, Noters*, [2014] SC 372, where it was held that, in the absence of a specific power to do so, a liquidator (as agent of the company) has no power to divest the company of land by a unilateral disclaimer whereby the land would become *bona vacantia* (para 122).

[32] 1997 c. 9.

preservation of the building". Moreover, a "repairs notice" must be issued no less than two months before the compulsory purchase of the building. Acquiring authorities are encouraged to send a non-statutory certificate when submitting an order for confirmation to the Scottish Government. This sets out whether there will be any demolition, alteration or extension to a listed building under the terms of the CPO.[33]

(i) Public rights of way

2.33 Where land is acquired, or proposed to be acquired, by a body holding compulsory purchase powers to which the 1947 Act applies and there subsists over any part of the land a public right of way (excluding a right for vehicles) the Scottish Ministers may take steps to extinguish that right of way.[34] Ministers must be satisfied that a suitable alternative right of way has been provided or that no such alternative is necessary.

2.34 Ministers must publish a notice publicising the proposed order and give at least 21 days for objections to be made. If an objection is made, and not withdrawn, then a public inquiry must be held. No such order can be made over land upon which there is apparatus belonging to a statutory undertaker unless the undertaker consents to the order.

2.35 We consider this procedure for extinguishing rights of way in Chapter 5 on the procedure for obtaining a CPO.

(j) Land owned by acquiring authority

2.36 As a general conveyancing rule, a person cannot grant a disposition of land which he or she owns to him or herself.[35] This being the case, it is not competent for an acquiring authority to acquire land from themselves. This has been identified as a problem by some members of the Advisory Group, and it has been suggested that it would be desirable to empower acquiring authorities to acquire land from themselves using a CPO. We discuss that question in paragraphs 7.102 to 7.106.

(k) Land held by statutory undertakers

2.37 As enacted, paragraph 9 of Schedule 1 to the 1947 Act required the use of special parliamentary procedures in relation to a proposal to acquire land held by statutory undertakers. Section 120(2) of the 1980 Act removed that requirement. Accordingly, the only restriction on the acquisition of land held by statutory undertakers is in paragraph 10 of Schedule 1 to the 1947 Act.[36] This provision essentially requires the Scottish Ministers not to confirm the CPO unless they are satisfied that the land is not required for the purposes of the undertaking, or that the loss of it can be made good.

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[33] http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/ComPur/protectedassets.

[34] 1947 Act s 3.

[35] See *Aberdeen College Board of Management v Youngson* 2005 1 SC 335. Lord Menzies held that the transfer of property was essential for an effective conveyance of land and a person could not dispone a piece of land from himself to himself in exactly the same status or category, as no transfer would result.

[36] 1947 Act, Sch 1, para 10.

2.38 In exceptional circumstances, where a CPO is promoted under Part VIII of the 1997 Act,[37] it may be confirmed in respect of statutory undertakers' land in the absence of a certificate provided it is confirmed or made by the Scottish Ministers.

Discussion

2.39 As we noted above, the various provisions setting out special rules for the acquisition of particular categories of land generally reflect the fact that, in these cases, the balancing exercise as to the interests involved is being carried out between competing public interests of one kind or another.

2.40 In some cases – such as the application of the town and country planning legislation to the Crown – these special rules have recently been the subject of Parliamentary consideration. The same is true of special parliamentary procedures. While the original provisions were in the Statutory Orders (Special Procedure) Act 1945, referred to above, and the transitory provisions were in subordinate legislation made prior to the establishment of the Scottish Parliament, the present legislation for matters within devolved competence is contained in primary legislation made as recently as 2010.

2.41 It is not possible to say the same about the continued application of special parliamentary procedures to the acquisition of land held inalienably by the National Trust for Scotland (although had that been perceived to be a problem, there was an opportunity to change the position when the National Trust for Scotland (Governance) Act 2013[38] was before the Scottish Parliament). The current situation represents a considered adjustment of the usual position to reflect the particular importance of National Trust land to the public at large.

Summary

2.42 Apart, therefore, from the more detailed consideration of the extinction of rights of way, which appears in Chapter 5, and of the implications of local authorities seeking to acquire their own land, which appears in Chapter 7, we do not intend to comment further on the categories of land subject to special procedures.

Acquisition by whom?

2.43 We turn to consider the bodies which we suggest should be able to make use of the proposed new statute in Scotland (referred to in this Paper as "acquiring authorities"). In our (preliminary) view, the statute should apply to compulsory purchase by Scottish Ministers, UK Ministers, local authorities and statutory undertakers; it would also be available for the purposes of any special legislation enacted in relation to any particular project (such as the new Forth crossing).

2.44 Of these acquiring authorities, only statutory undertakers are not elected. They are currently defined as:

> "(a) persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier

[37] 1997 Act, Part VIII – Acquisition and appropriation of land for planning purposes, etc.
[38] 2013 asp 9.

or lighthouse undertaking, or any undertaking for the supply of hydraulic power or water,

(b) the Civil Aviation Authority, a universal service provider (within the meaning of the Postal Services Act 2000) in connection with the provision of a universal postal service (within the meaning of that Act)] and any other authority, body or undertakers which by virtue of any enactment are to be treated as statutory undertakers for the purposes of … the Town and Country Planning (Scotland) Act 1997, and

(c) any other authority, body or undertakers specified in an order made by the Scottish Ministers under this paragraph."[39]

2.45 The 1947 Act applies to acquisition by statutory undertakers.[40] Therefore, while statutory undertakers are not themselves elected, any compulsory purchase which they wish to implement must be approved by Ministers through the confirmation process.

Acquisition of what?

General

2.46 Essentially, compulsory acquisition powers can only be exercised in relation to immoveable property, in essence, land. That is clear from the authorising statutes. The first section of the 1845 Act provides:

> "This Act shall apply to every undertaking in Scotland authorized by any Act of Parliament which shall hereafter be passed, and which shall authorize the taking of ***lands*** for such undertaking …." (emphasis added)

Section 188 of the 1997 Act provides:

> "(1) A local authority shall … have power to acquire compulsorily any **land** in their area …." (emphasis added)

"Lands" is defined in section 3 of the 1845 Act as extending "to houses, lands, tenements, and heritages, of any description or tenure". In terms of section 17 of that Act, the promoters (acquiring authorities)[41] of an undertaking are required to give notice to "all the parties interested in such lands", and to demand from such parties "particulars of their interest", so that compensation can be assessed.

2.47 For modern purposes the matter has been settled by the 2010 Act, Schedule 1,[42] which provides:

> "'[L]and' includes buildings and other structures, land covered with water, and any right or interest in or over land."

2.48 The 1947 Act glosses the ordinary definition of land by providing that, where a local authority is carrying out a compulsory acquisition under the Harbours, Piers and Ferries

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[39] 1980 Act, s 120(3).
[40] By virtue of s 120(1) of the 1980 Act.
[41] The compulsory purchases envisaged by the 1845 Act were very largely by private companies acting under a special Act of Parliament; the term "promoters" is accordingly an accurate description of what we now describe in this Discussion Paper as "acquiring authorities".
[42] For UK legislation, see Schedule 1 to the Interpretation Act 1978.

(Scotland) Act 1937,[43] "land" includes a "marine work" within the meaning of the 1937 Act.[44] We propose to retain that gloss in the proposed new statute.

Existing rights and interests in or over land

2.49 The definition of "land" in the 2010 Act is wider than land in the sense of a physical piece of land. It also applies to "any right or interest, in or over land".[45] As a matter of general property law, there exist various subordinate rights over land. The main ones are as follows.

(a) Leases

2.50 A lease is the right to use land for a period of time in return for rent.[46] It will be for the acquiring authority, in all the circumstances of the case, to determine whether the acquisition of an existing lease is required for their purposes.[47]

(b) Liferents

2.51 A liferent is the right to use someone else's property for life.[48] While the 1845 Act, section 7, allows liferents to be acquired in order that they can be extinguished, it is a general rule of property law that only natural persons (people) can hold liferents and not legal persons such as companies and local authorities.

(c) Standard securities

2.52 A standard security secures debt and enables the land to be sold to recover that debt.[49] It is difficult to envisage a situation in which an acquiring authority would want to acquire an existing standard security as opposed to extinguishing it. There is, indeed, a question as to whether acquiring a standard security should be competent. The question might be resolved by looking at the purpose for which the power to acquire land has been granted. For instance, section 188 of the 1997 Act empowers local authorities to acquire land for, *inter alia*, the purposes of development, redevelopment or improvement. It would be difficult to say that the acquisition of a standard security would be required for one of those purposes.

(d) Servitudes

2.53 A servitude is the right of one landowner to enter or make limited use of neighbouring land, for example to take access or receive services such as water or electricity.[50] Servitudes are constituted in favour of neighbouring land and cannot be acquired separately from a piece of land. Thus if Jane owns a field which is served by a servitude right of way along a private road, anyone acquiring the field (including an acquiring authority) will

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[43] 1937 c. 28.
[44] That definition has subsequently been superseded by a new definition set out in s 57 (interpretation) of the Harbours Act 1964 (c. 40).
[45] The distinctions between (a) "right" and "interest" and (b) "in" and "over" are not clear.
[46] See further A McAllister, *Scottish Law of Leases* (4th edn, 2013).
[47] See *Errington v Metropolitan District Railway Co* (1882) 19 Ch D 559.
[48] See Gretton and Steven, *Property, Trusts and Succession* Ch 21.
[49] Standard securities are regulated by the Conveyancing and Feudal Reform (Scotland) Act 1970. The lay term used is normally "mortgage".
[50] The leading text is D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998).

automatically acquires the servitude. This is because the servitude is a pertinent of the field.[51] The servitude cannot be acquired independently.

(e) Real burdens

2.54 A real burden is normally a positive or negative obligation affecting land, such as a prohibition on building.[52] Usually real burdens are constituted in favour of neighbouring land, known as the benefited property, although in a limited number of cases there is no benefited property.[53] Thus Lucy may be able to prevent her neighbour Malcolm from building on his land because of a real burden affecting his land which she can enforce. The position as regards acquisition is like that for servitudes. Where an acquiring authority acquire a benefited property, this will give them the right to enforce the real burdens against the relevant burdened property or properties because the burdens are a pertinent of the benefited property. Equally, it is not possible to acquire the real burdens separately from that property.

(f) Other existing rights or interests

2.55 It may be that there are other existing rights in or over land which acquiring authorities may wish to acquire and we would welcome consultees comments in that regard.

2.56 We ask the general question:

2. For the purposes of compulsory purchase, is the current definition of "land", set out in the 2010 Act, satisfactory?

New rights or interests in or over land

2.57 Under the current law, an acquiring authority cannot rely on powers of compulsory purchase to *create* new rights in land less than ownership unless the legislation expressly provides for this.[54] The leading case is *Sovmots Investments Ltd v Secretary of State for the Environment,* [55] in which Lord Keith of Kinkel stated:

> "Where Parliament intends to confer power to create and acquire compulsorily new easements over land it says so expressly, as in section 11 of the Water Act 1968 and section 55(2) of the Post Office Act 1969. Compulsory purchase enactments are to be strictly construed, and a particular power of compulsory acquisition, which is not expressly conferred, can be conferred by implication only where the statutory provisions would otherwise lack sensible content."[56]

[51] See also below, para 8.66.
[52] Real burdens are regulated by the 2003 Act.
[53] See G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd edn, 2013) ch 13.
[54] For example, see the discussion in Rowan Robinson & Farquharson-Black, para 15-07, that the power in s 47 of the Water Industry (Scotland) Act 2002 to acquire land compulsorily, does not include a power to acquire a right by the creation of a new right and no such right can be implied.
[55] [1979] AC 144.
[56] At p 183.

2.58 There are now several authorising Acts which expressly provide for the creation of new rights other than ownership through compulsory purchase.[57] Despite this, the courts in Scotland have adopted a strict approach to the interpretation of compulsory powers and will be reluctant to imply such powers unless they have been clearly conferred by Parliament.[58] Where the authorising Act does not provide for the acquisition of lesser interests, then the whole of the land must be acquired, despite the fact that the acquiring authority may only require a lesser right, such as a servitude, for the purposes of the undertaking.[59]

2.59 We now consider new rights which an acquiring authority might require.

(a) Leases

2.60 Where there is a legislative power to create a new right it seems that, in theory at least, this may be employed to create a new lease without the need for agreement.[60] Indeed, in those cases where a utility company uses a legislative power to create a new right over land, Hutchison and Rowan Robinson suggest that the continuing relationship between the private landowner and the company is best reflected in the form of a lease as opposed to a "servitude".[61] However, a lease is, by definition, a bipartite agreement which contains rights and obligations negotiated by the parties. It is therefore difficult to see how a new lease can be created through compulsory purchase, even where an acquiring authority are empowered to create new rights through statute. We understand that this is an issue which has been encountered by the Scottish Ministers, in their role as confirming authority of CPOs.

(b) Liferents

2.61 A liferent is the right to use someone else's property for life.[62] Since liferents can only be held by natural persons,[63] it is not competent for an acquiring authority to acquire a new liferent.

(*c*) *Standard securities*

2.62 It is difficult to envisage a scenario in which an acquiring authority, empowered to compulsorily acquire a newly created right in land, would wish to use this power to create a new standard security over the land.

(d) Servitudes

2.63 Many of the Acts which confer the power to acquire lesser rights in land concern the right of various utility suppliers to lay pipe-lines and other apparatus essential for the services they provide. The legislation here is generally complex and difficult to apply in a

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[57] See, for example, Land Powers Defence Act 1958, Sch 2, para 12; Gas Act 1986, s 9(3) and Sch 3, para 1, as amended by the Gas Act 1995, Sch 3, para 56; Communications Act 2003, Sch 4, para 4(3); Waverley Railway (Scotland) Act 2006, s 15; Edinburgh Airport Rail Link Act 2007, s 19; Glasgow Rail Link Act 2007, s 14; Planning Act 2008, ss 123 and 159(2).
[58] *Marquess of Breadalbane v West Highland Railway Co* (1895) 22 R 307.
[59] *Pinchin v London and Blackwell Railway Co* (1854) 43 ER 1101.
[60] But cf *Pinchin v London and Blackwall Railway Co*, above.
[61] See N Hutchison and J Rowan Robinson, *Utility Wayleaves: A Legislative Lottery*, RICS Research Paper Vol 3, No 10 (RICS Research Foundation) (2002).
[62] See Gretton and Steven, *Property, Trusts and Succession* ch 21.
[63] See above, at para 2.51.

way consistent with general property law. The conferral of these powers on private utility companies can be justified in the public interest in terms of securing the installation, maintenance, repair, improvement and replacement of necessary infrastructure. There is little doubt that utility companies depend on these powers, although in many cases their use may be a measure of last resort as agreement will often be reached with the landowner in the "shadow of compulsion."[64]

2.64 One example of such a power is contained in paragraph 1 of Schedule 3 to the Electricity Act 1989 ("the 1989 Act"),[65] which provides that:

> "(1) Subject to paragraph 2 below, the Secretary of State may authorise a licence holder to purchase compulsorily any land required for any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on.
>
> (2) In this paragraph and paragraph 2 below *"land"* includes any right over land (other than, in Scotland, a right to abstract, divert and use water); and the power of the Secretary of State under this paragraph includes power to authorise the acquisition of rights over land by creating new rights as well as acquiring existing ones."

2.65 For the acquisition of a new right under the 1989 Act, the 1947 Act has effect, with the modification necessary to make it apply to a licence holder's compulsory acquisition of a right in Scotland by the creation of a new right (other than a right to abstract, divert and use water) as it applies to the compulsory acquisition of land.[66] The 1845 Act equally so applies in relation to a licence holder's compulsory acquisition of a right in Scotland by the creation of a new right, with the modifications specified in the 1989 Act.[67]

2.66 As well as making provision for compulsory purchase of land which includes the power to acquire a new type of right recognised by general property law, legislation may also provide for the creation of a "wayleave". Although the term "wayleave" is not specifically used in the legislation, it may consist of a statutory right to install, maintain, repair and replace infrastructure in private land. An example is contained in section 23 of the Water (Scotland) Act 1980,[68] which provides Scottish Water with the right to, for the purposes of its functions and after having given reasonable notice, lay a main in, under or over any road, or under any cellar or vault below a road, and in, on or over any land not forming part of a road. Wayleaves, unlike servitudes, do not require a benefited property.[69] There are strong arguments for a review of this area of statute law,[70] but as explained above,[71] we have reached the view that this cannot be done within the scope of the current project.

2.67 We understand that, in practice, Scottish Ministers, acting in their capacity as confirming authority, have encountered situations where acquiring authorities, in the process of acquiring a new right such as a servitude, attempt to impose additional restrictions or positive obligations on the landowner, attached to the new right. For example, an electricity licence holder in terms of the 1989 Act may acquire a servitude in terms of Schedule 3, as

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[64] N Hutchison and J Rowan Robinson, "*Utility wayleaves: time for reform*," 2001 JPL (Nov) 1247-1259.
[65] 1989 c. 29.
[66] 1989 Act, Sch 3, para 16.
[67] 1989 Act, Sch 3, para 24.
[68] 1980 c. 45, as amended by the Water Industry (Scotland) Act 2002, Sch 6, para 18.
[69] See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 2.6 and Ch 26.
[70] See N Hutchison and J Rowan Robinson, "*Utility Wayleaves: time for reform*" 2001 JPL 1247-1259.
[71] See para 2.10 above.

outlined above, and additionally, attempt to impose conditions on this – for example, a restriction on planting trees over the area acquired for the servitude. Those statutes which do allow for the creation of a new right do not, usually, also provide the power to impose conditions on this new right. This suggests that, at present, such an attempt by an acquiring authority will be incompetent. Nevertheless, the power to impose conditions on acquired rights, other than ownership, appears to be unobjectionable in principle and, in some cases, acquiring authorities may welcome such a power.

(e) Real burdens

2.68 Where authorising legislation provides the power to create and acquire new rights over land, this could include the power to impose real burdens. Thus an acquiring authority might be acquiring a site for a new development beside land owned by Ewan. It may wish to impose a real burden on Ewan's land preventing any building which blocks the light reaching the new development.

(f) Other rights and relationship between compulsory purchase and property law

2.69 There may be other new rights in land which an acquiring authority would find helpful and we would welcome consultees' comments on this matter. This raises a more general issue. It may perhaps be reasonable to assume that, where the legislature confers a right of compulsory acquisition through the creation of a new right, it would intend this only to cover those rights recognised by general property law. But sometimes the application of a general law in a compulsory purchase context is not straightforward. For example, a lease is a contract negotiated and entered into consensually by landlord and tenant. The essence of compulsory purchase is that there is no agreement. It would be illogical and unrealistic to seek to attach to an enforced statutory regime the attributes of a consensual contract.[72] Further, there might be circumstances in which an acquirer may wish to secure a right which is not recognised by general property law. While it is open to the legislature to permit this, there is an issue as to whether that right can then qualify as a proprietary right and bind successor owners of the land affected.

Conclusion

2.70 It may be that the above discussion as to the creation of new rights will prompt consultees to suggest that the general right to acquire land should be extended so as to include the creation of rights or interests in or over land where ownership of that land is not being acquired. It has been suggested to us that a general power to create new rights through compulsory purchase may be mutually beneficial to both parties. The creation of a new servitude instead of the acquisition of ownership of the land, for instance, would be less invasive to the landowner in many cases and would reduce the compensation which the acquiring authority will be liable to pay. We ask the questions:

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?

[72] See the discussion of the courts' (initial) approach to a notice to treat as creating a contract of sale, at paras 7.32 to 7.38, below.

4. **What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?**

Temporary possession and use of land

2.71 There are situations where an acquiring authority will require temporary access, for example, for construction or storage purposes, but only for the duration of a specific project. At present, such temporary possession can only be taken if there is specific statutory provision.[73] In the absence of such specific provision, and if no agreement can be reached with the landowner, the land has to be compulsorily purchased.

2.72 Some members of our general Advisory Group have suggested that a general power should be introduced to allow an acquiring authority to take temporary possession of land which they do not need to acquire compulsorily. It is suggested that such a power would be beneficial, since it would be clear that the landowner retained ownership of the land, and would also receive compensation. The disruption to the landowner would be less significant than under compulsory purchase, since the measure would be temporary, and the amount of compensation payable by the acquiring authority would be reduced.

2.73 We doubt whether it is appropriate to describe a non-voluntary arrangement, whereby the acquiring authority can take possession of land temporarily, as a lease. Moreover, a lease under the general law may require the tenant to have exclusive possession of the land,[74] whereas this may not necessarily be needed here. It would be necessary, if such a power were to be granted, for the statute to set out the attributes of the legal relationship which was being created. We would envisage that the land would be appropriately described and that the acquiring authority would specify the time for which they would need to retain possession of it. The compensation to be paid to the landowner could be agreed between the parties as if it were a lease and, failing agreement, could be referred to the LTS. The arrangement would continue, initially, for a period set by the acquiring authority, and would be able to be extended by them if necessary, again upon terms settled, if not agreed by the parties, under the supervision of the LTS. It would be open to the landowner to refer any question arising out of any such temporary possession to the LTS. We ask the question:

5. **Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?**

[73] For example, see Waverley Railway (Scotland) Act 2006 (asp 13), s 17.
[74] McAllister, *Scottish Law of Leases* paras 2.54-2.57.

Chapter 3 Human rights

Introduction

3.1 In this Chapter we examine the relationship between compulsory purchase law and human rights law.

3.2 The authorisation of the compulsory purchase of land involves the striking of a balance, normally between the interests of society, on the one hand, and those of an individual, on the other. The striking of that balance has been the subject of frequent litigation, certainly since the passing of the 1845 Act. It may be useful, before investigating the position in relation to the Convention, to look briefly at how the subject has been dealt with domestically.

3.3 Accordingly, we begin with a brief survey of the position prior to the passing of the 1998 Act. We then look at three general issues; first, that the challenges to compulsory purchase tend to be focused on its use in individual cases, rather than against the legislation itself; second, that the ECtHR has treated compulsory purchase as raising separate issues under both Article 8 and A1P1; and, third, whether it is necessary for an authority to demonstrate that they have taken human rights considerations into account.

3.4 While proportionality is also a "general issue", it too has been considered differently, depending upon whether the case concerns only A1P1, or A1P1 and Article 8. We therefore deal with it separately in our discussion of the respective Articles.

3.5 We then look in detail at the issues raised by A1P1, Article 8 and Article 6.

Background

3.6 Any developed society must establish criteria by which the public interest of society as a whole can be tested against – and, if necessary, preferred to – the interest of individual citizens. The modern statutory codes on planning are familiar examples of this. Compulsory purchase of land is another, albeit more extreme, example of the same kind. This preference of the general interest to the private interest has been recognised throughout history – subject always to the proviso that where the property of an individual is expropriated by the state, compensation should be paid, so that the individual's loss is no more than his or her individual share in the general cost.

3.7 On the major point, as to how the balance is to be struck between the public and private interest, much will depend on the circumstances of the individual case, in the light of the applicable legislation. All compulsory purchase in the United Kingdom is authorised by or under primary legislation.

3.8 The proviso, that compensation should always be paid, has been the subject of some general judicial consideration in the cases of *De Keyser's Royal Hotel v The King*,[1] and

[1] [1920] AC 508.

Burmah Oil Company (Burma Trading) v The Lord Advocate.[2] In the latter case, the Lord Ordinary (Kilbrandon) was referred to the earliest authorities, and found many statements of this principle.[3] Further, in both of these cases the history of compulsory acquisition in the United Kingdom was examined in great detail.

3.9 In *De Keyser's Royal Hotel,* the essential point was whether any royal prerogative power (any power of the executive at common law) could exist alongside a statutory power covering essentially the same area of activity: in the case, the Crown was maintaining that acquisition of a hotel for the purposes of housing a military staff during World War I had been carried out under the prerogative, and that no compensation was payable. The House of Lords held that, standing the existence of various statutory powers to acquire land for defence purposes, there was no room for the continuance of prerogative powers. But in the course of the case they looked at the precedents, to see whether there was any history of acquisition in the public interest without compensation. Lord Dunedin pointed out that:

> "The most that could be taken from them [the cases referred to in argument] is that the King, as *suprema potestas*[4] endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property, and that the texts give no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. In view of this silence it is but natural to inquire what has been the practice in the past. … [S]peaking generally, what can be gathered from the records as a matter of practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect of land taken under the prerogative, for the acquisition of which there was neither bargain nor statutory sanction. Nor is there any proof that any such acquisition had taken place."[5]

3.10 Lord Atkinson observed:

> "The conclusion [from the review of past practice], as I understand it, is this: that it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative."[6]

3.11 The matter of acquisition without compensation was raised again in the *Burmah Oil* case. A company registered in Scotland had had oil installations in Burma. When Burma was invaded by the Japanese in 1942, instructions were given, by the War Cabinet in London, that the installations should be destroyed. That was done. After the war the

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[2] 1962 SLT 347.
[3] See, for example, Grotius, *De Jure Belli et Pacis*, Whewell's ed, Cambridge, 1853, Book 3, Ch 20, para 7. "We have elsewhere said that the property of subjects is under the eminent dominion of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this, public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the state relieved from this *onus* if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives." (quoted at p 351).
[4] Meaning supreme power or ultimate authority.
[5] At pp 524-525.
[6] At pp 538-539.

company sued the Lord Advocate, as representing the Crown, for compensation, on the basis that the demolitions had been carried out in the exercise of the royal prerogative. The Lord Advocate pleaded that, even if the demolition had been carried out under the prerogative (which was, initially at least, denied), no compensation was payable.[7]

3.12 After a full review of United Kingdom (and United States) authority, the House held that:

> "The demolitions being carried out lawfully in exercise of the royal prerogative, though without statutory authority, there is no general rule that the prerogative can be exercised, even in time of war or imminent danger, by taking or destroying property without making payment for it."[8]

3.13 If it is accepted that compulsory acquisition will in some circumstances be desirable or necessary, or both, then it seems logical to have in place clear legislation which will set out, for the benefit of those using it, and those affected by it, how such acquisition is to be carried out. The general attitude of the courts in modern times is well expressed by Lord Denning (in a passage extensively quoted subsequently) in *Prest v Secretary of State for Wales*,[9] where his Lordship said:

> "To what extent is the Secretary of State entitled to *use* compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid … ."[10]

3.14 We note that in *Kennedy v The Charity Commission,*[11] a case involving the construction of the Freedom of Information Act 2000,[12] some of the Justices made *obiter* comments suggesting that a common law jurisdiction might run alongside the statutory code, so that information which was not required to be published in terms of the legislation might be required to be disclosed at common law. Since the point had not been argued, the authorities mentioned above had not been considered by the court. No doubt the courts will return to the matter in an appropriate case.

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[7] It was noted by some members of the House of Lords that it was strange for the case to be conducted on the basis that the law of Scotland was applicable, since the only connection which the case had with Scotland was that the companies concerned were established in that jurisdiction; but Lord Reid observed that the House could "properly deal with the matters involved in this appeal because it does not appear that as regards them there is any material difference between the law of Scotland, the law of England and the law applicable in Burma in 1942".

[8] The case went to the House of Lords on preliminary pleas as to the relevance of the respective averments and, in consequence of the House's decision, was remitted back to the Court of Session so that a proof could be heard. But in 1965 Parliament passed the War Damage Act 1965 (c. 18), which excluded any right to compensation for war damage at common law.

[9] [1983] RVR 11.

[10] At p 198.

[11] [2014] UKSC 20.

[12] 2000 c. 36.

3.15 The entry into force of the Convention and of A1P1 and the passing of the 1998 Act have brought the issue of balancing individual and public interests into sharper focus. It is accordingly necessary to examine how far the system of checks and balances of the current legislative arrangements are compatible with the Convention as originally ratified, and as subsequently interpreted by the domestic courts and the ECtHR.

Summary

3.16 There are three principal Convention rights which are relevant to compulsory purchase – A1P1, Article 6 and Article 8. They are fully discussed in the following paragraphs, in the light of the courts' decisions. For present purposes the following conclusions can be distilled from the jurisprudence:

3.17 First, with regard to A1P1, compulsory purchase carried out in accordance with the current statutory procedures in Scotland – and in particular with regard to the payment of fair compensation – is unlikely to be in conflict with the UK's obligations under that Article.

3.18 Second, with regard to Article 6, the current procedures for obtaining and implementing a CPO, if properly carried out by the acquiring authority, are compatible with that Article.

3.19 Third, while it is theoretically possible that an acquisition, carried out compatibly with Article 6 and A1P1, will nevertheless breach a person's right under Article 8, there is no recorded case of that having occurred.

General

3.20 There are three general issues to which we should refer at this stage.

Focus on individual cases rather than on general legislative framework

3.21 First, we are not conscious, from our discussions with our Advisory Groups, or from the cases, of any groundswell of concern as to the *basis* upon which compulsory purchase is authorised. Challenges to CPOs seem to be more on the merits of particular proposed acquisitions, rather than on general grounds of justification in Convention terms. There are challenges based on an alleged failure to comply with the terms of the authorising statute, but such challenges tend to relate to technical questions as to whether the particular acquisition falls within what is permitted by the statute, rather than whether the acquisition is compatible with the Convention. For example, in the case of *Argos v Birmingham City Council,*[13] (which we discuss in more detail later in this Paper), one of the grounds of challenge was that the alterations to the proposed compulsory purchase were not competent in terms of the CPO which had been originally granted.

[13] [2011] EWHC 2639 (Admin).

Relationship between Article 8 and A1P1

(a) General

3.22 Second, both the domestic courts and the ECtHR have considered compulsory purchase as requiring separate consideration of the requirements of Article 8 and A1P1. That seems odd. It might have been preferable to treat Article 8 as the *lex generalis,* the statement of the general rule that a person's private life is to be respected and protected; and to treat A1P1 as the *lex specialis*, the application of that general rule in the context of the compulsory acquisition of property.

3.23 This would in our view have been a more coherent approach to what the Convention seeks to protect. Where compulsory purchase is under consideration, there are no arguments under Article 8 which could not equally well be raised under A1P1 in appropriate cases. It may be possible to sum up the general effect of the various cases by suggesting that in every case of compulsory acquisition, it will be necessary for the decision-making authority to balance the private rights of the landowner against the public interest in the development in question: and that that balancing exercise will be more or less acute depending on the circumstances of the individual case.

3.24 As we note later in this Chapter, there appear to have been no cases in which, following the failure of a challenge based on A1P1, a compulsory purchase has been struck down by virtue of Article 8. But the possibility remains that a development which has secured all the necessary permissions, and has advanced to the stage of actual acquisition of the necessary land, could be blocked on a consideration of the landowner's rights under Article 8. That possibility introduces what may be seen as an undesirable element of uncertainty into the process of proceeding with major developments.

(b) When should a challenge be made?

3.25 We appreciate that the courts do in fact consider citizens' rights separately under both Articles, and that that approach by the courts seems unlikely to change. But if the two Articles are to continue to be separately considered, it may be that such consideration should be *required* to be conducted at an earlier stage in the proceedings, perhaps in the period immediately following the making of the CPO. We discuss the possible implications of that suggestion in Chapter 6.

Acquiring authority's duty to demonstrate consideration of human rights

3.26 The third issue is whether decision-makers require to demonstrate that they have taken human rights into consideration. Where the underlying statutory framework allows for a balancing of individual rights against the public interest, as is the case with the law of compulsory purchase, a review by the courts in terms of human rights will be limited. In particular, the courts are likely to confine themselves to a review of the effect a particular decision has on the human rights of the individual concerned and will not require evidence that the decision-maker expressly considered human rights in making the decision in question.

3.27 This principle is illustrated, in a wider context, by the decision of the House of Lords in the case of *Belfast City Council v Miss Behavin' Ltd.*[14] The case concerned the refusal by Belfast City Council to grant Miss Behavin' Ltd a licence to operate a sex shop in Belfast City Centre. Miss Behavin' Ltd challenged the decision on the basis of A1P1 as well as Article 10 of the Convention. The Northern Irish Court of Appeal found that there had been a breach of Convention rights because the Council, in exercising its statutory powers, had not sufficiently taken into account the applicant's human rights. In other words, the Convention had been violated by the way the Council had arrived at its decision.

3.28 However, when the case reached the House of Lords, Lord Hoffmann in the leading judgment, disagreed with the findings of the Court of Appeal. He held that it would be "ridiculous" to require "formulaic incantations" from local government stating that Convention rights had been considered as part of the decision-making process. According to Lord Hoffmann, the domestic constitution entrusts a "broad power of judgment" to local authorities in this regard. He quoted Lord Bingham in *R (on the application of SB) v Denbigh High School Governors,*[15] where his Lordship said:

> "The focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."[16]

3.29 The House of Lords accordingly allowed the appeal. The approach taken to the need to demonstrate consideration of human rights in *Miss Behavin'* can also be seen in compulsory purchase cases. Thus, in *Lough and Others v The First Secretary of State,*[17] Pill LJ observed:

> "I am utterly unpersuaded that the absence of the word "proportionality" in the decision letter renders the decision unsatisfactory or liable to be quashed. … The need to strike a balance is central to the conclusion in each case. … The decision in the Samaroo[18] case does not have the effect of imposing on planning procedures the strait-jacket advocated by Mr Clayton."[19]

3.30 Nevertheless, guidance contained in Planning Circular 06/2004, which applies in England and Wales, suggests it is best practice for authorities to expressly consider human rights issues during the compulsory purchase decision-making process. The Circular provides that the Secretary of State, in confirming the order should be satisfied that:

> "The purposes of the CPO sufficiently justify interfering with the human rights of those with an interest in the land affected, having regard in particular to the provisions of Art. 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Art. 8 of the Convention."[20]

3.31 Despite the apparent difficulties in challenging a confirmed CPO on A1P1 grounds where the proper statutory procedures have been followed and compensation has been

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[14] [2007] UKHL 19.
[15] [2007] 1 AC 100.
[16] At pp 115-116.
[17] [2004] 1 WLR 2557.
[18] See footnote 30, below.
[19] At para 50.
[20] Circular 06/2004, "*Compulsory Purchase and the Crichel Down Rules*," Office of the Deputy Prime Minister, London, the Stationery Office, 2004, para 17.

paid, the argument was raised recently in the *Argos* case, which concerned the compulsory acquisition of Argos' premises in Birmingham City Centre, as part of a general redevelopment of the area. After confirmation of the CPO, but before a GVD in respect of Argos' premises was made, the overall planning scheme changed. In terms of the original proposal, Argos would have been able to continue trading from the premises; the revised proposal prevented them from doing so. Argos unsuccessfully challenged the GVD on the ground that it was being used to acquire land for purposes outside the scope of the CPO.

3.32 Argos additionally argued that the acquisition, if authorised, would be a breach of A1P1, on the basis that the acquiring authority had failed to reconsider the proportionality balance required in terms of A1P1 in the light of the changed circumstances which had arisen since confirmation of the CPO. The High Court confirmed that, where a CPO does not breach human rights, the fact that this decision was reached on the basis of an inadequate assessment of human rights will not be a ground for review. Following *Miss Behavin',* Ouseley J concluded that it was not an error of law that Birmingham City Council failed to reconsider human rights where the decision did not lead to a breach of human rights, which, he concluded, it did not.

3.33 In reaching this conclusion, Ouseley J noted:

> "As the second paragraph of Article 1 suggests, Article 1 was intended to give to signatory states a wide margin of discretion over what circumstances justified the use of compulsory purchase powers."[21]

3.34 This wide margin of appreciation, coupled with the fact that, where an authority acts in accordance with the law, a decision to acquire land compulsorily is likely to be compatible with the Convention, means that it is unlikely that a reviewing court will find that the requirement of a "fair balance" of the rights of the individual and the public, has not been met. Furthermore, it is equally unlikely that it will find that the individual has been forced to bear a "disproportionate and excessive burden". This will be even more certain where the authority has expressly taken account of human rights. Such an approach by the reviewing courts reflects the established understanding that it is appropriate that a policy decision which involves the balancing of individual rights against the public interest, should be made by democratically accountable decision-makers rather than by the courts.

3.35 We now consider each of the three Articles in turn.

A1P1

3.36 A1P1 provides:

> "(1) Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

[21] Above at para 204.

accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

3.37 As we noted at the beginning of this Chapter, it is well established, in the law of the United Kingdom, that it is competent for the Government and other public authorities to acquire compulsorily the property of a citizen for the public benefit, on the payment of compensation. The courts have long been involved in determining whether an acquiring authority have acted lawfully in the exercise of their compulsory purchase powers. But after the incorporation of the Convention, and particularly A1P1, into domestic law by the 1998 Act, there has been an increase in the number of cases citing a breach of individual rights in compulsory purchase situations.

3.38 A1P1 therefore requires that the acquiring authority, in exercising their compulsory purchase powers, must make out a compelling case for acquisition in the public interest. That is to say, they must pursue a "legitimate aim". In that connection, the specific reference to the right of a member state to control the use of property in accordance with the general interest is a clear recognition of the extensive margin of appreciation which individual states enjoy.

3.39 A1P1 further requires that the legitimate aim is to be pursued in a way which is "proportionate". This means that the purpose for which the CPO is made, must sufficiently justify interfering with the human rights of those with interests in the land affected.[22] In the language of the ECtHR, this is expressed as a requirement that a "fair balance"[23] must be struck between the interests of the individual and the public, and that the individual must not bear a "disproportionate and excessive burden".[24] We accordingly consider, in the following paragraphs, the question of "proportionality" in the context of compulsory purchase and, in particular, whether it requires the least possible interference with the rights of the individual.

Proportionality

Does it require use of least possible interference?

3.40 Proportionality may be seen as relevant at two levels, namely that of the legislation which provides for compulsory purchase, and that of the effect of that legislation on an individual. At either level it could be, and has been, argued that the rights of the individual should be protected as far as possible and that, accordingly, the method of implementing the public policy should be that which involves the least possible interference with those rights. But that is not the position taken by the ECtHR.[25] A "fair balance" proportionality test does not mean that the acquiring authority are required to proceed by less intrusive means where these may be available.

3.41 So far as policy set out in legislation is concerned, the ECtHR considered proportionality in the case of *James v United Kingdom*.[26] In that case, there was a question as to whether the English leasehold reform legislation, which enabled holders of long leases

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[22] See *The Alliance Spring Co Ltd and Others v First Secretary of State* [2005] EWHC 18 (Admin) at para 9.
[23] *Allen and Others v United Kingdom* (dec) No 5591/07 (6 October 2009).
[24] *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 para 73. We note, in passing, that this approach reflects, in different language, the proposition by Grotius. See fn 3, above.
[25] See the discussion in *Lester, Pannick and Herberg, Human Rights Law and Practice* 3rd Edition at para 4.19.19.
[26] (1986) 8 EHRR 123.

to “buy out” the landowner’s interest, was compatible with A1P1. It was argued that the policy could have been implemented by less draconian measures. The Court observed:

> “The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 23, para. 49).
>
> The occupying leaseholder was considered by Parliament to have a "moral entitlement" to ownership of the house, of which inadequate account was taken under the existing law (see the extracts from the 1966 White Paper quoted above at paragraph 18). The concern of the legislature was not simply to regulate more fairly the relationship of landlord and tenant but to right a perceived injustice that went to the very issue of ownership. Allowing a mechanism for the compulsory transfer of the freehold interest in the house and the land to the tenant, with financial compensation to the landlord, cannot in itself be qualified in the circumstances as an inappropriate or disproportionate method for readjusting the law so as to meet that concern.”[27]

3.42 Nevertheless, across a wide range of governmental and public policies, it has been argued that the authority concerned is under a duty to use the least intrusive means of securing its aim.

Application of requirement for proportionality in different policy areas

3.43 One of the recurring difficulties in analysing the decisions on the relevant Convention Articles is that of extrapolating between decisions made on the same Article, but in the context of quite different policy areas. It is the case, as we have noted above, that the courts deal with compulsory purchase as raising issues under both A1P1 and Article 8. But there are many cases, such as *Daly*,[28] *De Freitas*[29] and *Samaroo,*[30] in which only Article 8 is relevant, and in circumstances far removed from questions of compulsory purchase. However, the principles developed in these non-compulsory purchase cases are often prayed in aid in compulsory purchase cases in which both Articles are engaged. But the courts have found it possible to develop different requirements for compliance with the same Article in different policy areas.

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[27] At para 51.
[28] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26.
[29] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69
[30] *R. (on the application of Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139; [2001] UKHRR 1150. *Samaroo* did not involve the proportionality of a blanket policy, but whether an *ex facie* legitimate policy was being correctly applied in the individual case before the court. The court observed: “It is plain that in general terms the objective of preventing crime and disorder is sufficiently important to justify limiting a fundamental right, and that the deportation of those convicted of serious criminal offences (especially drug trafficking offences) is a measure that is rationally connected to that objective. **The issue in such a case is not whether there is a less restrictive alternative to deportation as a means to achieve the objective. The sole question is whether deportation has a disproportionate effect on Mr Samaroo's rights under Article 8(1).** (emphasis added).

3.44 Thus, in *R (Clays Lane Housing) v Housing Corporation*,[31] the issue was whether a forced transfer of property between two registered social landlords was incompatible with A1P1. Maurice Kay LJ said:

> "In my judgment, the task in which [the Housing Corporation] was engaged was wholly different from the task of the Secretary of State in Samaroo's case [2001] UKHRR 1150. Having lawfully decided that there would have to be a transfer, the decision was then one between two proferred alternatives. Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in *Lough v First Secretary of State* [2004] 1 WLR 2557, para 55, namely 'a situation where the essential conflict is between two or more groups of private interests'. **I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights**. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough v First Secretary of State* and the present case."[32] (emphasis added)

3.45 This explanation of proportionality was also adopted in the case of *Lisa Smith.*[33] Further, in two first instance decisions, a clear distinction appears to have been drawn between the approach to Article 8 in cases such as *Daly* (where it is the only Convention Article which is applicable) and cases involving A1P1.[34]

Conclusion

3.46 A1P1 therefore appears to reflect the principles to which the courts in the United Kingdom adhered prior to its incorporation by the 1998 Act. The requirement of proportionality enshrined in A1P1 is inherent in the existing statutory framework of compulsory purchase, long established throughout the United Kingdom. The general position was well summarised in the *Alliance Spring* case, where Collins J observed:

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[31] [2005] 1 WLR 2229.
[32] At pp 2241-2242.
[33] *Lisa Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), *per* Mr George Bartlett QC (sitting as a Deputy High Court Judge), at para 20: "I do not accept that proportionality in a case such as this is to be determined by treating as a requirement that the CPO should be the 'least intrusive' means of achieving the public benefit that is sought."
[34] See *Pascoe v First Secretary of State* [2006] EWHC 2365 (Admin); [2007] 1 WLR 885, per Forbes J at para 75: "I therefore reject Mr McCracken's submission that the means used to achieve the regeneration … must be the least intrusive of the claimant's Convention rights. The Samaroo approach is not one of universal application and I approach the matter on the basis of the law as stated in the Clays Lane Housing case, in particular in para 25 … ". See also *Lisa Smith*, in fn 33 above, per Wyn Williams J at para 42: "In fact, I agree with Forbes J that a decision to confirm a compulsory purchase order may be proportionate even though it does not amount to the least intrusive interference of the landowner's rights under Article 8." This quotation sets out the judge's conclusion on the principle of the application of Article 8.

> "Compulsory purchase powers are granted in the public interest and so, provided they are exercised in accordance with the law and in a properly proportionate fashion, will not constitute a breach of the Article."[35]

Compensation

3.47 A fundamental component of the current statutory framework of compulsory purchase in the UK is that compensation will be paid for the land at market value. The general rule, contained in section 12(2) of the 1963 Act, is that compensation shall "be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise". The provision of compensation on this basis complies with the requirements of A1P1 as, although the Article does not expressly provide for a right of compensation following deprivation of property, the ECtHR has held that the taking of property without compensation can only be justified in exceptional circumstances; not to pay compensation in such circumstances would render the right contained in A1P1 as "largely illusory and ineffective."[36]

3.48 Indeed, the ECtHR has also said that, "compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants."[37] Thus, compensation for appropriated property ought to be of an amount "reasonably related to its value" but this does not guarantee "full compensation in all the circumstances".[38]

Compensation not required for restriction of use

3.49 We should note at this point that the above consideration applies to cases where property is actually transferred from the owner to the acquiring authority. The considerations will be different where there is only a restriction on the uses to which property can be put. In *R (on the application of Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs,*[39] the owners of a canal were prohibited from using it in a range of ways, but without payment of compensation. The Court of Appeal considered whether that restriction on use, without compensation, infringed A1P1, and concluded:

> "We have been referred to no case where the European Court of Human Rights has found that the absence of a provision in the relevant legislation for compensation has resulted in a control of use, as opposed to an expropriation, infringing article 1 of the First Protocol. However, in *S v France* (1990) 65 DR 250, the commission appears to have concluded that, where substantial compensation was payable in a control of use case (involving substantial interference with the applicant's enjoyment of her property) there was no infringement of article 1 of the First Protocol. None of this comes close to a doctrine that there can be no control of use without compensation.
>
> The right analysis seems to us to be that provided the state could properly take the view that the benefit to the community outweighs the detriment to the individual, a fair balance will be struck, without any requirement to compensate the individual. Should

[35] *The Alliance Spring Co Ltd and Others v First Secretary of State* [2005] EWHC 18 (Admin), at para 9.
[36] *James v United Kingdom* [1986] 8 EHRR 123 at para 54.
[37] See above, at para 3.6.
[38] *Lithgow v United Kingdom* (1986) Series A No 102.
[39] [2005] 1 P&CR 495, CA; [2005] 1 WLR 1267.

this not be the case, compensation in some appropriate form may serve to redress the balance, so that no breach of Art. 1, Protocol 1 occurs."[40]

3.50 So far as actual expropriation is concerned, the fact that compensation is invariably paid would seem to put the human rights issue beyond doubt. Compulsory acquisition of land will not breach A1P1 in the vast majority of cases.[41] Indeed, in the *Argos* case,[42] Mr Justice Ouseley noted:

> "Compensation for the loss of a property owned at market value is important in the Strasbourg jurisdiction. Indeed, disturbance compensation which may or may not be seen as part of the market value will also be paid. I was shown no Strasbourg case in which such compensation was payable on compulsory acquisition in which Article 1 was held to have been breached."

3.51 In that connection we note that although a right to compensation can readily be inferred from the 1845 Act, it is not expressly stated. We therefore propose that:

> **6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.**

Article 8

3.52 Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Proportionality

3.53 The proportionality test for determining whether there has been an interference with Convention rights would appear, from the authorities, to be more rigorous under Article 8 than under A1P1.[43] In *R (Daly) v Secretary of State for the Home Department,*[44] the House of Lords held that a proportionality analysis under Article 8 requires consideration of three separate issues:

> (i) Whether the objective justifying the interference is sufficiently important to justify limiting the right;
>
> (ii) Whether the measures designed to meet the objective of the interference are rationally connected to it;

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[40] At paras 57-58.
[41] See also *R (MWH and H ward Estates Ltd) v Monmouthshire County Council* [2002] EWCA Civ 1915 where it was held that the existence of a statutory compensation scheme in England satisfied the requirements of A1P1 in terms of the control of the use of property.
[42] *R (on the application of Argos) v Birmingham City Council* [2011] EWHC 2639 (Admin).
[43] *R (on the application of A) v Secretary of State for Communities and Local Government)* [2011] EWCA Civ 1253, at para 79.
[44] [2001] UKHL 26.

(iii) Whether the means used to impair the Convention right are no more than is necessary to accomplish that objective.

3.54 The last of these three requirements seems to import the need, in Article 8 cases, to consider whether the means used to interfere with the right are the least intrusive means required to meet the objective. There is a difficulty here, in relation to compulsory purchase. There is no sensible half way house between acquiring a private individual's property and not acquiring it. If the public purpose for which the property is required is legitimate, and the property in question is necessary to achieve that purpose, it is not easy to see that anything less than acquisition will suffice. That will be so even in what may be seen as extreme circumstances.

3.55 In *Smith and Others v Secretary of State for Trade and Industry and Another,*[45] a CPO had been made to acquire an authorised camping site used by Romani gypsies. The land was needed for developments connected with the holding of the Olympic Games in London in 2012. The Inspector had concluded that the site should not be acquired until the Secretary of State was satisfied that alternative sites were available on which the claimants could pitch their caravans. The Secretary of State had rejected that conclusion and had decided that there was an urgent need to acquire the site so that work on facilities for the Olympic Games could begin. In rejecting the argument that the decision was a breach of the claimants' rights under Article 8, Wyn Williams J observed:

> "I accept that as at December 2006 there was a risk that the claimants might be evicted from the sites with no alternative lawful sites available and to which they might move. On any view that is an important consideration in an assessment of proportionality. I accept, without reservation, the evidence of the personal circumstances of the particular claimants.
>
> All that said, I do not find that the defendant's decision to confirm the order was unjustified or disproportionate. In my judgment, it was the least intrusive measure available to him. Realistically, the only way of ensuring that a substantial proportion of the order lands (which included the sites) was under the control of the LDA by mid-2007 was to make the order."[46]

Nature of challenge under Article 8

3.56 We turn to the first of the three issues, in the context of whether, how, and at what stage of the process it is appropriate to review the proposed acquisition against the requirements of Article 8. As we have noted above,[47] the courts tend to distinguish the requirements of Article 8, in cases where it is the only Article under consideration, from cases where A1P1 is also in play. In the latter cases – and all cases of compulsory purchase will fall into that category – they seem likely to hold that, as in other cases under A1P1, it is not necessary that the interference with rights need be the least intrusive.[48]

3.57 Accordingly, despite the fact that the proportionality of an interference with Article 8 may appear to require to satisfy a more rigorous test, it is likely that, where the authority has determined that the compulsory acquisition is in the public interest so that it sufficiently

[45] [2008] 1 WLR 394.
[46] At paras 49-50.
[47] See para 3.43.
[48] See the quotation from Maurice Kay LJ's judgment in *R (Clays Lane Housing),* at para 3.44, above.

justifies interfering with individual rights, and compensation is or will be paid at market value, any reviewing court will find that the requirements of Article 8 have been met. But that does not obviate the requirement to address the issue specifically. The question has given rise to a number of overlapping decisions in the courts here and in Strasbourg.

3.58 Within the UK, the final position, prior to the decision in *Pinnock* (below) had been taken by the House of Lords, which had reached the view that it was not open to a residential occupier, against whom possession was being sought by a local authority, to raise a proportionality argument under Article 8.[49]

3.59 In Strasbourg, the ECtHR considered this matter in two cases, the decisions in which have caused a comprehensive re-examination of the approach of the domestic courts. In *Connors v United Kingdom,*[50] which concerned eviction from a local authority gypsy site, the ECtHR noted that special consideration ought to be given to gypsies as a vulnerable minority group "both in the relevant regulatory framework and in reaching decisions in particular cases".[51] The Court observed, in a review of their previous decisions:

> "The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation. It may be noted however that this was in the context of Art.1 of Protocol No.1, not Art.8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. Where general social and economic policy considerations have arisen in the context of Art.8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant."

3.60 In the subsequent case of *McCann v United Kingdom,*[52] the Court rejected an argument that the decision in *Connors* should be confined to cases involving minority groups such as gypsies. They said:

> "The Court is unable to accept the Government's argument that the reasoning in Connors was to be confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Art.8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end."[53]

3.61 In the light of these ECtHR decisions, a bench of nine judges of the Supreme Court re-examined the matter, in the case of *Manchester City Council v Pinnock (Secretary of*

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[49] See *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] 2 AC 465; and *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] AC 367.
[50] (2005) 40 EHRR 9.
[51] Above at para 84.
[52] (2008) 47 EHRR 40
[53] At para 50. See also *Cosic v Croatia* (2009) 52 EHRR 1098 and *Zehentner v Austria* (2009) 52 EHRR 739.

State for Communities and Local Government and another intervening).[54] The legal background was the administration by the local authority of housing stock in accordance with the relevant legislation. The local authority had sought, and obtained, a possession order against an unsatisfactory tenant. The judge held that he only had discretion to review the authority's decision on conventional judicial review grounds, and that he could not resolve factual disputes or consider issues of proportionality under Article 8. He found that there were ample grounds upon which the review panel could have come to the decision it had reached.

3.62 The Court of Appeal upheld the judge's decision (being bound by the previous decisions of the House of Lords). In the Supreme Court, Lord Neuberger delivered the judgment of the court and, after reviewing the cases, set out the following propositions, as having been established in the jurisprudence of the ECtHR:

> "(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of Article 8, even if his right of occupation under domestic law has come to an end: *McCann v United Kingdom* 47 EHRR 913 , para 50; *Cosic v Croatia* 52 EHRR 1098 , para 22; *Zehentner v Austria* 52 EHRR 739 , para 59; *Paulic v Croatia* given 22 October 2009, para 43; and *Kay v United Kingdom* [2011] HLR 13, paras 73–74.
>
> (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i.e., one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: *Connors v United Kingdom* 40 EHRR 189, para 92; *McCann v United Kingdom* 47 EHRR 913, para 53; *Kay v United Kingdom* [2011] HLR 13, paras 72–73.
>
> (c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if Article 8 has been complied with: *Zehentner v Austria* 52 EHRR 739, para 54.
>
> (d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied.
>
> Although it cannot be described as a point of principle, it seems that the European court has also franked the view that it will only be in exceptional cases that Article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: *McCann v United Kingdom* 47 EHRR 913 , para 54; *Kay v United Kingdom*, para 73."[55]

3.63 His Lordship went on to consider what might constitute "exceptional circumstances". He held that it would be for the tenant to make out the case that the order for possession was disproportionate:

> "[T]he fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its

[54] [2011] 2 AC 104.
[55] At para 45.

duties, will be a strong factor in support of the proportionality of making an order for possession." and

"Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way."[56]

3.64 As we have noted, the case of *Pinnock* concerned the proper administration of policy under the Housing Acts. Cases involving compulsory purchase are liable to raise different considerations. But, in principle, it appears to us that, as the law currently stands, the entire process of dispossession, including the enforcement stage, may be subject to proportionality analysis by the courts.[57] This proportionality analysis will require an assessment of the impact of the eviction on those affected. The personal circumstances of the individual will be relevant and may, where they are not properly considered, lead to a conclusion that there has been disproportionate interference with Article 8.[58] Where a proportionality analysis is carried out in the context of compulsory purchase, we would expect that Lord Neuberger's observation, in *Pinnock* (see paragraph 3.62 above) would be no less applicable.[59]

3.65 From a Scottish perspective, the leading case is *Glasgow City Council v Jaconelli*,[60] which did relate to compulsory purchase. Mrs Jaconelli's property was subject to a CPO under the Glasgow Commonwealth Games Act 2008. Following a GVD in their favour, Glasgow City Council raised an action for recovery of possession of heritable property (i.e. recovery of land). Mrs Jaconelli argued, among other points that, with reference to *Pinnock*, where a court was asked to make an order of possession at the instance of a local authority it was required to consider the proportionality of an order in terms of Article 8. It was suggested that the sheriff at first instance had not properly considered the Article 8 proportionality of the order of possession.

3.66 Sheriff Principal Taylor in Glasgow Sheriff Court closely followed the reasoning of the Supreme Court in *Pinnock* and found that the circumstances presented on behalf of Mrs Jaconelli were not sufficient to "tell the other way"[61] and that the interference with her human rights was justified and proportionate.

3.67 *Pinnock, Smith*[62] and *Jaconelli* are examples of cases in which the personal circumstances of the applicants were not sufficiently exceptional. Unsurprisingly, they give little guidance as to what personal circumstances may be so "exceptional" so as to give rise to a breach of Article 8 where an acquiring authority move for possession of an individual's home following execution of a CPO. All that can be said, therefore, is that the bar for finding that there has been a disproportionate interference with Article 8 in this context has been set extremely high.

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[56] At paras 53-54.
[57] *R (on the application of JL) v Secretary of State for Defence* [2013] EWCA Civ 449.
[58] *Bjedov v Croatia* App No 42150/09 (29 May 2012).
[59] See also *Corby BC v Scott* [2012] EWCA Civ 276.
[60] 2011 Hous LR 17.
[61] Lord Neuberger in *Pinnock,* referred to in para 3.63 above.
[62] *Smith and Others v Secretary of State for Trade and Industry and Another,* [2008] 1 WLR 394. See para 3.55 above.

3.68 Nevertheless, due to the importance of the rights protected in Article 8, it is essential that there is an adequate process and procedural safeguards in place which secure a proper proportionality assessment in each case. An adequate process must allow for balancing the individual's personal circumstances against the general interest, before an independent tribunal which is "properly equipped with procedural tools and safeguards for a thorough and adversarial examination of complex legal issues."[63] The ECtHR has established that:

> "The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."[64]

3.69 Therefore, it is not only the decision which must consider the personal circumstances of the individual concerned. Ideally the "relevant regulatory framework" should allow for consideration of individual circumstances, particularly where the individual is part of a vulnerable group.[65]

3.70 Following the decision of the Sheriff Principal in Glasgow Sheriff Court (and an unsuccessful action for reduction in the Court of Session), Mrs Jaconelli has applied to the ECtHR for an order requiring the Scottish Government to ensure that the Scots law of compulsory purchase of dwelling houses, is compatible with the Convention. We understand that, based on *Connors,*[66] it will be argued that the Scottish court procedure was insufficient to satisfy the requirements of Article 8. In particular, it will be argued that Glasgow City Council should have been required to adduce evidence and provide a substantive justification for evicting Mrs Jaconelli and her family from their home. The decision of the ECtHR is awaited with considerable interest.

3.71 There is one remaining issue potentially raised by cases such as *Jaconelli*. We do not know what remedy might have been granted by the Sheriff Principal, had he found that Mrs Jaconelli's rights under Article 8 had been breached. Given Lord Neuberger's conclusion in *Pinnock* (see paragraph 3.62 above) it seems likely that she would not have been immediately evicted from the property. Mrs Jaconelli was seeking to remain in the property. There was therefore the prospect that, at the stage of an action for possession, following upon the vesting of the property in the acquiring authority, a court might have made an order which would have had the effect of preventing that part of the development from proceeding. We consider the implications of that position, and a possible solution, in Chapter 6.[67]

Article 6

3.72 Article 6(1) provides that:

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[63] *Paulic v Croatia* App No 3572/06 (2009), para 44.
[64] *Connors v United Kingdom* (2004) EHRR 189, para 83.
[65] See also, *Pinnock* at para 64: "Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases" seem to us well made."
[66] *Connors v United Kingdom* (2004) EHRR 189 at para 92.
[67] See paras 6.40-6.44 below.

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

3.73 In terms of CPOs in Scotland, paragraph 15 of Schedule 1 to the 1947 Act contains a statutory right to challenge a CPO on a point of law. Ownership in property constitutes a "civil right".[68] Any challenge to the right of an acquiring authority to acquire a property must be determined by an "independent and impartial tribunal". Due to this requirement, the courts have been required to consider the potential for a breach of Article 6(1) where a CPO is both promoted and confirmed by the Scottish Ministers.

3.74 In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*,[69] in one of the cases in the conjoined appeal, the Secretary of State made the CPOs, decided whether or not to confirm them and actively promoted them at an inquiry before an inspector. The Secretary of State thereby had a direct interest in the determination of the civil rights in question and had an interest in the CPO being granted.

3.75 In his analysis, Lord Hoffmann considered the Strasbourg jurisprudence in this area and discussed the applicability of Article 6 to disputes between private individuals and the state, as, for example, where an individual's land is acquired compulsorily in the wider public interest. At para 78, his Lordship noted:

> "As a matter of history it seems likely that the phrase "civil rights and obligations" was intended by the framers of the Convention to refer to rights created by private rather than by public law."

3.76 However, as his Lordship went on to consider, the ECtHR has established, most notably in the case of *Ringeisen,*[70] that Article 6 may apply to a question of administrative discretion where the exercise of such powers has an effect on private law rights. In the *Ringeisen* case, the regulatory power exercisable by an administrative body was "decisive" for the enforceability of the private law contract of the sale of land. The Court's case law has gone on to provide a general requirement that all administrative decisions should be subject to some form of judicial review.[71] In the case of *Albert and Le Compte v Belgium*,[72] the ECtHR found:

> "Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

3.77 Therefore, on the facts of *Alconbury,* the House of Lords held that there was no breach of Article 6(1) because, although the Secretary of State, who was confirming the CPO, did not represent an "independent and impartial tribunal", the right to appeal his decision to the High Court ensured compliance with Article 6(1). Moreover, in the Inner House of the Court of Session, *Alconbury* was cited favourably in *County Properties Ltd v*

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[68] *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 para 79.
[69] [2001] UKHL 23.
[70] *Ringeisen v Austria* (no 1) (1971) 1 EHRR 455.
[71] *König v Germany* (1979) 2 EHRR 170.
[72] (1983) 5 EHRR 533, at para 29.

Scottish Ministers.[73] In this case, the method of granting listed building consents did not breach Article 6 as although the decision on listed building status is made by the Scottish Ministers, or a reporter on their behalf, and not an "independent and impartial tribunal", there is a mechanism of appeal against decisions and the reporter is subject to the control of the court.

3.78 On this basis, following *Alconbury* and *Country Properties*, it would seem that the requirements of Article 6(1) in regard to review by an "independent and impartial tribunal" are satisfied, despite the lack of impartiality and independence that will arise when the Scottish Ministers have an interest in a particular CPO.[74]

3.79 The approach that has been adopted by the domestic courts reflects an understanding and observation of the separation of powers between the administrative and judicial branches. Decisions which concern the public interest, from a policy perspective, are best left to democratically accountable decision-makers as opposed to the courts. This understanding is also reflected in ECtHR jurisprudence which recognises "the respect which must be accorded to decisions taken by administrative authorities on grounds of expediency".[75]

3.80 Following *Alconbury* and *County Properties*, it now appears to be settled law that, provided there is the option of appeal to an independent and impartial tribunal, Article 6(1) will not be breached where there is an exercise of administrative discretion by a decision-maker which is not itself independent and impartial.[76] An application to the ECtHR by one of the appellants in *Alconbury*, on the basis of the "independent and impartial tribunal" requirement in Article 6(1), was dismissed as manifestly ill-founded and therefore inadmissible.[77]

3.81 As noted in the case of *Albert and Le Compte* (quoted above), however, where the jurisdictional organs themselves do not comply with Article 6(1), as is the case where the Scottish Ministers confirm a CPO, then the Convention requires that they are subject to control by a judicial body that has *full jurisdiction* and does provide the guarantees of Article 6(1). As Lord Hoffmann illustrates in *Alconbury,* at paragraph 87 of the judgment, this means "full jurisdiction to deal with the case as the nature of the decision requires." A distinction must be drawn in this regard between decisions which concern the exercise of administrative discretion and those which concern an issue of disputed fact.

3.82 In the *Begum*[78] case, which concerned the homelessness scheme under the Housing Act 1996, Laws LJ in the Court of Appeal observed that where:

> "the subject matter of the scheme generally or systematically requires the application of judgment or the exercise of discretion, especially if it involves the weighing of policy issues and regard being had to the interests of others who are not before the

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[73] 2002 SC 79.
[74] Rowan Robinson & Farquharson-Black, para 2-37.
[75] *Zumtobel v Austria* [1994] 17 EHRR 116 para 32; *ISKCON and Others v United Kingdom* (1994) 18 EHRR CD 133.
[76] J Finlay and S Bird, "Alconbury *a year on: Article 6 challenges face stiff uphill struggle after Court of Appeal in* Begum *and* Adlard *adopt a schematic approach*" [2002] JPL 1045. See also *R (Hammond) v Home Secretary* [2005] UKHL 69.
[77] *Holding and Barnes plc v United Kingdom* (Application No 2352/02), 12 March 2002.
[78] *Begum v Tower Hamlets London Borough Council* [2002] 1 WLR 2491.

> decision-maker, then for the purposes of article 6 the court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expert than a judge (I use the terms loosely), and the second instance appeal is in the nature of a judicial review."[79]

3.83 The "weighing of policy issues", in particular, the interests of the property owner against the public interest, is an inherent component in the exercise of compulsory purchase powers. Due to the nature of decision making in compulsory purchase, therefore, an appeal on a point of law is highly likely to satisfy the requirements of Article 6.

3.84 On the other hand, where the issue concerns the resolution of a primary fact, an appeal only on a point of law, such as that contained in the 1947 Act, would not satisfy the requirements of Article 6.[80]

3.85 There may be an unclear dividing line in the determination of which disputes hinge on an issue of administrative discretion and which concern the resolution of some primary fact. In the House of Lords in *Begum,* Lord Bingham noted that although the housing officer in the case was required to resolve some disputed factual issues which did not require professional knowledge or experience, these findings of fact were "only staging posts on the way to much broader judgments"[81] and therefore a greater degree of review was not required to meet the "full jurisdiction" requirement in the circumstances. To the extent that a Minister involved in promoting a CPO is required to consider factual issues, it is likely that similar reasoning can be applied.

Conclusion

3.86 In the light of the above discussion, we repeat our conclusions in relation to the three Articles we have discussed

- First, with regard to A1P1, compulsory purchase carried out in accordance with the current statutory procedures in Scotland – and in particular with regard to the payment of fair compensation – is unlikely to be in conflict with the UK's obligations under that Article.

- Second, with regard to Article 6, the current procedures for obtaining and implementing a CPO, if properly carried out by the acquiring authority, are compatible with that Article.

- Third, while it is theoretically possible that an acquisition, carried out compatibly with Article 6 and A1P1, will nevertheless breach a person's right under Article 8, there is no recorded case of that having occurred.

3.87 To sum up, we are accordingly of the (preliminary) view that the current statutory framework of compulsory purchase in Scotland, when applied properly by an acquiring authority, is compatible with the Convention. Nevertheless, we ask the question:

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[79] Above at para 40.
[80] See *Tsfayo v United Kingdom* (Application No. 60860/00) 14 November 2006; *Ali v Birmingham City Council* [2010] UKSC 8.
[81] At para 9.

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

Chapter 4 Current statutory framework

General

4.1 As indicated in Chapter 1, we are of the opinion that the complex array of existing legislation should be replaced with a twenty-first century statute. We are supported in that view by our Advisory Groups, and by the Scottish Government. In Chapter 2 we set out which aspects of compulsory purchase the project would include, and which subjects we felt impelled, from lack of resources, and time, to exclude. In this Chapter we discuss briefly the existing primary legislation on compulsory purchase. This will give the reader an idea of the scale of the project, in terms of the volume of legislation which requires to be examined, with a view to whether it should be re-enacted, with or without amendment, or simply repealed. The outcome of this project, if our final recommendations are adopted by the Scottish Parliament, will be that a great deal of old, and indeed very old, legislation will be removed from the statute book.

4.2 There is one further preliminary point. Throughout this Discussion Paper we frequently mention our "proposed new statute". In fact, the legislation on a subject like compulsory purchase overlaps with other codes (notably, in this case, the legislation relating to town and country planning). The exact placing of any particular provision will be a matter for the technical judgment of the drafter of the eventual legislation in due course.

Background

4.3 We start with by looking at the history of the legislation. While compulsory acquisition of land had occurred by means of legislation prior to the nineteenth century, it was the development of the railway system in the 1830s which occasioned an extremely high and continuing demand for legislation to authorise compulsory purchase in relation to particular projects.

4.4 This was done by way of Private Bills which were promoted in Parliament. Each such Bill contained numerous clauses setting out the procedures to be followed in relation to the acquisition of land, the manner in which title was to be passed, and the manner in which the level of compensation was to be determined.[1] There were also supplementary provisions as to the resolution of disputes. Much of this legislation was repetitive and the volume of each Bill tended to obscure the real issues; which were first, the particular route to be followed by the railway in question and, second, whether a railway along such a route was likely to be viable.

4.5 The solution was to separate the legislative approval for particular projects from the procedural provisions by which such projects were brought to fruition. The former operation would be by way of a special Act, which would set out Parliamentary consent to the particular project. The procedural aspects would be dealt with in general legislation

[1] At para 1.7, for example, we footnoted the Act for making a Railway from Edinburgh to Glasgow, to be called 'The Edinburgh and Glasgow Railway', with a Branch to Falkirk." (1838 c. lviii.)

consolidating the procedural provisions largely common to all the special Acts. This general legislation would be made to have effect in relation to future special Acts by being "incorporated" into them.

4.6 Accordingly, in 1845, legislation was passed to consolidate the provisions necessary for the procedural aspects of compulsory purchase. Separate legislation was passed for Scotland on the one hand, and England and Wales on the other. Although it was the expansion of the railway system which prompted this legislative activity, the method adopted was to pass general legislation applicable to all compulsory acquisition, and thereafter to make specific provision for the particular requirements of railways. Thus, in that year, the 1845 Act and the 1845 Railways Act came into force in relation to Scotland, and the 1845 English Act and the Railways Clauses Consolidation Act[2] came into force in relation to England and Wales.

4.7 The provisions of these pairs of enactments were in many respects similar, although it is apparent that the English enactments were drafted first, and the Scottish provisions were largely copied from the English Acts.

4.8 There have, in consequence, been scathing criticisms of the 1845 Act where its treatment of Scottish land law came into question. Thus, in *Heriot's Trust v Caledonian Railway Co.*[3] Lord Dunedin observed:

> "I said in *Fraser's* case,[4] and I venture to repeat it here, that the genesis of the 1845 Act is plain enough. It is a copy of the English Act of the same year, the copy being adapted to Scottish needs by a person with a very hazy notion of Scottish real property law. Indications of ignorance crop up all through the statute, in small things as well as great."[5]

4.9 The way in which the legislation is laid out has also been criticised. The Act has internal divisions by way of italicised cross-headings, which have been used in some special Acts to incorporate only those parts of the 1845 Act thought to be required. But the division of the Act is not accurate. Thus, in relation to compulsory purchase itself, the Act has a part headed "*Purchase of lands otherwise than by agreement*", which extends to 50 sections (sections 17 to 66), and which might be expected to contain all the provisions with regard to compulsory purchase. But sections 15, 16 and 90 also contain provisions in relation to compulsory purchase.

4.10 No doubt these problems are now well known to those preparing special Bills, but the general structure of the 1845 Act clearly leaves much to be desired, quite apart from the fact that much of its phraseology is distinctly out of date.[6]

4.11 In practice, the courts have not allowed their distaste for the technical defects in the drafting of the 1845 Act to prevent them from implementing it in a sensible manner.

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[2] 1845 c. 20.
[3] 1915 SC (HL) 52.
[4] *Fraser's Trs v Caledonian Railway Co* 1911 SC 145.
[5] At p 65.
[6] See, for example, para 4.12 below.

Moreover, some of the difficulties over these provisions have been remedied by the ending of the system of feudal tenure by the Abolition of Feudal Tenure Etc. (Scotland) Act 2000.[7]

Underlying structure of legislation

4.12 The preamble to the 1845 Act provides, among other things:

> "Be it therefore enacted that this Act shall apply to every Undertaking in Scotland authorized by any Act of Parliament which shall hereafter be passed, and which shall authorize the taking of Lands for such Undertaking, and this Act shall be incorporated with such Act; and all the Provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the Undertaking authorized thereby, so far as the same shall be applicable to such Undertaking, and shall as well as the Clauses and Provisions of every other Act which shall be incorporated with such Act, form Part of such Act, and be construed together therewith as forming One Act.[8]

4.13 The effect of this provision is that the 1845 Act is included, without further provision, in every Act authorising the compulsory acquisition of land. In practice, any new legislation for a proposed new railway or other works requiring compulsory purchase has included a provision "incorporating" the provisions of the 1845 and/or 1845 Railways Acts, or such of those provisions as has seemed necessary or desirable.

4.14 The provisions incorporating the 1845 Act tend to be focused and discriminating. In *Barony Parish Council v Glasgow School Board*,[9] a school board had powers to acquire land voluntarily, and (separate) power to acquire land compulsorily. It was held, on a construction of the statute, that the incorporation of the 1845 Act for the purposes of compulsory acquisition, did not apply where the purchase was voluntary. Similarly, in *Gammell's Trustees v the Land Commission and others*[10], where there was provision incorporating the 1845 Act for the purposes of certain specified provisions of the Land Commission Act 1967, it was held that the 1845 Act had not been incorporated "by silent implication" in relation to other provisions. In later years, and certainly in modern times, much of the provision of the 1845 Act is specifically glossed or excluded by the authorising Act, and replaced with provisions which are seen as more appropriate to the particular development.[11]

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[7] 2000 asp 5.

[8] This is an unusual example of the preamble to a statute containing a substantive provision. But it seems clear that it was intended to have substantive effect, because the first numbered section of the Act is "II". Further, potential problems as to interpretation are resolved by an express provision that the 1845 Act and any special Act are to be read as one.

[9] (1895) 23 R 221.

[10] 1970 SLT 254.

[11] See, for example, s 81 of the Edinburgh Tram (Line One) Act 2006 (asp 7):

"(1) The Lands Clauses Acts, except sections 120 to 125 of the 1845 Act, so far as they are applicable for the purposes of, and are not varied by or inconsistent with, the provisions of this Act, are incorporated with this Act.
(2) Section 6 of the Railway Clauses Consolidation (Scotland) Act 1845 (c. 33) is incorporated with this Act to the extent that it applies to compensation payable in respect of diminution in value to properties caused by construction works, and for the avoidance of doubt no other provisions of the Railways Clauses Consolidation (Scotland) Act 1845 are incorporated with this Act.
(3) In construing the enactments incorporated with this Act—
(a) this Act shall be deemed to be the special Act;
(b) the authorised undertaker shall be deemed to be the promoters of the undertaking or the company; and
(c) the authorised works shall be deemed to be the works or the undertaking."

4.15 We do not propose any alteration to this basic structure. It seems to us that the essential separation of the processes of approval of the project, on the one hand, and its implementation, on the other, is a sound approach to the matter. We are aware that modern developments, and particularly large-scale projects, are sometimes dealt with by way of a special Act which also sets out, in more or less detail, provision as to compensation etc.[12] That tendency may partly be explained by the extent to which the 1845 legislation has become unfit for purpose and reinforces our aim to set out a new, comprehensive statute for everything involved in the implementation of a decision to acquire land compulsorily.

Examination of statutes

4.16 Having regard to the discussion as to the scope of this project (at paragraphs 2.2 to 2.4 above), we consider that any general compulsory purchase legislation should include the following elements:

(a) a procedure for obtaining a CPO;

(b) provision for the acquisition of land by agreement;

(c) a procedure for implementation of a CPO, failing agreement;

(d) provision for the actual transfer of the land to the acquiring authority;

(e) provision for the valuation of the landowner's interest in the land;

(f) provision for the assessment and payment of compensation.

4.17 Linking and supporting the provision on these matters will be provision as to settlement of disputes and as to timings. All of these matters are currently dealt with, in more or less detail, in one or more of the following principal statutes: the 1845 Act; the 1845 Railways Act; the 1947 Act, the 1949 Act, the 1963 Act, the 1973 Act and the 1997 Act. We look at each of these in turn.

1845 Act

4.18 As noted above, the 1845 Act is predicated on the authorisation of compulsory acquisition being granted in what the 1845 Act refers to as a special Act.[13] Sections 2 to 5 contain interpretation provisions.[14] Sections 6 to 16 deal with various aspects of acquisition by agreement, and effectively deal with all possible claims that disposal is incompetent by the person holding the land, in whatever capacity. Sections 17 to 18 (notices to treat), 80 to 82 plus the Schedules (conveyancing) and sections 83 to 88 (entry on to the acquired land) deal with implementation of the CPO. Sections 19 to 79 deal with compensation. Of particular note, not least for its brevity, is section 61, which relates to the assessment of price and compensation:

> "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 not only to the value of the land to be purchased or taken by the promoters of the undertaking, but

[12] See, for instance, Airdrie-Bathgate Railway and Linked Improvements Act 2007.
[13] See s 1, Preamble.
[14] It was customary in the nineteenth century to place such provisions at the beginning of an Act.

> also to 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 lands by the exercise of the powers of this or the special Act, or any other Act incorporated therewith."

4.19 One of the recurring observations about the 1845 Act is that it contains no clear, specific provision to the effect that a person whose property is being compulsorily acquired has a right to be compensated. Section 61 goes no further than a necessary implication of such a right. The absence of such a provision does not appear to have caused any practical difficulty, but in paragraph 3.51 above, we propose that a clear statement of such a right should be included in the proposed new statute.

4.20 Sections 89 to 127 deal with a variety of particular problems which may arise (as, for instance, in relation to the acquisition of part only of a house, or lands intersected by the proposed acquisition). Sections 128 to 141 deal with notices, penalties and other miscellaneous matters.

(a) Problems arising from amendment of 1845 Act

4.21 Most of the provisions in the 1845 Act have been replaced by later statutes, both general and specific. Normally, when a later statute amends or replaces earlier provisions, those earlier provisions are formally repealed, either to reduce the possibility for confusion as to what Parliament's (new) intention is, or (at least) to remove extraneous material from the statute book. But the 1845 Act remains upon the statute book, with only minor amendments and deletions having been made to its original form. In spite of a number of judicial and other criticisms of the state of the legislation,[15] and a large number of Parliamentary opportunities to undertake the necessary "housekeeping", there has been no serious attempt to remove provisions which have clearly been superseded, or which are otherwise of no continuing use. The usual processes for ensuring that the statute book presents as clear as possible a picture of Parliament's intention to the user, have been disregarded. This causes immense confusion. We give two examples.

(i) Prohibition on acquisition of part only of dwelling house

4.22 In the 1845 Act there is provision preventing the compulsory acquisition of part only of a single building. Section 90 of the Act provides:

> "And be it enacted that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

Section 90 was replaced, in relation to acquisitions by local authorities and (certain) Ministers, by another version, to the same general effect, but in more detail. This was paragraph 4 of Schedule 2 to the 1947 Act, which provides:

> "The following provisions shall have effect in substitution for the provisions of section ninety of the Lands Clauses Consolidation (Scotland) Act 1845, that is to say, no person shall be required to sell a part only of any house, building or manufactory, or of a park or garden belonging to a house, if he is willing and able to sell the whole of

[15] See paras 4.29–4.30, below.

> the house, building, manufactory, park or garden, unless the tribunal by whom the compensation is to be assessed determines that, in the case of a house, building, or manufactory, such part as is proposed to be taken can be taken without material detriment to the house, building or manufactory, or, in the case of a park or garden, that such part as aforesaid can be taken without seriously affecting the amenity or convenience of the house, and, if the tribunal so determines, the tribunal shall award compensation in respect of any loss due to the severance of the part so proposed to be taken, in addition to the value of that part, and thereupon the party interested shall be required to sell to the acquiring authority that part of the house, building, manufactory, park or garden."

4.23 Paragraph 4 of Schedule 2 to the 1947 Act appears to be what was (for that time) a comparatively rare example of textual amendment,[16] in that it appeared simply to replace the previous version of section 90 with that set out in the paragraph. In addition, that new version applies to the great majority of compulsory purchases including, as we will see below, purchases for the purposes of Scottish planning authorities,[17] the National Health Service in Scotland, and Ministers under the Roads (Scotland) Act.[18]

4.24 Section 90 would still apply, in its original form, to any special Acts passed for the purposes of a particular development unless excluded or amended by that Act. That may be why neither legislation.gov.uk nor the Westlaw legislation website has the revised version of section 90 in the text of the 1845 Act. Moreover, since 1947, the paragraph has been replaced by (at least) two further versions, for different purposes.

4.25 First, a combination of paragraphs 8 and 22 of Schedule 3 to the Gas Act 1986,[19] replace paragraph 4 with a new version, stated (by paragraph 16 of Schedule 3) to be for the purposes of "a public gas supplier's compulsory acquisition of a right in Scotland". In that case, however, the substituted provision operates as a replacement of paragraph 4 of Schedule 2 to the 1947 Act, and not as a replacement of section 90 of the 1845 Act. Second, similarly, paragraph 21 of Schedule 5 to the Postal Services Act 2000[20] substitutes another version of paragraph 4 of Schedule 2, this time, for the purpose of acquisitions by "universal service providers".

4.26 Finally, on this matter, paragraphs 19 and 20(1) of Schedule 15 to the 1997 Act (which contains the current version of the provisions on GVDs) provide:

> "19. Paragraph 4 of Schedule 2 to the Acquisition Act 1947 shall not apply to land in respect of which a general vesting declaration is made under this Act.
>
> 20. (1) If a general vesting declaration under this Act comprises part only of a house, building or factory, or of a park or garden belonging to a house, any person who is able to sell the whole of the house, building, factory, park or garden may by notice served on the acquiring authority (in this Part referred to as a "notice of severance") require them to purchase his interest in the whole."

4.27 It is perhaps not surprising that legislation to deal with acquisitions by particular public bodies should be specifically tailored to fit what are seen as the particular

[16] A method of statutory amendment where a new provision is substituted for the existing provision.
[17] See 1997 Act, s 189(7).
[18] 1984 c. 54, s 110(3).
[19] 1986 c. 44.
[20] 2000 c. 26.

circumstances of such bodies. But the effect of the multiple amendments is to leave the ordinary user of the legislation in some uncertainty as to what the position is. We wonder whether the divergences of policy – which no doubt gave rise to these multiple formulations – justify the work required to put them into effect, or the confusion which they are liable to cause to the user of the legislation. That is a matter which we discuss in more detail in Chapter 5.

(ii) Effect of "glossing" 1845 Act with references in later statutes

4.28 The second example arises from *Birrell Ltd v City of Edinburgh District Council.*[21] In this case, there was a question as to whether interest was payable on compensation from the date of vesting (by virtue of what would now be called a GVD), or from the date on which the acquiring authority actually took physical possession of the premises, the previous landowner having remained on the premises, and continued trading, until that date. After an exhaustive consideration of the terms of the proviso to paragraph 3(4) of Schedule 6 to the 1945 Act, and of sections 83 to 88 of the 1845 Act, all the judges agreed that the date of vesting was the date from which interest should be calculated. Lord Fraser of Tullybelton observed:

> "So when the proviso to paragraph 3(4) directs that the purchasing authority are to be liable as if those provisions of the 1845 Act had been complied with, the effect is in my opinion that interest on the compensation is due to the sellers from the date of vesting.
>
> That is the conclusion I reach upon a consideration of the complicated terms of the proviso to paragraph 3(4). It is a matter for regret that the draftsman proceeded by incorporating the 1845 Act instead of making direct provision for the case with which he was dealing. It would be impossible for promoters to comply with all the provisions in sections 83 to 88 and in the other sections of the 1845 Act, and I think that the proviso must be read as meaning as if they had complied with such of them as are applicable in the particular circumstances."[22]

(b) Replacement of 1845 Act

4.29 We are in no doubt that the 1845 Act should be repealed and replaced. This is not a new conclusion. This Commission was persuaded of the requirement some fifty years ago.[23]

4.30 Indeed, some fifty years before that, the Scott Committee was set up to look at questions of valuation and compensation. They too were firmly of the view that the 1845 Act should be replaced. At paragraph 6 of their Report[24] they said:

> "We are of opinion that the Lands Clauses Acts are out of date, and fail to give effect to the requirements of the community of today, and therefore that they should be repealed and replaced by a fresh code."

4.31 Nevertheless, the Acts were left in place. In 1964 a consolidation of the English compulsory purchase legislation was put in hand. This involved the consolidation of the

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[21] 1982 SC (HL) 75.
[22] At pages 109-110.
[23] The Scottish Law Commission's first programme of law reform in 1965.
[24] Scott Committee Report.

1946 Act and the English 1845 Act. The resulting statute, the 1965 Act, replicated many of the provisions of the English 1845 Act, but did not repeal that Act. The reasons appear from the work carried out by the Law Commission who, as we have already noted in Chapter 1, carried out a comprehensive review of the whole system of compulsory purchase some ten years ago. Their Report was published in 2004. They considered the question of repeal of the English 1845 Act in both the Consultation Paper and in the final Report. In the Consultation Paper they set out, at paragraph 1.29, three principal obstacles which had appeared to prevent those responsible for the 1965 consolidation from fully consolidating and repealing the English 1845 Act:

> "(1) The 1845 Act was partly adoptive and partly not. So far as it was adoptive, it had been adopted with innumerable variations of modification by a long series of Acts both public general and local. Moreover, the 1845 Act was automatically incorporated (and not simply applied) unless it was specifically excluded in the special Act;
>
> (2) Many of the 1845 Act's provisions had been overtaken, without being repealed, by the property legislation of 1925; and
>
> (3) At some of the most important points the 1845 Act proceeded by inference rather than by specific enactment. Thus, instead of conferring a right to compensation, it assumed the existence of such right and concentrated on the method of assessing the amount (which meant that case law had filled the gaps and would need to be codified – a task outside the then scope of consolidation).
>
> These concerns gave rise to the fear that repealing the 1845 Act would lead to errors of inadvertent omission, and consequently alteration, of the present law."[25]

Turning to consider their own position, they continued:

> "Today the problem remains. In the Scoping Paper we suggested that the 1845 Act should finally be repealed. The alternative view is that it is safer to leave well alone, and that the possibility of unanticipated alterations to the law remains, particularly in relation to local statutes which have incorporated the 1845 Act. Either way, it is not a priority task. Since the 1845 Act has very limited application, cases will rarely arise where the courts will need to intervene. Moreover, those private or local Acts which have incorporated the 1845 mechanisms for particular works or projects will almost certainly have been time-limited in their operation.
>
> We would prefer to see the 1845 Act repealed as a whole, but we accept that there are practical reasons for a less radical solution. The ODPM [Office of the Deputy Prime Minister] likewise feels that wholesale repeal could give rise to significant and unforeseen complications. Accordingly, we are not making any specific proposals in relation to the 1845 Act."[26]

4.32 For our part, we are unable to appreciate the technical difficulties in relation to the amendments to English property law made by the Law of Property Act 1925,[27] and we are not in a position to comment on the view that the difficulties in relation to those matters would effectively prevent any sensible repeal of the English 1845 Act.

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[25] Law Com 169, para 1.29.
[26] Law Com 169, para 1.30-1.31
[27] 1925 c. 20.

4.33 So far as the other matters are concerned, we do not, at present, consider that any of them would make it impracticable to repeal the 1845 Act. It is certainly the case that the 1845 Act has been incorporated, wholesale, into very many enactments authorising the compulsory acquisition of property. It is also the case that many private or local Acts which have incorporated the 1845 mechanisms will have been time-limited in their operation. We do not see why that fact would prevent repeal and replacement of the 1845 Act. Most individual uses of the legislation will be completed within two or three years from the authorisation of the purchase. Even if there were on-going processes to which the 1845 Act applied, it would be possible to make appropriate transitional provision.

(c) Restatement not consolidation

4.34 We should make it clear that we are contemplating the repeal of the 1845 Act in the context of its replacement with a comprehensive modern statute. We do not propose a pure consolidation. It would be technically possible to consolidate the legislation relating to compulsory acquisition. But the example we have given above, in relation to section 90 of the 1845 Act, illustrates how difficult that might be in practice. Further, the provisions of the 1845 Act have not only been interlinked with and overlaid by the provisions of later statutes: they, or their successors, have been interpreted and re-interpreted by the courts. We consider that nothing short of a comprehensive restatement will introduce clarity to the legislative framework.

4.35 A further advantage of a restatement is that it will not seek simply to re-enact the legislation in the light of the way in which it has been interpreted. It can, and should, incorporate adjustments to the policy which experience has shown to be desirable.

4.36 More generally, while many of the subjects dealt with in the 1845 Act will continue to have their place in a modern statute, the relevant law will be expressed in modern terms, and in a single instrument, rather than scattered across the face of the statute book and the court reports over a period of more than 150 years. The process of constructing such a statute will be informed and assisted by the process of removing the 1845 Act.

4.37 The final obstacle to the repeal of the English 1845 Act was that identified by Her Majesty's Government, that repeal might give rise to "significant and unforeseen complications". In the context of a restatement, we cannot see that there is a greater risk of complications than with the repeal and re-enactment of any other part of the statute book. We anticipate that as a new statute is drafted, and examined by stakeholders within and outwith Government, most defects will be identified and remedied. The final version, if enacted by the Scottish Parliament, will stand on its own. Any problems which arise in the implementation of the new legislation will be problems with that legislation, and not with the repeal of pre-existing legislation.

4.38 Accordingly, our intention in this project, is to recommend the repeal of the 1845 Act, with the replacement only of those provisions which are still of relevance in modern times.[28]

[28] See para 1.14 above.

1845 Railways Act

4.39 This Act received Royal Assent only two months after the 1845 Act. Essentially it adapts, for railways, the procedural arrangements contained in the earlier Act. It differs, however, in two relevant respects. First, in section 6, it specifically provides for a duty to pay compensation:

> " … [T]he company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners … ."

Second, it makes provision for the case where the railway is to run over land containing minerals. In sections 70 to 78, it provides that the acquiring authority can effectively buy out the value of the mineral workings. If that does not happen, then the owner of the minerals can work them, provided that the works do not damage the railway.

4.40 This fasciculus of provisions, known commonly as the "Mining Code" has effectively been reproduced in many individual Acts authorising the compulsory acquisition of land.[29] Subject to any particular circumstances pertaining to particular developments, it appears to us that they should form part of the general regime of any modern compulsory purchase statute. We discuss them in more detail in Chapter 9.

Lands Clauses Consolidation Acts Amendment Act 1860[30]

4.41 The 1860 Act makes various technical amendments to the 1845 Act and the English 1845 Act, in relation to compensation provisions. The 1860 Act also provides for the Secretary of State for War to be able to use the provisions of the 1845 Act for the purposes of acquisitions made under the Defence Act 1842.[31] We are not aware that the Secretary of State has made use of those provisions in recent years but we would envisage discussing the technical issues as to the possible repeal or replacement of that Act with the UK Government during the preparation of a draft Bill. If, at the end of the day, it is apparent that Westminster legislation is necessary, that can be done at Westminster by means of appropriate subordinate legislation.[32]

1919 Act

4.42 Historically, both of the major wars in the twentieth century occasioned a re-examination of the pre-war compulsory purchase system, followed by substantial alterations. As we have noted, the Scott Committee was set up towards the end of World War I. One of the problems which the committee addressed was the perceived tendency of arbiters and valuation panels to award excessively generous sums by way of compensation.

4.43 Many of the Scott Committee's recommendations[33] in relation to the improvement of assessing compensation were implemented in the 1919 Act.[34] The Act made special

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[29] See, for example, s 21(2) of the Forth Crossing Act 2011 (asp 2).
[30] 1860 c. 106.
[31] 1842 c. 94.
[32] See para 1.41 above.
[33] See Scott Committee Report.

provision for the assessment of compensation in relation to land acquired by a Government department or local or public authority. It set out the rules which the arbiters, appointed under the Act to assess compensation, were to follow. In particular, section 2 of the Act set out, for the first time in statutory form, the "six rules" which were to guide the committees, and the courts, in assessing compensation. Those rules are now consolidated, as amended, in the 1963 Act.

1945 Act

4.44 Following World War II there was another flurry of legislative activity in relation to compulsory acquisition. The 1945 Act is mentioned only for the sake of historical completeness. Its particular interest is that it provided, for the first time, for an accelerated procedure for the implementation of CPOs, through what would come to be known as a GVD. Section 17 empowered the Minister confirming a CPO to direct that the provisions of Schedule 6 to the Act (which set out in detail how expedited procedure should work in practice) should apply. The effect of such a direction was that notices to treat were deemed to have been served in relation to the land affected by the direction.

4.45 Schedule 6 proceeded by providing that, where it applied, the acquiring authority were entitled to "enter on and take possession of" the land, as if the provisions of sections 83 to 88 of the 1845 Act had been complied with"; but the acquiring authority remained under an obligation to pay such compensation as would have been payable if the provisions of those sections had [actually] been complied with. The modern provisions in relation to GVDs are found in Schedule 15 to the 1997 Act (see paragraph 4.58 below).

4.46 Following the 1945 Act, the 1946 Act provided for new procedures in relation to the acquisition of land by local authorities and the Minister of Transport. That Act applied to Scotland as well as to England and Wales, but was replaced, for Scotland, by the 1947 Act.

1947 Act

4.47 The 1947 Act is the current statute in relation to the procedure by which a CPO is obtained, either by a local authority or by Scottish Ministers.[35] It sets out procedures for the acquisition of land by local authorities under general powers of compulsory acquisition conferred by general legislation, and by Ministers and the Secretary of State (now the Scottish Ministers) under certain particular public general Acts. The Acts to which the procedures under the 1947 Act apply are Acts passed prior to the coming into force of the 1947 Act. The difficulty was that much legislation authorising compulsory acquisition was passed after the 1947 Act. The solution was, and is, to deem such Acts to have been passed prior to the coming into force of the 1947 Act, or to mention them specifically in section 1 of that Act.

4.48 For example, the 1947 Act is the means by which compulsory purchase authorised by section 57(1) of the National Health Service (Scotland) Act 1947[36] (which was passed prior to the 1947 Act) was to be carried out. When, after the passage of the 1947 Act, the 1947 Planning Act was passed, its provision in relation to compulsory acquisition (section 35) was made retrospective, so that the procedure in the 1947 Act could be used for

[35] See Ch 5 for detailed discussion.
[36] 1947 c. 47.

compulsory purchase under the 1947 Planning Act.[37] That method of application has been followed subsequently. For example, section 110(3) of the Roads (Scotland) Act 1984[38] provides that, in relation to compulsory acquisition under that Act, it is to be treated as if it had been passed prior to the 1947 Act and, where an acquisition is by the Secretary of State, as if the sections under which he acquired the land were mentioned in section 1(1)(b) of that Act.

1949 Act

4.49 This Act established the LTS and the Lands Tribunal, the latter having jurisdiction over the rest of Great Britain.[39] For our purposes, the function of the LTS was, and is, to settle disputed questions of compensation arising under the 1963 Act and, more generally, under the 1845 Act. Essentially, the conferral of this function on the LTS made much (indeed, around one third) of the 1845 Act superfluous.

1959 Act

4.50 Between 1947 and 1959, land compulsorily acquired was valued only on an "existing use" basis. The 1959 Act provided that the landowner was again allowed to benefit from the development value of land compulsorily acquired. The Act is particularly important in relation to a study of the principles upon which compensation is awarded. In particular, section 9 of the Act was Parliament's attempt to put into statutory form, the effect of the judgment in the *Pointe Gourde* case.[40] We discuss that matter below, in Chapter 12. But for present purposes, it is its complexity to which we call attention. In *Davy v Leeds Corporation,*[41] in the Court of Appeal, Harman LJ began his judgment with the following observation:

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a slough of despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually pale and exhausted, reached the other side where I find myself, I am glad to say, at the same point as that arrived at with more agility by my Lord."[42]

Section 9 was subsequently consolidated as section 14 of the 1963 Act.

1963 Act

4.51 As noted above, the 1963 Act consolidated the provisions of the 1919 Act, as well as various provisions respecting compensation made after World War II. Before the 1949 Act was brought into force in relation to Scotland (March 1971), sections 1 to 7 of the 1963 Act provided for the determination of questions of compensation arising out of compulsory acquisition. These sections have now been repealed.

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[37] 1947 Planning Act, s 34(4): "The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, shall apply to the compulsory acquisition of land under this section and accordingly shall have effect as if this section had been in force immediately before the commencement of that Act".
[38] 1984 c. 54.
[39] The Act, in so far as applying to Scotland, came into force in March 1971.
[40] *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* [1947] AC 565.
[41] (1965) P & CR 24.
[42] At p 33.

4.52 Section 12 of the 1963 Act sets out the six rules about compensation which were previously set out in the 1919 Act. Sections 13 to 16, which are of considerable complexity, set out considerations affecting the development value of land. We discuss them in some detail in Chapter 12.

4.53 Sections 17 to 20 deal with various special cases, (section 21 has been repealed) and sections 22 to 24 deal with planning assumptions derived, or as the case may be, not derived, from development plans. Part IV of the Act (sections 25 to 30) makes provision for CAADs. Part V of the Act (sections 31 to 37) provides for compensation where permission for alternative development has been granted after the acquisition of the property. Sections 38 to 49 deal with miscellaneous and general matters.

4.54 The subject matter of the 1963 Act will be included in our proposed new statute.

1973 Act

4.55 In the 1973 Act, Part I (sections 1 to 17: compensation for depreciation caused by use of public works) and Part II (sections 18 to 26: mitigation of injurious effect of public works), fall outwith the scope of the project as we have defined it, and we are not minded to consider them in detail. That said, it has been represented to us that if the remainder of the 1973 Act is repealed, then the provisions in Parts I and II will be left as the sole survivors of the twentieth-century statute book on this subject; and that it might be more convenient for the user if they were consolidated in the new statute. We will accordingly consider, in the preparation of a draft Bill, whether it would be feasible to include such a consolidation in the proposed new statute.

4.56 Part III (sections 27 to 40: provisions for the benefit of persons displaced from land), is a part of the wider consideration of compensation, and we do deal with that matter. Part IV (sections 47 to 63: headed “Compulsory Purchase”) provides for compensation for injurious affection, and for other particular cases where the ordinary rules for compensation are thought to require adjustment. It also provides for advance payments of compensation, a matter which we consider in Chapter 18. It is our intention to include provisions along these lines in the proposed new statute.

1991 Act

4.57 This Act made substantial amendments to planning law both north and south of the border. In particular, for present purposes, Part IV of the Act made amendments to the 1963 and 1973 Acts and, indeed, revived Part V of the former. Again, it is our intention to include the provisions made by the 1991 Act in our proposed new statute.

1997 Act

4.58 This Act consolidates, with some amendments suggested by this Commission, the law relating to town and country planning in Scotland. It provides for the acquisition of land by agreement or compulsorily, for planning purposes. Generally, where land is to be acquired compulsorily, such acquisition is to be carried out using the procedure set out in the 1947 Act. Section 189(7) of the 1997 Act deems that section to have been in force immediately prior to the commencement of the 1947 Act.

4.59 In particular, section 195 of, and Schedule 15 to, the 1997 Act, deal with GVDs, which we consider in some detail in Chapter 5. In our view it would be more convenient to the user of legislation if these provisions were located with the other provisions directly relating to compulsory acquisition in our proposed new statute.

Summary

4.60 In this Chapter we have described and commented on the legislation relevant to the project which we outlined in Chapter 1. We are conscious, as we pointed out in that Chapter, that it would be possible to extend the project into other areas more or less closely related to compulsory acquisition. But, as we discuss in paragraphs 2.2 to 2.5, and repeat above, our resources are limited: if we do not confine this project to what we believe is necessary, we may never reach a conclusion.

PART 2: OBTAINING AND IMPLEMENTING CPO; MINING CODE

Chapter 5 Procedure for obtaining CPO

Introduction

5.1 In this Chapter we look at compulsory acquisitions to which the present general procedure applies, and we consider legislation which does not use the general procedure, and examine the rationale for the differences. We set out the general procedure for obtaining a CPO and ask whether, and how, the procedures could be improved. We consider registering a CPO, revocation of a confirmed CPO, and the validity of a confirmed CPO. Finally, we look at public rights of way. The timeline set out in Appendix C may be of assistance to readers.

Compulsory acquisitions to which present general procedure applies

5.2 Since World War II, the principal procedural measure in the control of the planning and development of land has been the 1947 Act.[1] As amended by subsequent legislation, and in particular as extended by the 1980 Act, it sets out the general procedure for the vast majority of acquisitions by local authorities, by Scottish Ministers, by UK Ministers and by statutory undertakers. Section 1(1) (which has been much amended) sets out the acquisitions to which the Act applies.

Exceptions to application of general procedure

Local Acts

5.3 There are situations in which the 1947 Act procedures are specifically applied, or disapplied, to other legislation which provides for compulsory acquisition.

5.4 Section 6 of the 1947 Act provides that, where a local authority has power to acquire land compulsorily under a local Act, Ministers may, by order, empower the authority to use the procedures in the 1947 Act in place of those in the local Act. Any order made by Ministers under section 6 is subject to special parliamentary procedures. This seems odd.

5.5 It should not in our view be necessary for a local authority to get the approval of Scottish Ministers before using the standard procedure for compulsory purchase under a local Act. Whatever may be the practice at present, we see no reason why a local Act should set out a different, non-standard, procedure for such compulsory purchase, or why the granting of that request should necessitate the use of special parliamentary procedures. Finally, from the responses to our list of legislation (see paragraph 5.18 below), it would appear that very little use is made of this provision. We accordingly propose that:

[1] The 1845 Act appears to have been primarily intended to apply to acquisition by private acquiring authorities operating under a special Act for a specific project, which is what was involved in the expansion of railways.

8. Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.

Opencast Coal Act 1958[2]

5.6 Section 4 of and Schedule 2 to the Opencast Coal Act 1958, modify the provisions of the 1947 Act as they apply to acquisitions under the 1958 Act; and section 6A of the 1947 Act makes further modifications to Schedule 1 for the same purpose.

Exceptions set out in 1947 Act

5.7 Section 1(4) of the 1947 Act sets out three enactments which are specific exceptions to the application of the Act, which we now consider.

(a) Burial Grounds (Scotland) Act 1855 ("the 1855 Act")[3]

5.8 Section 2 of the 1855 Act provides that it is to be executed by parochial boards. The procedure for the acquisition of land for new burial grounds is by way of application to the sheriff to certify that the land is suitable. Thereafter the board may proceed to acquire the land, if necessary, compulsorily. The 1845 Act, with various adjustments, is applied to any such acquisition.

5.9 Parochial boards were abolished, and their functions transferred to parish councils, by sections 21 and 22 of the Local Government (Scotland) Act 1894.[4] The functions of parish councils were transferred to county councils and district councils by section 1 of the Local Government (Scotland) Act 1929.[5] In consequence of the various re-organisations of local government since then, the result would appear to be that the functions of parochial boards with regard to the acquisition of land are now vested in local authorities within the meaning of the Local Government (Scotland) Act 1994.[6] We can accordingly see no reason why the acquisition of land for burial grounds should not be conducted in line with the general procedures to be set out in the proposed new statute.

(b) Allotments (Scotland) Acts 1892 to 1922[7]

5.10 The Allotments (Scotland) Act 1892 imposes a duty on local authorities to acquire land for allotments upon representation in writing by "any six registered parliamentary electors or ratepayers resident".[8]

5.11 Section 20 of the Land Settlement (Scotland) Act 1919[9] provides for a local authority to apply to the Agricultural Board for the compulsory acquisition of land for allotments. Section 18 of the Act provides that the duties and powers conferred on local authorities under the Act in relation to allotments will be "exercised and performed as if they had been conferred and imposed by the Act of 1892". Where the Agricultural Board acquires land

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[2] 1958 c. 69.
[3] 1855 c. 68.
[4] 1894 c. 58.
[5] 1929 c. 25.
[6] 1994 c. 39.
[7] 1892 c. 54, 1922 c. 52.
[8] S 2(1).
[9] 1919 c. 97.

compulsorily under the 1919 Act, or provides for compulsory acquisition by a local authority, then the 1845 Act may apply.[10] The functions of the Agricultural Board were transferred to the Secretary of State for Scotland by the Reorganisation of Offices (Scotland) Act 1939.[11] It would be sensible to bring the procedure for the compulsory acquisition of land for allotments into line with the procedure which will apply generally.

(c) Light Railways Acts 1896[12] and 1912[13]

5.12 The Light Railways Act 1896 and the Light Railways Act 1912 have been overtaken and replaced by a number of later statutes, and compulsory acquisition of land is no longer carried out under them.[14] Therefore we do not consider these Acts any further.

Potential exceptions to 1947 Act

(a) General

5.13 In addition, there are a number of other statutes which set out their own procedures for the compulsory acquisition of land, and it is not clear, as a matter of statutory interpretation, whether the general formulation in the 1980 Act has the effect of replacing the special procedures in those Acts, with the procedures set out in the 1947 Act.

(b) Acquisitions under Forestry Act 1967[15] ("1967 Act")

5.14 We take, as an example, the 1967 Act, which authorises the Scottish Ministers to acquire land compulsorily for Forestry Commission purposes. Various issues arise.

5.15 First, section 40 prohibits the compulsory acquisition of ancient monuments, parks, pleasure grounds, home farms or garden grounds of a house. It also prohibits the acquisition of land belonging to local authorities, statutory undertakers, universal service providers or the National Trust for Scotland (where the land is held by the Trust inalienably).[16] It seems to us that these exclusions represent a deliberate policy decision by Parliament in relation to the Forestry Commission, so we discuss that aspect of the legislation no further.

5.16 Second, the 1967 Act currently makes no mention of the procedures in the 1947 Act. It specifically incorporates most of the 1845 Act and, in Part I of Schedule 5 to the Act, sets out procedures for making a CPO which at least closely resemble those set out in Schedule 1 to the 1947 Act. One difference is that where the 1947 Act gives Ministers the choice between ordering an inquiry or a hearing where there are continuing objections, the 1967 Act gives only the option of an inquiry.

5.17 We consider that there may be little rationale for differences between how compulsory acquisition is conducted generally on the one hand, and under the 1967 Act on

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[10] 1919 Act, Sch 1, para 1.
[11] 1939 c. 20, s 1.
[12] 1896 c. 48.
[13] 1912 c. 19.
[14] We are currently considering recommending the repeal of the 1896 and the 1912 Act as part of our continuing examination of obsolete statutes.
[15] 1967 c. 10.
[16] See para 2.19 above.

the other. If our proposal for a new statute is accepted, there will have to be amendments to the 1967 Act, at least to replace the provisions referring to the 1845 Act. Our provisional view is that we should take the opportunity of bringing the procedure under the 1967 Act into line with that which will apply generally.

Provisions on compulsory acquisition in other legislation

5.18 There are many other Acts which incorporate the provisions of the 1947 Act, with or without modification. We sent a list of the relevant legislation (now attached as Appendix B to this Discussion Paper) to the Scottish and UK Governments, local authorities, statutory undertakers and others with an immediate interest in the technical aspects of this project. We asked them for any views on whether any particular processes mentioned in those Acts, which in some cases differ from the general procedures set out in the 1947 Act, need to continue to be different from those to be set out in the proposed new statute. We also asked whether there was any relevant legislation which we had omitted from the list. We received a number of useful responses. The vast majority supported our proposal, to apply the procedures in the proposed new statute to the enactments listed. We have responded directly to consultees who raised particular questions. We welcome any further views on applying the proposed new procedures to the legislation listed. We ask the questions:

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

10. Is there any relevant legislation missing from that list?

General procedure for making and confirming a CPO under 1947 Act

5.19 We now consider the procedures for making and confirming the compulsory acquisition of land in the 1947 Act. Schedule 1 to that Act sets out two procedures for making a CPO: one where the acquisition is by a local authority or statutory undertaker, and the other where the acquisition is by the Scottish Ministers or a UK Minister.

Preliminary matters

(a) Survey of land

5.20 Before making a CPO, an acquiring authority may well wish or require to go on to the land to ascertain whether it is fit for the purpose for which they are minded to acquire it. Section 83 of the 1845 Act empowers an authority to do that, upon giving not less than three nor more than 14 days' notice to the landowner. The section provides for the acquiring authority to compensate the landowner for any damage caused to the land by the survey process. We ask the question:

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

5.21 Under whichever Act authorises them to do so, the acquiring authority make, in a prescribed form,[17] a CPO which identifies the land to be acquired by reference to a map.[18] Where the compulsory acquisition is being made by Ministers, they prepare a draft CPO describing the land by reference to a map,[19] but otherwise not in a prescribed form.[20] Paragraph 7(4) of Schedule 1 to the 1947 Act applies the provisions of paragraphs 3 to 6 of the same Schedule, as they apply to cases where the Scottish Ministers are the confirming authority, with amendments as appropriate, to cases where the Scottish Ministers are the acquiring authority.

(b) Advertisement and notification of public, and of directly affected persons

5.22 Paragraph 3(a) of Schedule 1 to the 1947 Act requires the acquiring authority, in two successive weeks, to publish in one or more local newspapers, a notice, in a prescribed form,[21] informing the readers that the CPO has been made and is about to be submitted for confirmation.[22] The notice must also describe the land, and set out the purpose for which it is required. Further, the notice must name a local place where the CPO and map may be inspected and specify a time, being not less than 21 days from first publication of the notice, within which, and the manner in which, objections to the CPO may be made.[23]

(c) Notification of statutory objectors[24]

5.23 Paragraph 3(b) of Schedule 1 to the 1947 Act[25] requires the acquiring authority to serve a notice on every owner, lessee and occupier (except tenants for a month or for any period less than a month), on the holder of any personal real burden affecting the land,[26] on the owner of any land which is a benefited property,[27] and on any owners' association of the development in question.[28] The notice must set out the effect of the CPO. These persons who are directly affected by the proposed CPO are known as "statutory objectors".[29] We understand from our Advisory Group that some acquiring authorities, when notifying a CPO to statutory objectors, prefer to serve notices by personal delivery, because it is a very reliable method of delivery and because it is easier to prove delivery of the notices.[30] This does however involve additional costs for the acquiring authority.

5.24 The list of statutory objectors was revised by the 2003 Act, to reflect the changes being made by that legislation.[31] No further alterations seem necessary as it appears that

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[17] Form 1, reg 3(a) of SSI 2003/446 and Forms 1 and 10, regs 3(b)(ii) and 5(b)(ii) of SI 1994/3097.
[18] 1947 Act, Sch 1, para 1 and 2.
[19] 1947 Act, Sch 1, para 7(1) and 7(2).
[20] 1947 Act, Sch 1, para 7(3).
[21] Forms 2 and 3, reg 3(b) and (c) and 4 of SSI 2003/446 and Forms 3, 4, 11, 12, reg 3(b)(iii) and (iv) and 5(b)(iii) and (iv) of SI 1994/3097.
[22] 1947 Act, Sch 1, para 3(1) and 3B.
[23] 1947 Act, Sch 1, para 3(b) and 3A.
[24] See also para 1.23.
[25] As amended by s 109(2) of the 2003 Act.
[26] If registration of the conveyance in implement of the CPO would vary or extinguish the personal real burden in question.
[27] Defined by s.122(1) of the 2003 Act in relation to any land comprised in the CPO if such registration would vary or extinguish the title condition in question.
[28] If a development management scheme applies as respects any land comprised in the CPO and registration of the conveyance in implementation of the CPO would dis-apply that scheme.
[29] Compulsory Purchase by Public Authorities (Inquiries Procedure)(Scotland) Rules 1998 (1998/2313), rule 3(1).
[30] Para 19 of Sch 1 to the 1947 Act makes provision for service of notices where the identity of the "directly affected" person cannot be ascertained. See also para 5 of Sch 2.
[31] 2003 Act, s 109(2).

the present provisions adequately cater for those "directly affected" by the CPO. Nevertheless, we ask the question:

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why?

Objections to CPO

(a) Referral to DPEA

5.25 The procedure for submitting a CPO to Scottish Ministers for confirmation is set out in Schedule 1 to the 1947 Act and the CPO Circular.[32] If there are no objections, or any objections have been withdrawn, Ministers can, if satisfied that all necessary notices have been served, and if they think fit, confirm the CPO, with or without modifications.[33] However, if a statutory objector makes, and does not withdraw, an objection to the CPO, then the confirming authority must cause an inquiry or hearing to be held. The only restriction on the grounds upon which an objection may be insisted upon is that it may not relate to a matter within the jurisdiction of the LTS. This leaves open a wide range of issues. It also makes it possible for a single objector effectively to delay the progress of a development. That may be entirely appropriate, having regard to the importance of the issues for the individual landowner. On the other hand, it could be argued that a single objector, perhaps owning only a small part of the land covered by the CPO, should not be able to delay the project. It would be possible to introduce a requirement that only a given percentage of the affected landowners, or only a landowner of a given percentage of the land being acquired, should be able to insist upon an inquiry or hearing being held. We ask the question:

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

5.26 When Scottish Ministers refer the case to the DPEA, the DPEA appoint a reporter to hold the inquiry or a hearing. After considering the resulting report from the reporter, Ministers may then confirm the order, with or without modifications.[34] In practice, on initial receipt of objections from statutory objectors, Ministers will forward these to the acquiring authority, which will try to negotiate an agreement with the statutory objectors and persuade them to withdraw their objections. In some cases, this extended negotiation period prolongs considerably the process of dealing with statutory objectors. Although it is in the interests of all parties that objections be settled by agreement, it is also desirable that the confirmation process is not unduly protracted. The acquiring authority will already have had previous opportunities to negotiate with potential objectors, not only before the CPO is submitted for confirmation, but also before the CPO is made. With a view to reducing delay, we therefore ask the question:

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

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[32] Paras 58 to 69.
[33] Para 4(1) of Sch 1.
[34] Para 4(2) of Sch 1.

5.27 Before fixing an inquiry or hearing, the DPEA will allow the acquiring authority a further opportunity to attempt to resolve objections through negotiations with the objector(s). If that fails, the DPEA proceed to appoint a reporter, who may hold either a public local inquiry or hearing.[35] We understand that it is sometimes possible, if all parties agree, for the "hearing" to comprise written representations without oral proceedings.

(b) Comparison with DPEA's role in planning cases

5.28 In our discussions with DPEA, they drew our attention to their role in determining appeals in planning cases, under section 267(1) of the 1997 Act.[36] All parties have the opportunity to make representations about the procedures to be adopted, which are considered carefully by the reporter. However, ultimately it is for the reporter to decide whether or not a hearing/inquiry is necessary in an individual case. Frequently the reporter deals with cases solely on the basis of written submissions and/or a site visit. The number of public inquiries and hearings is small and where one is held, it will often be on discrete issues rather than the case as a whole.

5.29 Because the reporter has a great degree of control over the process, the timescale in planning appeal cases has been significantly reduced. It seems sensible to assume that, if the reporter had similar control over the process of dealing with objections in compulsory purchase cases, the timescales involved could similarly be reduced.

5.30 However, a critical difference between the compulsory purchase system and the planning system is the importance of the process to the landowner concerned. It may legitimately be assumed that someone whose continued occupation of his or her home is at risk has a greater interest in the outcome of a process than someone who is promoting an application to alter the use of his or her property. Compulsory purchase requires a much more rigorous balancing of the public against the private interests than will be the case with the vast majority of planning applications or appeals. It may well be, as a matter of principle, that the former process necessarily requires that the persons affected be accorded a right to be heard. Nevertheless, we ask the question:

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

(c) Fixing of time limits in primary legislation

5.31 The time limits within which the various stages of the CPO process have to be carried out, are contained in subordinate legislation, and those time limits allow for extensions to be permitted in cases where adherence to them is impracticable. The

[35] A hearing session takes the form of structured discussion led by a reporter. Inquiry sessions are normally more formal events where witnesses give their evidence to the reporter and can be cross examined by other parties. Generally, an inquiry may be most appropriate if there are likely to be handling difficulties because of the complexities of a case, the objections raise complicated matters of policy or complicated legal issues, or it is likely that either party will need cross-examination to test the opposing case. In other cases a hearing may be more appropriate.

[36] Pt 3 of the Town and Country Planning (Appeals) (Scotland) Regulations 2013 (SSI 2013/156) sets out the procedures for planning appeals.

guidance issued by Scottish Ministers[37] encourages the various participants in the process to seek to do better, which we understand is happening.

5.32 It seems to us that putting such time limits into primary legislation would remove the flexibility which enables Ministers to adjust the timescales when, for whatever reason, it seems appropriate to them to do so. In addition, where a particular case is especially complex, a set time limit may not be conducive to its proper consideration. Ultimately, as we noted in Chapter 1, the allocation of legislative provision between primary legislation and subordinate legislation is a matter for Parliament. We accordingly propose that:

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.

Confirmation of CPO

5.33 Following the inquiry or hearing, it is the responsibility of the DPEA reporter to make a report to Scottish Ministers on the CPO and recommend whether or not it should be confirmed. Ministers then decide whether or not to confirm the order, with or without modifications.[38] The confirmation must be advertised and intimated in the same way as the making of the CPO (see paragraph 5.22 above). The modification cannot authorise the purchase of land which the unmodified order would not have authorised, unless all interested persons consent.[39] In practice, the time between the inquiry or hearing, and the submission of the DPEA report to Ministers, varies greatly according to the nature and complexity of the case.

(a) Requirement for Ministerial confirmation

5.34 Compulsory acquisitions by a local authorities or statutory undertakers on the one hand, and by the Scottish Ministers or a UK Minister on the other, involve two stages: first the making and the second confirming of the CPO.[40] Where the acquiring authority is a local authority or statutory undertaker, the CPO must be confirmed by Ministers. Where the acquiring authority is a Minister, the CPO is made in draft, then made formally after any objections have been dealt with.

5.35 There is a general question as to whether confirmation is, or should be, necessary and, more particularly, what advantages or disadvantages there are in such a requirement. It seems to us that there are two justifications for the requirement, one substantive and one technical.

5.36 First, any CPO is of immense importance, certainly to those whose property is being expropriated. It is, accordingly, frequently the case that there is considerable opposition to a CPO. The decision to confirm such an order is the last formal opportunity to consider whether it is appropriate for the development to proceed, and the Order to be made. That consideration involves the balancing of the public interest in the development concerned

[37] CPO Circular.
[38] 1947 Act, Sch 1, para 4(1) and 4(2).
[39] 1947 Act, Sch 1, para 5.
[40] 1947 Act, s 1 requires special parliamentary procedures to be followed where the land to be acquired is the property of a local authority, has been acquired by statutory undertakers for the purposes of their undertaking, forms part of a common or open space or is held inalienably by the National Trust for Scotland. That matter is fully discussed in Ch 2.

against the private interest and human rights of the landowners whose property is being compulsorily acquired. Such a decision is essentially a political one. The role of the confirming authority, which has discretion to make modifications to the CPO before confirming it, may be critical. In a small jurisdiction such as Scotland, it is not practicable for Ministers to distance themselves from the implications of decisions of this sort. It may accordingly be appropriate for a decision by a local authority or a statutory undertaker to be reviewed and confirmed by Ministers.

5.37 Second, there is the question of ensuring that the CPO is technically accurate. That is important, not only because of the general importance of such Orders, but because, as we set out in Chapter 6, the grounds for challenge are limited, and any challenge must be raised within a limited timescale. We understand that, even where there are no objections to a CPO, Ministers have it checked for technical accuracy before confirming it. Finally, on this point, if all local authority and statutory undertaker CPOs are seen by a single, central authority, it is possible to identify divergences of views as to the effect of the governing statutory provisions. In practice, moreover, we understand that there are not very many CPOs requiring to be confirmed. Between 2009 and 2012, local authorities submitted only 50 CPOs to the Scottish Ministers for confirmation.[41]

(b) Alternatives to requirement for Ministerial confirmation

5.38 We are aware that Ministerial confirmation is not the only possible method to ensure the technical accuracy of a CPO and allow for a balancing of the public and private interest. In some European jurisdictions, confirmation of CPOs is carried out by an independent body. For instance, in Denmark,[42] the Expropriation Board is responsible for authorising all expropriations of land. The Board consists of five members: a chairperson who is a government official and lawyer, two members appointed by the Ministry of Transport and two members selected from a municipal list. The Expropriation Board is independent; it is not answerable to the state administration. The task of the Board is to either approve or reject the given project and expropriation following an inquiry, and to calculate the compensation payable. The Board can decide alterations against the wishes of the acquiring authority. The Board's approval is essential and its decision is final.[43]

5.39 In Germany, expropriation is carried out by Expropriation Authorities. In most of the German states (Lander) Expropriation Authorities are set up at the regional level of administration. The Expropriation Authority is independent and does not have an interest in the public purpose that is to be achieved by the taking of the land.

5.40 In England and Wales, the provisions of section 14A of the Acquisition of Land Act 1981[44] permit acquiring authorities to confirm their own CPOs in certain circumstances. Briefly, those circumstances are that the confirming authority is satisfied that the notification requirements have been complied with, that no objection has been made to the CPO, or that

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[41] See the Answer to the Scottish Parliamentary Question - S4W-17481: Rhoda Grant, Highlands and Islands, Scottish Labour, Date Lodged: 27/09/2013 - http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S4W-17481&ResultsPerPage=10.

[42] Expropriation Process Act (Consolidated Act no. 1162) (29 November 2008).

[43] S Baumgarten and K Petersen, *How to Help Landowners by Preliminary Expropriation*, FIG Working Week 2009, p 5.

[44] 1981 c. 67. As inserted by s 102(2) of the Planning and Compulsory Purchase Act 2004 c. 5.

any objection has been withdrawn, and that the CPO can be confirmed without modification. It appears to us that the process for authorising the acquiring authority to confirm their own CPOs, requires just as much involvement of the confirming authority as occurs when the confirming authority are themselves doing the confirmation.[45]

5.41 We ask the question:

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

Advertisement and notification of CPOs – made and confirmed

5.42 The 1947 Act provides for advertising and notification by newspaper, sending notices and affixing notices to lamp posts, etc.[46] These methods of sending notices are similar to the methods provided in section 21 of the 2003 Act for notifying people of a termination of a real burden under that Act. However, section 21 requires that posting, delivering or sending the notice electronically should be used in preference to other forms of notification, and that advertisement is to be used only where it is not possible to affix a notice to a nearby lamp post. There is currently no requirement in the 1947 Act to publish a notice on Ministers', or the acquiring authority's, websites. Publication on the internet could make it easier for many more members of the public to access the details of the order than providing a copy of the order in a public place in the locality during business hours.[47] We ask the questions:

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

Revocation of a confirmed CPO

5.43 There is currently no statutory procedure by which an acquiring authority can revoke an existing CPO. While this situation may be relatively uncommon, there has been at least one case where the point was material.[48]

5.44 It may be that, for reasons of practicality or affordability, an acquiring authority decide that they can no longer proceed with a development in respect of which a CPO has been made and confirmed.[49] In such a case any properties affected may remain blighted if the CPO is not revoked. Therefore, in our view, provision should be made to allow for revocation. The effect of revocation would be that, if the authority subsequently decided to resume the development, it would have to begin the whole process again.

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[45] In point of fact, we understand that, in the first year or so of the operation of the new system, only about 50% of CPOs were referred back to the acquiring authority for confirmation by them.
[46] 1947 Act, Sch 1, e.g. paras 3–3B and paras 6–6A.
[47] The National Audit Office's Internet Access Quarterly update, Q2 2013, states that 43.6 million adults (86%) in the UK have used the Internet.
[48] *Fox v Scottish Ministers* 2012 SLT 1198.
[49] In such circumstances, the landowner should be entitled to compensation for any loss they have incurred due to the effect of the CPO.

5.45 It is possible that, even where a CPO has been revoked, a property may remain blighted. Potential buyers may fear that, when the reasons for the revocation – as, for example, adverse economic conditions – no longer apply, the acquiring authority may revert to their proposal.

5.46 It is difficult to see how that possibility could be excluded. One option might be to provide that where an authority have revoked a CPO, they should not be permitted to proceed with the same development within a specified time limit, or without the specific consent of Scottish Ministers. We propose that:

19. An acquiring authority should be able to revoke a CPO.

In addition, we ask the question:

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

5.47 It has been suggested by members of our Advisory Group that if a CPO is revoked, affected parties should be entitled to recover reasonable out-of-pocket expenses, such as professional fees properly incurred when considering the effect of the CPO. We propose that:

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.

Register of CPOs

5.48 At present there is no central register of CPOs. It can be difficult for persons contemplating the purchase of property to know conclusively whether the land in question is subject to such an Order. Therefore it might be useful if all CPOs required to be registered, provided this would not involve excessive cost or difficulty. Acquiring authorities might be required to report confirmed CPOs to the Keeper of the Registers of Scotland, for registration. It would be possible either to set up a new Register of CPOs, or to provide for registration of CPOs in the Land Register.[50]

5.49 If it is accepted that it should be possible for an acquiring authority to revoke a CPO, it should also be the case that, on revocation, a certificate of revocation should be sent to the Keeper, to make the appropriate adjustment to the Register.

5.50 Finally, where not all of the land which was originally affected by a CPO is required for the development, the acquiring authority should notify the Keeper accordingly of the area of land no longer required. We propose that:

22. Acquiring authorities should be required to register CPOs and revocations of CPOs.

[50] Or in the Register of Sasines if the land is still registered there.

In addition, we ask the question:

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register?

Validity of a confirmed CPO

Six-year combined period

5.51 Finally, we consider the current three year period within which a CPO remains valid.[51] An acquiring authority has three years from the confirmation of a CPO to implement the CPO by issuing either a notice to treat or GVD. As we will see in Chapter 7, there is also a three year period during which an acquiring authority may implement a notice to treat. In theory, therefore, the entire process, from the confirmation of the CPO to the eventual taking of possession by the acquiring authority, could take up to six years.

5.52 From the point of view of claimants, six years "seems excessive".[52] This long period of uncertainty can be unsettling for residential property owners and damaging for businesses that will be unable to plan ahead properly and may face a decline in custom. On the other hand, we have received views from some acquiring authorities which suggest that, particularly in the case of large and complex infrastructure projects, it would not be feasible to reduce the current three year time limit. An acquiring authority may need this time in order to adequately plan for the implementation of the scheme.

Introduction of flexibility in timescale

5.53 In England and Wales, the Planning Act 2008[53] makes provision in relation to "nationally significant" infrastructure projects. The development consent for such projects may include the authorisation of the compulsory acquisition of land. Section 154(3) of the Act provides:

> "Where an order granting development consent authorises the compulsory acquisition of land, steps of a prescribed description must be taken in relation to the compulsory acquisition before the end of—
>
> (a) the prescribed period, or
>
> (b) such other period (whether longer or shorter than that prescribed) as is specified in the order."

5.54 The "prescribed period" is to be set out in regulations made by the Secretary of State.[54] This Act, recognising the particular circumstances surrounding large infrastructure project, adopts a more flexible approach to the period of validity of authorised compulsory purchase.

5.55 A pragmatic approach may be to reduce the current three-year limit and allow for an extension by agreement where circumstances so require. The Law Commission found

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[51] See 1845 Act, s 116 and 1947 Act, Sch 2, para 1(a).
[52] DETR Review, para 55.
[53] 2008 c. 29.
[54] Under s 235.

reasonable support for reducing the limit to 18 months with such a proviso attached. Dissent to this proposal came from acquiring authorities, who raised concerns regarding complex issues on large projects such as funding and site assembly. The Law Commission ultimately recommended that the powers should only be exercisable for a prescribed period (being less than the current period of three years) from the date on which the order becomes operative.[55]

"Likelihood of implementation" test

5.56 Many landowners may feel particularly aggrieved where a CPO has been confirmed in relation to their property but where there is no clear indication that the acquiring authority's scheme will proceed, due to funding or other issues. In England and Wales, it has been established that there is no requirement that the confirming authority be satisfied that the development will probably be carried out.[56] There is no indication that the law in Scotland is different. However, Scottish Government guidance provides:

> "The authority should be satisfied that it has a reasonable prospect of securing enough funding to acquire the land within the statutory three year period and completing the scheme over a reasonable timescale. It should be satisfied that it has properly estimated the likely levels of compensation that it will need to pay. It should also be satisfied that it could make enough money available immediately to cope with any acquisition resulting from a blight notice.
>
> However, in some cases the authority may be able to justify acquiring the land where the long term funding is not guaranteed. Scottish Ministers recognise that funding streams for projects can be unpredictable and their sources can change over time. The authority may not intend the scheme to be independently financially viable, or it may be unable to finalise details until it has assembled the land. In such cases it should be satisfied that there is a reasonable prospect that it can meet any potential shortfalls. This may include considering the degree to which other bodies (including other public bodies, the private and/or third sector) have agreed to contribute or underwrite the scheme and on what basis other bodies will contribute or underwrite. In some cases a strict time limit on the availability of funding may justify proceeding with the order before the authority finalises details of the scheme".[57]

5.57 We are confident that acquiring authorities will follow this guidance as far as possible and, where the guidance is adhered to, any uncertainty as a result of the three year limit may be significantly reduced. However, as the guidance recognises, there may still be significant uncertainty in some cases.

5.58 In some European jurisdictions the feasibility of a project must be firmly established before the expropriation is confirmed. In Germany, for instance, the legitimacy of expropriation is linked with certain preconditions which must be satisfied in each individual case in order for the expropriation to be approved by the Expropriation Authority. These preconditions are set out in the Expropriation Acts of each of the Lander in addition to section 87 of the Rules of the Federal Building Code which provides that "the applicant must provide evidence that the land will be used for the designated purpose within a suitable

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[55] See Law Com No 291 at paras 4.21–4.24 and Recommendation 11(1).
[56] *Chesterfield Properties Plc v Secretary of State for the Environment* (1998) 76 P & CR 117; *Gala Leisure Ltd v Secretary of State for the Environment, Transport and Regions* (2001) 82 P & CR.
[57] CPO Circular, para 32 and 33.

term."[58] The potential need for a long time period between the confirmation of a CPO and its implementation is therefore reduced.

5.59 We ask the questions:

24. Is the current three year validity period of a confirmed CPO reasonable?

25. Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?

Public rights of way

5.60 Finally, we consider public rights of way. Section 3 of the 1947 Act provides that, subject to certain exceptions, where there is a public right of way over land which is the subject of a CPO, and it is proposed either that it be replaced, or that no replacement is necessary, the Scottish Ministers may extinguish the public right of way. The Scottish Ministers must publish a notice of their intention to extinguish a public right of way, and if there is an objection which is not withdrawn, they must cause an inquiry to be held.

5.61 Some members of our Advisory Group (and in particular Professor Paisley) have suggested that, because public rights of way are an emotive subject, there are often several objections to a CPO which proposes extinguishment of a right of way. Accordingly, public inquiries can be lengthy and complicated. Suggestions for improving the process include removing the requirement for a public inquiry, combining such an inquiry with any inquiry into the CPO itself or, alternatively, amending section 106 of the 2003 Act so as to apply it to public rights of way.[59]

5.62 The Law Commission following their review, found that the powers in England and Wales relating to the extinguishment of public rights of way[60] are little known and little used. However, despite this, they ultimately recommended that the procedure should be retained without amendment.[61]

5.63 For our part, we share the public's concern that rights of way should not be lost. At the same time we see the potential difficulties if the procedure in section 3 of the 1947 Act is used as a pretext for an inquiry by those who have wider objections to the proposed CPO. In the context of an otherwise desirable development, it does not seem to us to be crucial that an existing public right of way should be retained on its existing route. It is potentially much more important that the places linked by the right of way should continue to be so linked, albeit by a different route.

5.64 There are various options. One might be to provide for an inquiry into the loss of a public right of way only where no alternative was provided by the acquiring authority. Alternatively, or in addition, the acquiring authority might be required to say, in their proposals for the making of a CPO, whether they intended to replace any public right of way

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[58] Although see s 15 of the 1845 Act which suggests that where the promoter of the undertaking relies on capital to carry out the scheme this must be "subscribed under contract" before compulsory purchase powers are utilised. See Chapter 20.
[59] S 106 of the 2003 Act provides for the extinction of real burdens, servitudes etc. when land is acquired by compulsory purchase.
[60] Acquisition of Land Act 1981, s 32.
[61] Law Com 291, para 8.84.

across the land to be acquired. Where no replacement was intended to be provided, then any objection to that could be considered at any inquiry into the CPO generally. This would prevent the potential loss of time which was drawn to our attention. We accordingly ask the questions:

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

Summary

5.65 In this Chapter we have described the various stages leading to the making or confirmation of a CPO and the validity of a CPO, and have asked questions as to particular issues arising during the former process and the latter policy. It is entirely possible that some aspect, which we have not mentioned specifically, is nevertheless of concern to consultees. We accordingly ask the question:

28. Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?

Chapter 6 Challenging a (confirmed) CPO

Introduction

6.1 In this Chapter we consider how a CPO can be challenged in the courts. As we have noted in previous Chapters, the whole system of compulsory purchase rests upon the proposition that there will be circumstances in which the right of a property owner to the undisturbed possession of that property must give way to the broader interests of the community as a whole. That is inherent in the statutory provisions authorising the use of compulsory purchase powers. The system in operation in Scotland, like that obtaining in other parts of the United Kingdom, recognises that decisions as to the balance between public and private interests on public authorities are, in essence, political; and accordingly confers responsibility for making them on bodies which are ultimately accountable on political, rather than legal, grounds. It is consistent with that underlying philosophy that the grounds for challenging such decisions in the courts are restricted.

6.2 Broadly, a challenge can be mounted, first, on the ground that any particular exercise of the powers is *ultra vires* the relevant legislation and, second, on the ground that the person aggrieved has suffered prejudice by reason of some failure to follow the prescribed procedures. In this Chapter we consider in some detail the statutory grounds upon which challenges can be made, and how those grounds have been interpreted by the courts. We also consider whether the grounds for challenge, and the remedies which the courts may grant, are adequate.

Statutory provisions

6.3 Paragraphs 15 and 16 of Schedule 1 to the 1947 Act provide for challenges to CPOs, as follows:

> "15(1). If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, **on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in subsection (1) of section one of this Act**, or if any person aggrieved by a compulsory purchase order or a certificate under Part III of this Schedule desires to question the validity thereof **on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate,** he may, **within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published** in accordance with the provisions of this Schedule in that behalf, make an application to the Court of Session, and on any such application the Court—
>
> > (a) may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings;
> >
> > (b) **if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any**

> **requirement of this Schedule or of any regulation made thereunder not having been complied with**, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant.[1]
>
> 16. Subject to the provisions of the last foregoing paragraph a compulsory purchase order or a certificate under Part III of this Schedule **shall not**, either before or after it has been confirmed, made or given, **be questioned in any legal proceedings whatsoever**, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."[2] (emphasis added)

6.4 Provisions such as these, with narrow grounds on which to challenge and short time periods in which to do so, appear in a large number of statutes dealing with planning processes, road works, or other administrative legislation concerning public works[3] or the acquisition of private property for public purposes. They are designed to impose strict limits on the potential for challenges to the process, and to exclude such challenges after the expiry of the six week period. They, therefore, form part of a broader range of what may be characterised as deliberate decisions by Parliament to limit the extent to which the exercise of particular statutory powers may be subjected to scrutiny by the courts.

6.5 We consider four questions in relation to paragraphs 15 and 16 of Schedule 1 to the 1947 Act. The first is whether the time limit is too short. The second is whether the grounds of challenge – that the authorisation is *ultra vires* the powers of the acquiring authority, or that an applicant has been prejudiced by non-compliance with the statutory requirements – are sufficiently wide. The third is whether the range of remedies open to the court is adequate. The final question is whether, when a challenge to a CPO is raised, the "clock should be stopped" in terms of the validity lifespan of the CPO.

Time limit for challenging a CPO

Length of time limit

6.6 A general examination of limitation periods, even in the context of statutory codes, lies well outwith the scope of this project, and we confine ourselves to discussing the particular features of the provisions relating to compulsory acquisition. The limitation period in relation to compulsory purchase reflects a public policy decision to enable development which is *ex hypothesi* in the wider public interest, and in respect of which the statutory procedures have taken place, to proceed without the risk of legal challenge, beyond the narrow window provided in paragraph 15. Further, the grounds of challenge allowed by that paragraph are not intended to allow a general review of the policy considerations which informed the making of the CPO.

6.7 Instead, the first issue which may be raised is whether the CPO is *intra vires* the statute authorising the use of compulsory purchase powers. For example, if the authorising statute was an education measure permitting the compulsory purchase of land for the purpose of building a school, it would not be competent for an acquiring authority to seek to

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[1] S 60 of the 1973 Act has the effect of adding to the requirements mentioned in paragraph 15 any requirements as to the conduct of tribunals made by or under the legislation relating to tribunals and inquiries.
[2] Para 17 of the Schedule adjusts the provisions of paragraphs 15 and 16 where the CPO has required the use of special parliamentary procedures, now, for the most part, dealt with by Pt 4 of the 2010 Act.
[3] See, for example, 1997 Act, s 238(4) (validity of development plans).

use that power for the purpose of building a sewerage works. The second issue is whether there has been some deficiency in the operation of the procedure set out in the Schedule, which has caused prejudice to the aggrieved person.

6.8 In either case, the alleged defect should be clear to the person making the claim. That being the case, it appears to us that while the limitation period is short, it is not unreasonably so. Further, since it is consistent with the periods in other, analogous, codes, consideration of which lies beyond the scope of this project, we do not seek views as to whether it should be changed.

Challenges outwith time limit

6.9 In terms of their practical application, the question which arises in relation to paragraphs 15 and 16 is, whether the restrictions which they seek to place on the remedies open to those "aggrieved" by CPOs will be recognised by the courts. Here we discuss several cases and treatment in an academic journal.

(*a*) Smith v East Elloe Rural District Council and Others[4]

6.10 The first is the leading decision, which has informed the post-war consideration of the matter, *Smith v East Elloe Rural District Council and Others.* In that case Mrs Smith, whose house and land had been compulsorily acquired under the 1946 Act (the English equivalent of the 1947 Act), sought, amongst other things, a declaration that the CPO had been wrongfully made in bad faith, and had been wrongfully confirmed. She also sought damages against the clerk of the council.

6.11 Her action – which was, apparently, her third attempt at a legal challenge to the CPO – was raised well outwith the six-week period for challenge provided for in the legislation. The Appellate Committee of the House of Lords were unanimously of the view that her action against the clerk should be allowed to proceed.

6.12 The argument in the House of Lords focussed on whether Mrs Smith's allegations of bad faith justified allowing her challenge to the validity of the CPO to proceed. Their Lordships' opinions analysed the provisions of paragraphs 15 and 16 of Schedule 1 to the 1946 Act (which were largely identical to those quoted above) in detail. In the event, the House decided the case against Mrs Smith by a majority. Viscount Simonds, with whom Lord Morton of Henryton and Lord Radcliffe agreed, saw the matter as one of the construction of statute. He put it in this way, in a passage which encapsulates the conflicting tensions inherent in a provision such as paragraph 16:

> "In this House a more serious argument was developed. It was that, as the compulsory purchase order was challenged on the ground that it had been made and confirmed 'wrongfully' and 'in bad faith,' paragraph 16 had no application. It was said that that paragraph, however general its language, must be construed so as not to oust the jurisdiction of the court where the good faith of the local authority or the Ministry was impugned and put in issue. Counsel for the appellant made his submission very clear. It was that where the words 'compulsory purchase order' occur in these paragraphs they are to be read as if the words 'made in good faith' were added to them.

[4] [1956] AC 736.

> My Lords, … it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested. … What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. … But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, my Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words? What else can 'compulsory purchase order' mean but an act apparently valid in the law, formally authorized, made, and confirmed?"[5]

6.13 Lord Radcliffe, who took the view that paragraph 15 of the Schedule would permit an attack on a CPO which was alleged to have been made in bad faith if the challenge were made within the six-week period, observed:

> "I do not see how it is possible to treat the provisions of paragraphs 15 and 16 of Part IV of Schedule I of the Act as enacting anything less than a complete statutory code for regulating the extent to which, and the conditions under which, courts of law might be resorted to for the purpose of questioning, the validity of a compulsory purchase order within the protection of the Act. … Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not, in my opinion, a principle of construction for this purpose."[6]

6.14 Lord Morton of Henryton also founded on the words of the statute, and addressed the "inconceivable" argument directly. Further, he set out the policy justification which he inferred lay behind the provisions. He said:

> "It does not seem to me inconceivable, though it does seem surprising, that the legislature should have intended to make it impossible for anyone to question in any court the validity of a compulsory purchase order on the ground that it was made in bad faith. It may have been thought that the procedure which has to be followed before such an order is made and confirmed affords sufficient opportunity for allegations of bad faith to be ventilated, and it may have been thought essential, if building schemes were to be carried out, that persons alleging bad faith in the making of an order, after the order has been made, should be limited to claims sounding in damages against the persons who, in bad faith, caused or procured the order to be made. The present action started nearly six years after the order now in question was made and confirmed, and illustrates the difficulty which might arise if no such limit were imposed, since houses have already been erected on the land which was the subject of the order."[7]

6.15 Lord Reid and Lord Somervell of Harrow, who dissented on the major question – as to whether the jurisdiction of the courts was completely excluded after six weeks – did so on the basis that if Parliament had intended to exclude challenges where bad faith was alleged, something more would have been said in the Schedule to make that clear. On the Schedule as drafted, Lord Reid took the view that Mrs Smith's action would have been excluded, had she raised it within six weeks of the making of the Order, because of the terms of paragraph 15 of the Schedule. He found, however, that the broad words of paragraph 16 did not

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[5] At pp 750-751.
[6] At pp 768-769.
[7] At p 756.

exclude a challenge based on an allegation of bad faith. Both judges accepted the implications of their view, which involved acceptance of the possibility that a decision to compulsorily purchase a house, which might have been demolished by the time the matter came before the courts, might be declared to have been null.

6.16 On the major issue, the legality of the six-week limitation period set out in relation to compulsory purchase legislation, the House of Lords decided, by a majority, that the limit operated even in a case where the issue of bad faith was raised. As to whether a challenge to a CPO on the grounds that it had been made in bad faith would be competent, if raised within six weeks, the House decided, by a (different) majority, that such a challenge would not be competent. (Nevertheless, the minority view, that such a challenge would be competent, was apparently subsequently endorsed by the Court of Appeal – see paragraphs 6.36 to 6.37 below.) Finally, the judges were unanimous in finding that an action of damages against officials alleged to have been acting in bad faith would be competent. We return to that point in the discussion, below, as to remedies.

(*b*) Anisminic Ltd v Foreign Compensation Commission and Another[8]

6.17 The second decision of *Anisminic Ltd v Foreign Compensation Commission and Another,* was one in which in *Smith* was discussed. In *Anisminic,* a commission, set up by an Order in Council to administer a compensation fund for the benefit of persons whose property had been expropriated by the United Arab Republic, had decided that the applicants were not entitled to compensation. The Foreign Compensation Act 1950,[9] under which the Order was made, provided:

> 4(4) The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.

6.18 The House of Lords, by a majority, found that the Act, in referring to a "determination" must have meant a determination which was not a nullity. The House went on to find that the Commission had erred in law, and that the error went to their jurisdiction, with the result that the purported determination was in fact a nullity. In spite of the broad comparability of the provisions of paragraph 16, on the one hand, and section 4(4) of the 1950 Act, on the other, the court were able to distinguish *Smith v East Elloe Rural District Council* from *Anisminic*. Nevertheless, subsequent courts considering compulsory purchase cases were obliged to consider whether *Anisminic* had in fact altered the position established by *Smith.*

(c) Hamilton v Secretary of State for Scotland[10]

6.19 In *Hamilton v Secretary of State for Scotland,* a county council had made, and the Secretary of State had confirmed, a CPO. More than six weeks after the confirmation, an objector raised an action for reduction of the order on the ground that it was illegal and *ultra vires,* and had been confirmed upon the basis of proceedings which were contrary to the requirements of natural justice. Lord Kissen, after considering the authorities, and, in particular, the decision in *Smith,* held that paragraph 15 of Schedule 1 to the 1947 Act provided the only valid method of challenging a confirmed CPO and, accordingly, that

[8] [1969] 2 AC 147.
[9] 1950 c. 12.
[10] 1972 SC 72.

paragraph 16 of the Schedule rendered any challenge presented outwith the six week period incompetent. His Lordship observed:

> "My view is that the opinions in *Smith* regarding the meaning and effect of the identical statutory provisions considered in that case apply in the present case. … Apart from that, I think that the meaning and effect of the wide words of paragraph 16 are clear and that the Court of Session can competently intervene only under paragraph 15."[11]

6.20 The first part of Lord Kissen's *ratio* may be seen as an acknowledgement of the ordinary rule that, where the House of Lords was interpreting English provisions identical to Scottish provisions, that interpretation effectively bound the courts in Scotland.

(d) R v Secretary of State for the Environment, ex parte Ostler[12]

6.21 We consider next the case of *R v Secretary of State for the Environment,* ex parte *Ostler.* There was a plan to construct a relief road through the town of Boston. The execution of the plan was to be in two stages, the first to construct the relief road itself, and the second to construct the necessary side roads to provide access to and from the new road. When the first stage was announced, a firm of wine merchants objected on the grounds that it would cut off access to their yards. It was later alleged that an officer of the Department of the Environment had given them a secret assurance that the second stage of the implementation would include the widening of an existing lane, Craythorne Lane, which would allow lorry access to their premises. Accordingly, they withdrew their objection.

6.22 The applicant, Mr Ostler, conducted business as a corn merchant in Craythorne Lane. He did not object to the first stage, because it did not impact upon his business. He was not aware of the alleged secret assurance. When the second stage was announced, he considered that the widening of the lane would adversely affect his business, and lodged objections. At the inquiry into the second stage, he sought to show that he would have objected to the first stage had he been aware of the effect which the whole scheme would have on his business. His attempt was rejected by the Reporter, on the ground that it related to a previous, settled, Order. Thereafter Mr Ostler discovered that there had (allegedly) been a secret agreement, and accordingly raised a separate action to quash the original orders on the grounds that there had been a breach of natural justice and a breach of good faith. The action was, naturally, well outside the time limit specified in the legislation.

6.23 In the leading judgment Lord Denning distinguished *Anisminic* on public policy grounds and held that the Court of Appeal was bound by *Smith.* He also considered the question as to whether a CPO which had been obtained or made in bad faith, was voidable or void. (In *Anisminic,* it was the fact that the House of Lords had been able to find that the Commission's determination was a nullity which entitled the House to intervene in the matter.) Lord Denning found, as had Lord Radcliffe in *Smith*, that an order obtained in bad faith was voidable, and not void. He quoted the following passage from Lord Radcliffe:

> "At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such

[11] At p 82.
[12] [1977] QB 122; [1976] 3 WLR 288.

> orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders and that brings us back to the question that determines this case: Has Parliament allowed the necessary proceedings to be taken?"[13]

6.24 Lord Denning, like Lord Radcliffe, was of the view that, on the authority of *Smith,* the answer was "no". His Lordship went on to set out the rationale for the draconian nature of the provision in paragraph 16:

> "Looking at it broadly, it seems to me that the policy underlying the statute is that when a compulsory purchase order has been made, then if it has been wrongly obtained or made, a person aggrieved should have a remedy. But he must come promptly. He must come within six weeks. If he does so, the court can and will entertain his complaint. But if the six weeks expire without any application being made, the court cannot entertain it afterwards. The reason is because, as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth. The public interest demands that they should be safe in doing so. Take this very case. The inquiry was held in 1973. The orders were made early in 1974. Much work has already been done under them. It would be contrary to the public interest that the demolition should be held up or delayed by further evidence or inquiries."[14]

6.25 *Ostler,* like *Hamilton,* therefore represents a clear acceptance that, as between *Smith* and *Anisminic,* the courts will, in relation at least to challenges to CPOs, follow the former.

(e) *Academic opinion*

6.26 In that connection we have noted the discussion in *De Smith's Judicial Review.*[15] There, the authors note the decision in *Smith v East Elloe District Council* but express the view:

> "It is also suggested, despite the authorities to the contrary, that if it is not possible for a claimant to ascertain the existence of a ground for challenging a decision during the period in which a challenge is permitted, the claimant should be permitted, at least for excess of jurisdiction, to make a claim for judicial review. The court could then decide whether, in all circumstances, permission should be granted."[16]

6.27 The discussion in *De Smith's Judicial Review* is impressively detailed and technical, but it appears to us that the bright-line rule established in *Smith, Hamilton* and *Ostler* is more consistent with the objects of the legislation (and easier for practitioners to follow).

(f) McDaid v Clydebank District Council[17]

6.28 There have nevertheless been cases in which analogous provisions have in some circumstances been found not to exclude consideration by the courts. In *McDaid v*

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[13] At pp 769-770.
[14] *De Smith's Judicial Review,* 7th Edition 2013 (Woolf, Jowell, Le Sueur, Donnelly, Hare).
[15] At p 136.
[16] At para 4-042.
[17] 1984 SLT 162.

Clydebank District Council a question arose under provisions of the Town and Country Planning (Scotland) Act 1972.[18] Section 84(5) of the Act required a planning authority to serve enforcement notices on the owner, lessee and occupier of premises.[19] Such notices were in fact served only on the occupier, although the identity of the owner was known to the authority. Section 85(1) provided for an appeal to the Secretary of State within the period between the date on which the notice was served and the date on which the notice took effect.[20] Section 85(10) excluded any attack on the validity of an enforcement notice except by way of an appeal under the section.[21] In this case the notices, which were served on 20th October 1980, took effect on 20th November 1980. Accordingly, any appeal to the Secretary of State would have to have been made during that four week period.

6.29 The owner petitioned the Court of Session for suspension of the notices, and interdict of the local authority from relying on them, on the ground of the authority's failure to comply with section 84(5) of the Act. The local authority relied on the exclusion of the court's jurisdiction by section 85(10) of the Act. At first instance Lord Allanbridge found for the authority, on the basis of section 85(10).

6.30 On appeal, Lord Allanbridge's decision was reversed. Lord Cameron, who gave the leading judgment, observed:

> "I am of opinion that the appellate code prescribed by s 85 of the Act and its apparent exclusion of other remedies open to a party aggrieved by the action of a planning authority, applies and can only have been intended by the legislature to apply, to those parties who have been placed in a position to exercise, within the time-limits prescribed, the statutory rights of appeal. In the second place and in any event, there is no absolute but only a conditional ousting of the jurisdiction of the courts to give a remedy to a citizen aggrieved and damnified by the action or inaction of an organ of the executive. This is all the more so when, on the admitted facts, the alleged exclusion of jurisdiction rests not only upon implication but also upon the admitted failure of the respondents advancing the plea to afford, to the petitioners, as the statute required, the necessary opportunity to exercise the right of appeal to the Secretary of State which the legislation provides."[22]

6.31 It would therefore appear that even the most specific terms preventing legal challenge can give way, in appropriate cases, to clear breaches of a statutory duty. Alternatively, it might be said that an acquiring authority cannot rely on a statutory exclusion of an appeal when they have, by their own (admitted) omission, prevented the affected party from becoming aware of his or her rights in the matter.

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[18] 1972 c. 52.
[19] S 84(5) "An enforcement notice shall be served on the owner, lessee and occupier of the land to which it relates and on any other person having an interest in that land, being an interest which in the opinion of the authority is materially affected by the notice … ".
[20] S 85(1) "A person on whom an enforcement notice is served, or any other person having an interest in the land may, at any time within the period specified in the notice as the period at the end of which it is to take effect, appeal to the Secretary of State against the notice on any of the following grounds … (e) that the enforcement notice was not served as required by section 84 (5) of this Act … ".
[21] S 85(10) "The validity of an enforcement notice shall not, except by way of an appeal under this section, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b) to (e) of subsection (1) of this section."
[22] At pp 165-166.

Conclusion

6.32 On the one hand, there is a clear public interest in the smooth progress of necessary public works. It is essential that those carrying out such works should be able, once the necessary procedures have been complied with, to proceed without the threat of legal action hanging over them.[23] On the other hand, that public interest cannot extend to allowing an acquiring authority simply to fail to comply with the statutory duties imposed upon them. In the great majority of cases the statutory procedures will have been correctly carried out.

Grounds of challenge

6.33 The second question in this Chapter is whether the current grounds for challenge – that the authorisation is *ultra vires*, or that an applicant has been prejudiced by non-compliance with the statutory requirements – are sufficiently wide.

6.34 Paragraph 15 of Schedule 1 to the 1947 Act, quoted at paragraph 6.3, enables the court to look first at whether the CPO was within the powers conferred by the statute authorising compulsory purchase. In addition or alternatively, where there has been a failure to comply with the requirements of the Schedule, the court may look at whether that failure has caused substantial prejudice to the claimant. It does not empower the court to look at the merits of the decision to confirm or make the CPO. Lord Denning set the matter out in *Ashbridge Investments Ltd v Minister of Housing and Local Government.*[24]

6.35 In *Ashbridge* the Ministerial decision was not about the confirmation of a CPO. It was about the correct designation of a derelict property. Lord Denning in the Court of Appeal held, essentially, that the Minister's decision could be judicially reviewed on the usual grounds but that, apart from judicial review, the courts were not empowered simply to take a different view from that of the Minister.

Challenge on ground of bad faith

6.36 In *Smith v East Elloe Rural District Council,* the House of Lords held, by a majority, that an attack on a CPO on the grounds of the bad faith of those who were responsible for it, was excluded by the terms of paragraph 15. Lord Morton of Henryton, Lord Reid and Lord Somervell of Harrow so decided, with Viscount Radcliffe dissenting. It might have been thought that that would have settled the matter. Nevertheless, in *Ostler,*[25] Lord Denning MR felt able to say, after quoting an analogous provision in the Highways Act:

> "Although the words appear to restrict the clause to cases of *ultra vires* or non-compliance with regulations, nevertheless the courts have interpreted them so as to cover cases of bad faith. On this point the view of Lord Radcliffe has been accepted (which he expressed in *Smith v East Elloe Rural District Council,* [1956] A.C. 736,769). In addition this court has held that under this clause a person aggrieved – who comes within six weeks – can upset a scheme or order if the Minister has taken into account considerations which he ought not to have done, or has come to his decision without any evidence to support it, or has made a decision which no reasonable person could make. It was so held in *Ashbridge Investments Ltd. v.*

[23] See McDaid at para 6.28 above.
[24] [1965] 1 WLR 1320.
[25] See para 6.21 above.

> *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320, and the Minister did not dispute it. It has been repeatedly followed in this court ever since and never disputed by any Minister. So it is the accepted interpretation."[26]

6.37 It is difficult to see how the lone voice of Lord Radcliffe, as to the admissibility of complaints of bad faith, is to be preferred to those of the three judges who formed the majority, on that point, in the *Smith* case. And *Ashbridge,* as noted above, was not about compulsory purchase: it was about an exercise of Ministerial judgment as to the designation of a derelict building. It is nevertheless the case that other courts have found ways in which to set aside, or at least to test, the CPOs by the application of broader judicial review principles, to the actions of the acquiring or confirming authority. We refer, for example, to the observation of Lord President Emslie in *Wordie Property Co. Ltd. v Secretary of State for Scotland*:[27]

> "[The decision] will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it."[28]

We refer also to the discussion in Rowan-Robinson & Farquharson-Black at paragraphs 2.31 to 2.34.

6.38 In that connection, we have noted the views of the judges in the House of Lords, in *Smith,* that there remains a remedy of damages, for those affected by acts allegedly in bad faith. We ask the questions:

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

6.39 More generally, we ask the question:

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

Challenges on basis of non-compliance with Convention rights

6.40 We turn to consider the case for requiring any challenge under the Convention to be made within the statutory six-week period. This essentially relates to the timing of any

[26] At pp 133-134.
[27] 1984 SLT 345.
[28] At 347-348.

challenge under Article 8 of the Convention, and we referred to it, briefly, in Chapter 3.[29] It is the case that, in carrying out their duties under the current law, both the local authority which make a CPO, and the Ministers who confirm it, are legally required to take into account issues as to the justification of the proposed CPO in terms of Article 8.[30] We note, in this regard, the decision of Pill LJ in *Lough and others v First Secretary of State*.[31] In that case his Lordship observed:

> "Recognition must be given to the fact that article 8 and article 1 of the First Protocol are part of the law of England and Wales [and Scotland]. That being so, article 8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often, as in my judgment in the present case, produce the same answer but if true integration is to be achieved, **the provisions of the Convention should inform the decision maker's approach to the entire issue**."[32] (emphasis added).

6.41 It appears to us that, given the existing duty on the part of the public authorities concerned to take account of Convention issues, there are strong arguments in favour of a requirement that any specific question as to the compatibility of a CPO with the Convention, should be raised at as early a stage as possible. It will almost invariably be the case that issues as to the property owner's rights under Article 8 or A1P1, will be sufficiently clear at the date on which the CPO is confirmed.

6.42 Further, a real question as to whether the property owner's rights under Article 8 or A1P1, are being disproportionately interfered with is, in essence, also a question as to whether the acquiring authority is striking the correct balance between the public and private rights in relation to the development which is in contemplation. That may be seen as an additional ground for finding that the proposed acquisition is outwith the power conferred by the authorising statute: that is, that the CPO is *ultra vires*. There are occasions when the proposed CPO is made for purposes which fall technically outwith the powers conferred by the authorising statute. A remedy is already provided for this wrong in paragraph 15 of Schedule 1 to the 1947 Act. But, since the passage of the 1998 Act, it is unlawful for a public authority to act incompatibly with a Convention right.[33] And, by virtue of section 3 of that Act, courts are required to construe statutes compatibly with the Convention rights. It would accordingly appear that it is already competent for a challenge to be made to a CPO, within the six-week period, on the ground that it is incompatible with the applicant's rights under the Convention.

6.43 If that is the case, then all that would be necessary would be to make it clear, on the face of the proposed new statute, that any claim raising specific issues under the Convention must be raised within the six-week period, and cannot be raised thereafter.

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[29] See paras 3.25 and 3.71.
[30] 1998 Act, s 6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
[31] [2004] 1 WLR 2557.
[32] At para 48.
[33] See fn 30 above.

6.44 Such a requirement would, in our view, satisfy the Convention requirement mentioned in *Pinnock*,[34] and would remove the risk, however minimal, that a development, already perhaps well on the way to completion, could be halted at the point where a court is being asked to enforce an acquiring authority's right to possession of the property concerned. We ask the question:

> **32. Should any challenge to a CPO, on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six-week period for general challenges to a CPO?**

6.45 We cannot at present envisage circumstances in which a challenge based on the owner's rights under Article 8 or A1P1, could not be formulated at the time when the CPO is confirmed. Nevertheless, we ask the question:

> **33. Are there circumstances in which such a challenge should be permitted to be made at a later stage?**

Remedies

6.46 The third question is whether, where the court finds that a challenge to a CPO is successful, the remedies open to it are adequate. Paragraph 15(b) of Schedule 1 to the 1947 Act provides, so far as material:

> "[The Court] if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this Schedule or of any regulation made thereunder not having been complied with, **may quash the compulsory purchase order** or any provision contained therein, or the certificate, **either generally or in so far as it affects any property of the applicant."** (emphasis added)

6.47 It seems appropriate to us that where a CPO is successfully challenged on the ground that it was *ultra vires* the (allegedly) authorising legislation, it should be quashed. As we have noted, any statute authorising the compulsory acquisition of privately-owned land is, and in our view should be, construed strictly against the acquiring authority.

6.48 But the position may not be so clear where there has been a defect in the procedure, even where the defect has caused substantial prejudice to the landowner. Depending upon the point in the process at which the defect has occurred, it may be that it should not be necessary to compel the acquiring authority to start the whole process again. If, for example, there has been a failure to notify the landowner of the holding, or the date, of an inquiry, so that the landowner had had no opportunity of being heard, it might be that an appropriate remedy would be to order a re-hearing of the inquiry, rather than requiring the acquiring authority to begin again. If the court were not required to quash the CPO, but had a discretion to make such lesser order as would rectify the damage caused to the applicant, without delaying the whole project, then that might be as much as justice would require. We ask the question:

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[34] *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government and another intervening* [2011] 2 AC 104 – see para 3.61 above.

34. Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?

Stopping clock on validity of CPO under challenge

6.49 Both the Scottish Government and members of our Advisory Group have told us that the time limit on the validity of a confirmed CPO may cause difficulties where a court challenge is raised against the CPO. Some claimants may even deliberately adopt the strategy of raising court challenges to the order in order to "run down the clock" on the three year time limit of validity. This issue will arise regardless of whether the CPO is valid for three years or any other time period. It is the case that the court has a discretion, under paragraph 15(1)(a) of Schedule 1, to suspend the operation of the CPO pending the final outcome of any legal proceedings. If more were required, it would be necessary expressly to provide that, where there are extant judicial review proceedings challenging the validity of a confirmed CPO, time "stops running" on the validity of the CPO.

6.50 In Ireland, provision has recently been introduced to extend the time limit for the service of a notice to treat in implementation of a confirmed CPO where there are extant judicial review proceedings.[35]

6.51 We welcome any views on whether a similar provision should be included in the proposed new statute. We ask the question:

35. Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?

[35] Planning and Development Act 2000, s 217(6A), as inserted by the Compulsory Purchase Orders (Extension of Time Limits) Act 2010, s 1. See E Galligan and M McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice,* (2nd edn, 2013) at para 5.52.

Chapter 7 Implementation of a CPO

Introduction

7.1 In this Chapter we consider three methods which are currently available to implement a CPO following confirmation under the present law and, in addition, a possible new single procedure. Therefore we consider implementation of a CPO by (1) a notice to treat, (2) a GVD, (3) the third procedure, and (4) a new single procedure.

7.2 It is the first two methods which are currently used. The acquiring authority will proceed either by a notice to treat or by a GVD.[1] Each method has differing features, and therefore differing advantages and disadvantages in the context of particular developments. We consider them as they operate at present, and seek views on whether they should both be retained, or whether they should be replaced by a single procedure. In Chapter 8 we consider the technical conveyancing implications of the present position and any possible alternatives.

7.3 We are conscious that it can be difficult to appreciate, on the basis of a written description, how the various time limits in relation to implementation inter-relate. The timeline set out in Appendix C may be of assistance to readers.

Implementation of CPO by notice to treat

Parties upon whom notice to treat is to be served

7.4 Although the phrase "notice to treat" does not appear in it,[2] the statutory basis is still section 17 of the 1845 Act, which provides:

> "When the promoters of the undertaking shall require to purchase any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the special Act to sell and convey the same, or their rights and interests therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

7.5 As can be seen from section 17, a notice to treat requires to be served on "all the parties interested in such lands, or to the parties enabled by this or the special Act to sell and convey the same, or their rights and interests therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking". In *Union*

[1] In practice, we understand that most recent acquisitions in Scotland have been carried out by means of a GVD.
[2] It does feature in later legislation – see, for example, 1947 Act, Sch 2, para 3(1).

Railways (North) Limited v London & Continental Railways Limited and Kent County Council[3] it was confirmed that the acquiring authority have no discretion in this matter.

7.6 The phrase "enabled to sell and convey the same" reflects the formulation of sections 6 and 7 of the 1845 Act. Those sections make it clear, not only that the acquiring authority have the power to acquire any land by agreement, but also that three categories of persons have power to sell. Those categories are (1) the owners of the land, (2) parties holding any right or interest in the land, and (3) parties enabled by the 1845 Act or any special Act to sell their interest in the land. Since ownership is itself an "interest in land", there may be a degree of overlap in these provisions.[4] The effect is that anyone holding an interest in land is entitled to sell that interest, either personally or through someone acting on their behalf, notwithstanding any legal disability or lack of capacity which might otherwise have prevented such a sale.

7.7 A number of the legal disabilities described in section 7 have been overtaken and removed by subsequent legislation,[5] but there remain qualified or restricted interests in land, such as that of a liferenter. The clear intention of the 1845 Act is not only that such an interest can be compulsorily acquired, but that any person holding such an interest should be able to dispose of it.[6] For the sake of completeness, we note that section 8 makes it clear that such persons also have the power "to discharge lands from any rent, payment, charge" etc.

7.8 Finally, section 9 of the Act safeguards the interests of persons with disabilities. It is likely that these interests are now adequately protected under modern legislation, but it may nevertheless be sensible to re-enact provisions along the lines of section 9.

7.9 We propose that:

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

7.10 In practice, it will normally be quite straightforward for the acquiring authority to identify the parties to be notified, after the appropriate "diligent inquiry". The relevant parties will include the owner, any liferenter, any lessee and any holder of a heritable security.

(a) Owners

7.11 Ownership of a piece of land is acquired by registration of a conveyance in the Register of Sasines or the Land Register.[7] In terms of section 3 of the 1845 Act, however, the term "owner" is defined more widely as "any person or corporation, or trustees or others, who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking". This will not include persons who have merely

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[3] 2008 WL 2311306. Cf *Martin v London, Chatham and Dover Railway Company,* at fn 14 below.

[4] See generally Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 181, 2000) para 9.5.

[5] Any disability of judicial factors to sell property would effectively be removed if the recommendations in our Report (SLC No 233) were implemented). Entails were abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, s 50.

[6] See also below, para 8.22.

[7] See 2012 Act, s 50(2). On the 2012 Act coming into force fully, it ceased to be competent to register conveyances in the Register of Sasines.

entered into missives for the purchase of land, even if they have paid the purchase price, because such persons are not in a position to convey the land.[8] It will include an unregistered holder of the land, such as an executor or a trustee in sequestration or someone holding an unregistered disposition.[9] Such a person, by statute, is entitled to convey the land.[10] Accordingly, while it will be sufficient in most cases for a notice to treat to be served on the person who is registered as owner of the land, an acquiring authority will want to make enquiries as to whether there have been any subsequent changes, for example, the person has died or been sequestrated. In that case, the notice to treat should be served on the relevant unregistered holder such as the executor or trustee in sequestration.

(b) Interests other than ownership

7.12 Liferenters, and others holding any kind of subordinate right in the land, will also require to be served with a notice to treat. That will include lessees. The 1845 Act makes specific provision as to lessees with not greater interest than as a tenant for a year, or from year to year.[11] We deal with that subject in Chapter 20. For present purposes, it is sufficient to note that such a lessee does not require to be served with a notice to treat.[12]

7.13 Finally, holders of heritable securities[13] should be served with a notice to treat.[14] In that connection we agree with the observation made by the Law Commission, in their Procedure Report:

> "Mortgagees are entitled to be served with notice to treat. In the event of a failure to serve, they are not bound by any determination of compensation nor are they obliged, pending the mortgage being paid off, to accept any loss to their security."[15]

7.14 The service of a notice to treat does not deal with the question which arises when the owner is in "negative equity", because the value of the property is insufficient to pay off the mortgage. We deal with that matter in paragraphs 11.35 to 11.42 below.

7.15 It is clearly of interest to the acquiring authority to know upon which persons they should serve a notice to treat. But the service is only the start of a process which requires the active participation of those upon whom the notice is served. Section 17 does not include a list of the rights and interests which require service. It may be advantageous for the proposed new statute to have a comprehensive list of all possible interests in land the holders of which, if known to the acquiring authority, should be served with a notice to treat. In paragraphs 5.23 and 5.33, we set out the interests in respect of which a CPO should be served, when made and confirmed, and envisage that a notice to treat should require to be served in respect of the same interests. We ask the question:

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[8] Cf *Gibson v Hunter Home Designs Limited* 1976 SC 23.
[9] On unregistered holders generally, see G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) Ch 24.
[10] Conveyancing (Scotland) Act 1924 s 3. In the Register of Sasines the disposition requires to have a deduction of title clause linking the disponer to the person with the last recorded title. In the Land Register this is not required. See 2012 Act, s 101.
[11] 1845 Act, s 114.
[12] *Benjamin v London Borough of Newham* (1968) 19 P&CR 365.
[13] Since the coming into force of the Conveyancing and Feudal Reform (Scotland) Act 1970, the only form of heritable security which can be granted is a standard security. The English equivalent is a mortgage.
[14] See *Martin v London Chatham and Dover Railway Company* (1865-66) LR 1 Ch App 501.
[15] Law Com 291, para 3.33.

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served?

Non-service of notice to treat

(a) Deliberate failure to serve notice to treat

7.16 Section 17 of the 1845 Act clearly envisages that the acquiring authority will serve a notice to treat on everyone with an interest in the land to be acquired. There is authority to that effect. In *Martin v London Chatham and Dover Railway Company*[16] there was a question as to whether the holder of a mortgage should have been served with a notice to treat, and it was held that that should have been done. The question was raised again in *Union Railways (North) Limited and London and Continental Railways Limited v Kent County Council*.[17] In that case the authority argued, first, that they had discretion in the matter and, second, that if they decided not to serve such a person, then that person had no remedy under the legislation. The Court of Appeal found against them on both arguments. The Court confirmed that where a person holds an interest in land which is subject to a notice to treat, the acquiring authority must serve a notice to treat on that person. Where that is not done, the landowner has a remedy under the 1965 Act.

7.17 While we would assume that a Scottish court would come to the same conclusion as the Court of Appeal on the first question, there is no provision in the 1845 Act which clearly enables a person who has not been served with a notice to treat, to raise the matter in court. That is something which could be put beyond doubt in the proposed new statute.

(b) Interests overlooked by inadvertence

7.18 Section 117 of the 1845 Act provides for compensation to be paid in respect of any interest in land which, through mistake or inadvertence, has not been purchased, or paid for. It provides that the acquiring authority can remain in undisturbed possession of the land in question, provided that they pay compensation within six months of receiving notice of the interest or, where the right to the interest is disputed, within six months of a final determination of that matter.[18] Depending upon the circumstances, that section may be held to operate a considerable time after the construction of the works in question. In *Caledonian Railway Company v Davidson and Others,*[19] the land for a railway line was compulsorily acquired in about 1890. After a series of actions on different aspects of the matter, the case went to the House of Lords in 1903, when the House held that, there having been no final determination, section 117 continued to govern the matter.

7.19 In practical terms, the problem is solved by the incorporation into special Acts of section 6 of the 1845 Railways Act, which provides a clear right to compensation.[20] However, this is an unsatisfactory way to resolve the issue and is a matter which should be clarified in the proposed new statute. We propose that:

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[16] (1865-66) LR 1 Ch App 501.
[17] [2008] 2 P & CR 22.
[18] 1845 Act, s 117.
[19] [1903] AC 22.
[20] See Forth Crossing Act 2011 (asp 2), s 21(2).

38. It should be made clear that a person claiming to be the holder of an interest in land, and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

In addition, we ask:

39. Should there be a time limit within which such proceedings must be raised?

Content of notice to treat

(a) Land to be taken

7.20 The notice to treat must describe the land which is to be taken. It must be served upon those with an interest in the land to be taken, and it must require those persons to respond with an account of their interest in the land.

7.21 A notice to treat need not include all the land authorised to be taken for the purposes of the development.[21] Where the compulsory acquisition is for the purposes of a road or a railway, it may be that the final "line" of the development has not been settled when the CPO is confirmed. Further, there is no reason why the acquiring authority should not take land in parcels, so as to divide the carrying out of the undertaking into stages. It may, however, also be convenient for the development, and the affected proprietors, if all land belonging to a single proprietor is included in a single notice to treat. Further, it is competent for an acquiring authority to withdraw a notice to treat, and substitute another, provided the latter includes all the land which was included in the former.[22]

(b) Description of lands

7.22 The ground to be taken need not be described in conveyancing terms,[23] but it is necessary for it to be described adequately. In *Coats,*[24] the notice to treat was in respect of land to be used for the construction of a railway, and one of the lots of land which was to be taken, was marked out, on the plan attached to the notice to treat, on three sides only. The landowners sought interdict against the acquiring authority from proceeding with the acquisition of the land. The Inner House agreed with the Lord Ordinary that the notice to treat was invalid. The Lord Justice-Clerk observed:

> "The most serious objection seems to me to be that which has been sustained by the Lord Ordinary, and which applies to No. 94 upon the plan, which is a yard attached to Ferguslie Works. The plan shows nothing of the nature of enclosure or delineation. There are no lines which can in any reasonable sense be said to delineate a piece of

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[21] *Stevenson v North British Railway Co* (1901) 4 F 224.
[22] See *Coats v Caledonian Railway Company* (1904) 6 F 1042, where the Lord Ordinary observed: "There is no doubt that the respondents could not, without the consent of the complainers, withdraw the first notice to the effect of refusing to purchase No 83, but when the respondents found that they required more land belonging to the complainers, I think that … it was very reasonable for them, and was also the most convenient course for the complainers, to withdraw the first notice as a separate notice, and to give a second notice which included both No 83 and the additional ground which was required."
[23] See Rowan Robinson & Farquharson-Black, para 3.02; and *Rush v Fife Regional Council,* 1994 SC 104, discussed at paras 7.35 and 7.36, below.
[24] See fn 22.

> ground at the place referred to by the number. … Certainly there is nothing corresponding to what in ordinary language would be called a delineation of a definite piece of ground. It is suggested that the reclaimers are entitled to have the matter considered as if a line were drawn across from the outermost point of the marking of the line of road on the plan to the outermost point of the marking of the siding, and that they are entitled to take that ground under the notice. I cannot assent to that. In my opinion there is no delineation, and the drawing of such a line would be practically the supplying of a defect in delineation which cannot be supplied now."[25]

7.23 The Court's approach to the matter is consistent with the general approach, that statutes involving the removal of the rights of individuals will be strictly construed, as noted in paragraph 3.13 above.

Form of notice to treat

7.24 Currently it is not necessary for a notice to treat to be in any special form. It must include all information required under section 17 of the 1845 Act, but we are not aware of any general issue in Scotland of notices failing to do so. We see little obvious merit in requiring acquiring authorities to adopt a common form of notice to treat and do not take the view that prescribed forms are necessary. So far as landowners are concerned, it will be relatively unlikely that any landowner's property will be the subject of compulsory acquisition more than once. Finally, there is a wide variety of circumstances in which such notices to treat may be required to be used. The kinds of interest in land will differ from one undertaking to another. Therefore we propose no regulation of the form of a notice to treat.

Notice about claiming compensation

7.25 We understand that, in practice, notices to treat no longer include figures as to proposed compensation: that matter is now dealt with under other legislation.[26] Nevertheless, the service of a notice to treat could be a good opportunity to bring to the attention of landowners, the fact that they are entitled to compensation, and to tell them how they should set about the process of securing it. We accordingly ask the question:

> **40. Should a notice to treat be accompanied by information as to how compensation may be claimed?**

Effect of notice to treat

7.26 A notice to treat has various effects. First, it establishes the extent of the land to be taken. (This is subject to the possibility of the service upon the acquiring authority of a counter-notice, which is discussed below.[27]) The holders of the various interests have to respond to the notice to treat, with a statement of the interests held by them.

7.27 Second, it enables either party to require that compensation be assessed in respect of the land concerned. Holders of the various interests have to respond with statements of the claims made by them in respect of their interests. If they fail to do so, or no agreement is reached with the acquiring authority within 21 days of the service of the notice to treat, then

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[25] See the citation at fn 22, at 1046.
[26] SME, para 18. We consider the whole question of compensation in Part 3.
[27] See below, paras 7.52 onwards.

the 1845 Act provides for the dispute to be settled.[28] Third, it empowers the acquiring authority, upon issuing a notice of entry,[29] to enter upon the lands.[30]

7.28 Fourth, service of the notice to treat fixes the interests in respect of which compensation will be payable. If a person with an interest in the land acts so as to increase its value after the notice to treat is issued, that will not be effective so as to increase the compensation which the acquiring authority is obliged to pay. This will be the case unless the action was reasonably necessary and was not undertaken with a view to obtaining or increasing compensation. The principle is set out in paragraph 7 of Schedule 2 to the 1947 Act, which provides:

> "The arbiter shall not take into account any interest in land, or any enhancement of the value of any interest in land by reason of any building erected, work done, or improvement or alteration made, whether on the land purchased or on any other land with which the claimant is, or was at the time of the erection, doing or making of the building, works, improvement or alteration directly or indirectly concerned, if the arbiter is satisfied that the creation of the interest, the erection of the building, the doing of the work, the making of the improvement or the alteration, as the case may be, was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation."

7.29 Much turns on the subjective intention of the landowner. If there appears to be no prospect of a development proceeding, it would be unreasonable to prevent the sensible use of the land, and if such a use had the effect of increasing the compensation potentially payable by the acquiring authority, then that would be a consequence of the acquiring authority's not having proceeded expeditiously with the development. Further, if the result is that the total compensation would be too high, then the acquiring authority is entitled to withdraw. We ask the questions:

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

42. When fixing interests in land, should any action taken or alterations made before service of a notice to treat, be considered differently from any action taken or alterations made after such service?

7.30 It is also possible that an interest in land may simply expire during the time between the serving of a notice to treat and the actual taking of possession by the acquiring authority. In *Holloway v Dover Corporation,*[31] in 1947, the acquiring authority obtained a CPO affecting the claimants' premises, on which they carried on business as bakers, under a lease which expired in October 1954. Nothing further was done by the claimants or the acquiring authority until March 1957, when the claimants made a claim for compensation. The authority exercised their statutory powers as acquiring authority, and in October 1957 (having become the landlords of the property) served a notice to quit under the Landlord and

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[28] 1845 Act, s 19. See Ch 18 for current dispute resolution by the LTS. In point of fact, no application may be made to the LTS until after 30 days from the service of the notice to treat. See the LTS Rules (SSI 2003/452), rule 8.
[29] Under para 3 of Sch 2 to the 1947 Act, which disapplies the provisions of ss 83-85 of the 1845 Act.
[30] For notices of entry, see paras 7.69 to 7.73 below.
[31] (1960) 11 P & CR 229.

Tenant Act 1954. In May 1958 the claimants referred to the Lands Tribunal the question of the assessment of compensation arising out of the notice to treat.

7.31 Lord Evershed MR observed that, following the notice to treat:

> "The claimants continued in enjoyment of the premises. They continued to carry on throughout their bakery business, not only until the lease expired, but for some time thereafter. They made a claim under the Act of 1954 against their landlords (who in the meantime had become the corporation) and, indeed, we were informed that they did not even give up possession when the notice to quit expired in 1958.
>
> The position in the end of all seems to me plain and incontrovertible, namely, that when the powers and jurisdiction of the Lands Tribunal were invoked it had become quite clear that no proprietary right of the claimants had been compulsorily acquired by the corporation, and, therefore there was no subject-matter for which the corporation were liable to pay to the claimants any compensation."[32]

Nature of obligation created by notice to treat

7.32 In some of the early cases on the 1845 Act, it was held that the issuing of a notice to treat, validly expressed in relation to some or all of the land authorised to be acquired by the special Act, constituted a contract.

7.33 In *Campbell v Edinburgh and Glasgow Railway Co.*,[33] Lord Curriehill observed that: "The moment the respondents serve the notices, the purchase is complete, from which neither party can resile".[34] In *Forth & Clyde Junction Railway Co v Ewing,*[35] which was a case as to the validity of a particular form of intimation of a claim for compensation, Lord Justice-Clerk Inglis made the same point:

> "It is true that some notices may, by the statute, be made to have effects beyond notice, and such is the nature of the notice given by the railway company of their intention to take land. For that makes a contract of sale. The special act is substantially an offer of the land by the landowner to the company, and notice by the company of their intention to take the land is an acceptance of that offer."[36]

7.34 This view of the legal position – that compulsory purchase is akin to a contract of sale and therefore that there has been a mutual agreement between the acquiring authority and the landlord – is unlikely to commend itself to landowners who are, in fact, unwilling to sell their land to the acquiring authority.

7.35 In more modern practice the matter is formulated differently. In *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc.),*[37] Lord Morris of Borth-y-Gest observed:

> "A notice to treat does not establish the relation of vendor and purchaser between the acquiring authority and the owner. It does not transfer either the legal or the equitable interest to the acquiring authority. It informs the owner that the land is to be

[32] At p 235.
[33] (1855) 17 D 613.
[34] Previous footnote, p 619.
[35] (1864) 2M 684.
[36] Previous footnote, p 693.
[37] [1970] AC 874.

> taken and informs him that the acquiring authority are ready to negotiate with him as to the price of the land that they will purchase and that he must sell and as to compensation for damage that may be payable."[38]

7.36 The same approach has been taken in Scotland (although not by reference to the decision of the House of Lords in *West Midlands Baptist*). In *Rush v Fife Regional Council,*[39] where the issue was whether the notice to treat had sufficiently, or indeed validly, described the lands which the acquiring authority intended to purchase, Lord Weir, giving the opinion of an Extra Division, said:

> "In our opinion while the analogy between on the one hand a notice to treat following upon a compulsory purchase order, and a concluded contract for the sale of land on the other hand, has to be recognised, it can only be taken so far. There are distinct differences between the two situations. The essence of a contract of sale is that all the terms and conditions are set out and are made the subject of a binding agreement, whereas in the case of compulsory purchase, while a notice to treat obliges an acquiring authority to purchase the land from the person to whom notice has been given, many of the details at that stage remain unsettled."

7.37 The approach of the House of Lords in *Birmingham Corporation,* and of the Inner House in *Rush,* seem to us to be a more rational assessment of what is happening. It is unrealistic to impute to a landowner who is being required to lose ownership of his or her land, any of the attitudes or intentions of a voluntary seller of land. The object of the statutory provisions is to set out the procedures by which property, which is required for the public interest, is to be transferred from the landowner to the acquiring authority, with the aim of securing compensation which will satisfy general perceptions of objective fairness. If those provisions secure that aim, they are sufficient without our attempting artificially to construct a wholly illusory consensual basis for them.

7.38 Nevertheless, even if compulsory purchase cannot plausibly be characterised as a contract, a notice to treat does have the effect of requiring both parties to complete the "arrangements" (to use a neutral term) which it sets out. The landowner is required to set out a claim for compensation, and the acquiring authority is (generally) required to go through with the purchase.[40] Further, since the courts' characterisation of the process as a contract has informed many of the judgments as to notices to treat, it is as well to keep that factor in mind.

Duration of notice

7.39 Originally, there was no specific limit on the currency of a notice to treat, but section 78 of the 1991 Act provides that a notice to treat ceases to have effect after three years, unless compensation has been settled, a GVD has been executed, the acquiring authority has entered on and taken possession of the land or the question of compensation has been referred to the LTS.[41] It is also possible for the period of validity of the notice to treat to be extended by agreement between the owner and the acquiring authority. This statutory limit on the currency of the notice to treat would appear to make it difficult for any challenge to the implementation of a notice to treat to be based on simple delay. But in some circumstances

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[38] At p 903.
[39] 1994 SC 104, at page 119.
[40] See para 7.41 onwards for the circumstances in which a notice can be withdrawn (and not replaced).
[41] See fn 28 for when a claim for compensation can be referred to the LTS.

it might still be possible for a landowner to challenge the use of a notice to treat if the acquiring authority intend to use the land for purposes other than those for which the CPO was granted.[42]

7.40 It seems reasonable that there should be a limit on the time of currency of a notice to treat. We accordingly ask the question:

43. Does the three-year time limit on the validity of the notice to treat work satisfactorily in practice?

Withdrawal of notice to treat

7.41 The present position as to withdrawal of a notice to treat seems reasonably clear. Section 39 of the 1963 Act provides that a notice to treat can be withdrawn within six weeks of the delivery of a notice of a claim by the holder of a relevant interest.[43] Where the landowner fails to make a claim, the acquiring authority can withdraw the notice within six weeks of the final determination of the claim (unless they have already entered upon the land).[44] The rationale for both of these provisions is that the acquiring authority should be given an opportunity to withdraw once the full financial implications of the development become clear.

7.42 The point came up for consideration in *R v Northumbrian Water Limited, ex parte Able UK Limited*.[45] The acquiring authority had served a notice to treat, and a notice of entry, in August 1992. Physical possession of the land was taken in January 1994, but no work was carried out. The landowner had not delivered a notice setting out its claim for compensation, and the value of the land had not been agreed, although it was agreed that it was suitable for the tipping of inert waste. Thereafter, the landowner applied for and, following an appeal, obtained a CAAD (see Chapter 14). Based on that certificate, it claimed a very much higher price for the land than the acquiring authority had contemplated. Within six weeks of having received the claim, the acquiring authority gave notice that they were withdrawing the notice to treat. The landowner claimed that this was incompetent. Section 31 of the 1961 Act (the equivalent to section 39 of the 1963 Act), provides, as far as material:

> "(1) Where a claimant has delivered such a notice as is mentioned in paragraph (b) of subsection (1) of section four of this Act, the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on him or on any other person interested in the land authorised to be acquired.
>
> (2) Where a claimant has failed to deliver a notice as required by the said paragraph (b), the acquiring authority may, at any time after the decision of the [Upper Tribunal] on his claim but not later than six weeks after the claim has been finally determined, withdraw any notice to treat which has been served on him or on any other person interested in the land authorised to be acquired, unless the authority have entered into possession of the land by virtue of the notice."

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[42] See *Argos v Birmingham City Council* [2011] EWHC 2639 (Admin) (discussed in paras 3.31ff.).
[43] Cf a notice to treat served under the 1845 Act, which bound both parties, the promoter to buy, and the landowner to sell. The only point left to be settled was the price.
[44] 1963 Act, s 39(2).
[45] (1996) 72 P& CR 95.

7.43 Carnwath J held that the matter was a question of the interpretation of section 31(1) of the 1961 Act and held that the acquiring authority was entitled to withdraw the notice to treat. In the course of his judgment his Lordship observed:

> "This result [allowing the acquiring authority to withdraw the notice to treat] produces no anomaly or absurdity in this case. It leaves the owners with the land, unaffected by any works of the authority, and with a claim to compensation for any loss which they have suffered. … It also gives effect to the parliamentary intention, implicit in section 31, that authorities should be able to make an informed decision as to the likely cost of the acquisition before they are finally committed."[46]

7.44 Carnwath J was of the view that, while the legislative position was clear, it was not clear why there was a difference, as between subsections (1) and (2), in relation to whether or not the authority had entered into possession. Since the acquiring authority's claim in the instant case was based on subsection (1), nothing turned on the difference. Nevertheless, the question remains.

7.45 The rationale for the provision as to withdrawal is, as Carnwath J surmised, that it is reasonable to allow the acquiring authority some room for withdrawal where the actual liability is greater than could have been contemplated at the outset. This may well be so where the landowner secures an advantageous CAAD (see Chapter 14), but may also arise in other circumstances. In a straightforward case, when the landowner sends a notice to the acquiring authority setting out the valuation put on the relevant interests, the latter will be able, within six weeks, to form a view as to whether or not that notice is likely to be upheld by the LTS, and can decide, on that basis, whether or not to withdraw.

7.46 Where the landowner has not sent a notice, the acquiring authority will be uncertain as to their final liability, and it may be reasonable that the period within which withdrawal may be permissible, should not start to run until the level of compensation has been settled by the LTS. The landowner, whose failure to co-operate with the statutory process has led to the uncertainty, is not well placed to complain about the lengthened hiatus.

7.47 But this still leaves unanswered the question as to why, in the latter case, but not the former, the acquiring authority's entry on to the property should operate as a bar to withdrawal. It could be said, with some force, that an acquiring authority which chooses, before compensation has been fixed, to enter on to land, is thereby accepting a foreseeable risk that the compensation may be higher than anticipated.

7.48 In the *Northumbrian Water* case, indeed, it may have been chance which caused matters to turn out as they did. If the acquiring authority had proceeded with the development while the compensation claim was being decided, and the tribunal had taken into account the existence of the CAAD, withdrawal would not have been competent because of the acquiring authority's entry on to the land. Further, while the acquiring authority had entered on to the land, no work had been done, and it was possible to restore it to the owner essentially as it was before the question of compulsory acquisition arose. If the acquiring authority had begun operations, it would have been very much more difficult, at least in equitable terms, to justify withdrawal.

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[46] At p 103.

7.49 It may be that the provisions, with regard to the case where no claim has been made by the landowner, reflect a concern that the process of establishing the value of the land may take longer than it is reasonable to expect the acquiring authority to wait. We address that matter in Chapter 14.

Effect of withdrawal provisions on date of valuation

7.50 It appears to us that there may be a more fundamental difficulty with the implications of Carnwath J's decision in *Northumbrian Water.* An application for a CAAD may be made by either party in a compulsory purchase. Unless a notice to treat has been served, and the question of valuation has been referred to the LTS, either party can make such an application without the consent of the other. This would appear to be what happened in the *Northumbrian Water* case. The result was that the greatly increased valuation only became apparent some two years after the date of the notice to treat, and 18 months after the acquiring authority had entered on to the land. This leaves an area of uncertainty in the process, but that may be an inevitable feature of a system which seeks to reconcile the differing interests of the acquiring authority and the landowner whose property is being expropriated. We discuss the question of the time limits within which a CAAD may be sought in Chapter 14.

7.51 We ask the questions:

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period?

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on to the land?

Counter-notices

(a) Obligation to purchase related parcels of land

7.52 The 1845 Act makes provision for various cases where the acquisition of part of a landowner's property has a disproportionate effect on the remaining land. Section 90 provides:

> "… [N]o party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

7.53 Similarly, section 91 provides that where land is intersected by a compulsory acquisition and a parcel less than half an acre is separated from the remainder of the landowner's property, the acquiring authority may be required to purchase that parcel. As a corollary, section 92 provides that where the landowner would prefer such a parcel to be linked to other land he owns, but the cost of doing that would be greater than the cost of buying the parcel concerned, the acquiring authority can require the landowner to sell it to them.

7.54 Section 90 appears to confer upon the landowner, a right to require the acquiring authority to buy the whole of the "house, building or manufactory".[47] That right has since been qualified. As discussed in some detail in Chapter 4, the provisions of section 90 were replaced (but not repealed) by paragraph 4 of Schedule 2 to the 1947 Act. That paragraph expands the provision, so as specifically to include the park or garden of a house. And it sets out the test which is to be applied where there is a dispute between the acquiring authority and the landowner. In relation to a house, building or manufactory, it is whether the part proposed to be acquired can be taken "without material detriment" to the house etc. In relation to a park or garden, it is whether the part proposed to be acquired can be taken "without seriously affecting the amenity or convenience of the house".

(b) Material detriment

7.55 The content of the test was considered in the case of *Ravenseft Properties Ltd. v London Borough of Hillingdon.*[48] In that case the rear access and a large part of the garden were being acquired of a house facing on to a street in Hillingdon, London. The Lands Tribunal (Mr J S Daniel QC) dealt with two points. The first was whether any material detriment could be compensated by an increased financial payment. The second was whether "material detriment" could not be claimed unless the property could no longer be used for its present purpose. Mr Daniel said:

> "I should say that I cannot accept Mr Schofield's [Counsel for the acquiring authority] suggestion that there can be no material detriment unless some severance is caused for which compensation is not an adequate remedy. The section does not state this expressly, nor can I see any ground on which it should be inferred. It seems to me that if the section were to be so read, then, despite the instances which Mr Schofield ingeniously suggested, the section could rarely, if ever, come into play; for it is difficult to conceive that there can be many cases where the compensation could not be assessed to meet the damage, however great, caused by the severance. Nor do I think, and this is really part of the same contention, that the landowner can only succeed in requiring his whole property to be taken if what he is left with has been rendered physically or functionally incapable of continuing in its present use. If this had been intended it could, and I think would, have been so stated."

7.56 Mr Daniel's view as to the correct test was accepted in the case of *McMillan v Strathclyde Regional Council,*[49] although in that case the LTS held that, since the adverse effect of the purchase had been, or should have been, clear to the owners of the house when they bought it, the authority were not obliged to purchase the whole.

(c) Time limits for counter-notice

7.57 There is no specific provision in either the 1947 Act or the 1845 Act as to when a counter-notice is to be served. But if the acquiring authority are to be able to decide, in the light of the notice, that they wish to withdraw from the acquisition, then it seems logical that the notice should be served before they have taken entry. There is authority to this effect. In *Glasshouse Properties Ltd. v Secretary of State for Transport,*[50] which was a case under

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[47] See *Glasshouse Properties Ltd v Secretary of State for Transport* (1993) 66 P & CR 285, per Mr T Hoyes FRICS, at p 292.
[48] (1969) 20 P & CR 483.
[49] 1984 SLT (Lands Tr) 25.
[50] See fn 47, above.

section 8 of the 1965 Act (the equivalent to paragraph 4 of Schedule 2 to the 1947 Act), the judge, Mr T Hoyes FRICS, said:

> "I find that any notice or application by the claimant seeking to operate the provisions of section 8 had to be served prior to the agreed date of entry. … In the absence of such a notice or application the claimant is therefore not entitled to seek a determination from this Tribunal under section 8 of the 1965 Act."[51]

7.58 There is clearly a question as to whether any counter-notice or application should require to be made prior to the date of entry. In that connection, it is sensible to look at the position in relation to GVDs (discussed in detail below, from paragraph 7.75). A notice of objection to severance in relation to a GVD must be served within 28 days following the service on the landowner of a notice that a GVD has been made.[52] It may be sensible to have a similar time limit in relation to the procedure following a notice to treat.

(d) Counter-notices in relation to agricultural land

7.59 Section 49 of the 1973 Act provides that where an acquiring authority serve a notice to treat on a person in relation to agricultural land, the person may, within two months, serve a counter-notice on the authority, claiming that other land owned by them is, because of the proposed acquisition, not reasonably capable of being farmed as a separate agricultural unit, and requiring the acquiring authority to buy that other land. Section 50 provides that if the acquiring authority do not accept the counter-notice within two months, it may be referred by either party to the LTS, to determine its validity or invalidity.

7.60 Where the counter-notice has been determined to be valid, the acquiring authority will be deemed to be authorised to acquire the other land compulsorily, and to have served a notice to treat in respect of it on the same date as the first notice to treat was served. That deemed notice to treat cannot be withdrawn under section 39 of the 1963 Act.

7.61 Sections 51 and 52 of the 1973 Act make similar provision where a notice of entry (see below) is served on a person with no greater interest in the land than as a tenant for a year or from year to year. The occupier of the land has two months within which to serve a counter-notice, and the authority have two months to signify their acceptance of it, failing which the counter-notice may be referred to the LTS to determine whether the claim in it is justified, and declare whether or not it is valid.

(e) Discussion

7.62 A notice of entry can be served at the same time as a notice to treat, and entitles the acquiring authority to enter on to the land after the expiry of two weeks beginning with the date on which it was served.[53] Sections 49 and 51 therefore clearly envisage that the process of determining the validity of a counter-notice, with its accompanying increase in the obligations of the acquiring authority, may take place some time after work has begun on the development which is the object of the acquisition.

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[51] At p 292.
[52] Para 20 of Sch 2 to the 1947 Act.
[53] Para 3 of Sch 2 to the 1947 Act. See below.

7.63 That is to be contrasted with the position for counter-notices in relation to houses, buildings, manufactories, parks and gardens, where there is no time within which a counter-notice must be served; and it appears that there is an obligation to serve such a notice before the authority have entered on to the land.[54] Further, the acquiring authority have six weeks from the final determination that the notice is valid, to withdraw from the acquisition.

7.64 Therefore, the law and practice on counter-notices differ as between houses etc., on the one hand, and agricultural land, on the other. Counter-notices in relation to agricultural land may be served up to two months from the date of service of the notice to treat (or, where section 51 applies, from the date of service of the notice of entry). A determination that the notice is valid does not give the acquiring authority grounds to withdraw.

7.65 It appears to us that the less satisfactory part of the process is that relating to houses etc. A person served with a notice to treat and a notice of entry at the same time may have as little as 14 days to decide whether to lodge a counter-notice – because the authority will, at the least, be entitled to enter on the land after that time. No doubt it is desirable that a counter-notice should be served before the acquiring authority enter on to the land, but it is also important to give the landowner a reasonable time to consider whether to serve a counter-notice. We wonder whether it might be possible to find some way of reconciling the two interests.

7.66 As we see it, the options are either to extend the time before which the notice of entry takes effect, or, to allow a counter-notice to be served after entry. The difficulty with the former proposal is that it would delay progress in urgent cases. The difficulty with the latter proposal is that it effectively prevents the acquiring authority from withdrawing in light of the increased expense potentially caused by the counter-notice. However, it is likely that an acquiring authority will have considered the possibility that there may be a counter-notice, and they will have made some financial provision to meet that liability, on a contingency basis, should it arise. It is, in any event, difficult to believe that an authority would peril a development on the chance that such a counter-notice would not be declared to be valid.

7.67 Accordingly, we ask the questions:

46. Should the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days?

47. Alternatively, should it be competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

7.68 The question as to whether an acquiring authority are entitled to withdraw if the eventual liability turns out to be higher than might have been anticipated, also arises in relation to counter-notices. If the counter-notice – which need not be in any particular form – is not accepted by the acquiring authority, then the question of severance is settled by the LTS. When the LTS has reached a decision it is open to the acquiring authority to withdraw from the acquisition.

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[54] See *Glasshouse Properties Ltd,* above.

Notice of entry

7.69 The 1845 Act provides, in sections 83 to 88, that the acquiring authority are prohibited from entering upon the lands before the compensation has been paid; but that, failing agreement as to the amount of compensation, they may deposit a sufficient sum in the bank as security for that compensation, and proceed to enter.

7.70 These provisions have been overtaken by paragraph 3 of Schedule 2 to the 1947 Act, which provides for the acquiring authority to enter upon and take possession of the land, after serving a notice of entry on the landowner giving 14 days' notice. A notice of entry can be served at any time after the service of the notice to treat. This procedure is stated to be in place of the procedure set out in sections 83 to 88 of the 1845 Act, but the paragraph stipulates that the compensation payable is to be the same as if those provisions had been complied with. In practical terms this means that the acquiring authority will not be able to register their title to the land until compensation has been determined and paid.

7.71 As is pointed out in the CPO Circular, the use of the notice of entry procedure can enable the acquiring authority to gain possession of the land within as little as 14 days of the service of the notice to treat.[55] The Circular urges acquiring authorities to give landowners as much notice as possible. We have no reason to suppose that acquiring authorities ignore that advice; but the question remains whether that is too short a period, as a statutory minimum. On the other hand, there may be occasions of great urgency when even the period of 14 days is too long.

7.72 Of note in this regard is the position in Australia. Section 47 of the Land Acquisition Act 1989, as amended, provides that where an acquiring authority compulsorily acquire an interest in land, and the interest entitles the authority to possession of the land, a person occupying the land on the date of acquisition is entitled to remain in occupation of the land, or of such part of the land as the person specifies, by notice in writing given to the Minister, for the period of six months or for a longer period as agreed between the Minister and the person. This possession is subject to the terms and conditions agreed between the parties and can be displaced where urgent entry is required by the authority. This provision stems from a recommendation made by the Australian Law Reform Commission in 1980.[56] The recommendation was justified on the basis that a person whose land is acquired should be entitled to a period after acquisition during which he may consider his position and organise alternative accommodation. It was considered that in the vast majority of cases, such a delay would be of no particular disadvantage to the acquiring authority. A similar provision in Scots law may reduce hardship caused by a short period of notice.

7.73 Whatever period is considered to be reasonable, there is a question as to how long, if the acquiring authority do not enter the land immediately after that period, the notice of entry should remain in force. Considerable hardship can be caused if only 14 days are allowed for an owner to vacate premises. If, for whatever reason, the authority do not enter the land within that period, the landowner will remain in a state of considerable uncertainty. It might be sensible for there to be a provision that where, following a notice of entry, the authority do

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[55] Rowan Robinson & Farquharson-Black, para 3-20, "Research indicates that in England and Wales notice of entry is often served at the same time as the notice to treat. Most acquiring authorities give significantly longer than the minimum period of notice; if they do not and the notice to treat and notice of entry are served together, then owners and occupiers can face considerable hardship."

[56] The Law Reform Commission of Australia, *Lands Acquisition and Compensation,* (Report No 14), para 180.

not take possession of the land within the specified period, the notice should lapse, and that a further notice should require to be served. We ask the question:

48. For how long should a notice of entry remain valid?

Transfer of title

7.74 After the resolution of any questions as to the amount of compensation, the land is transferred to the acquiring authority. The technicalities of how that is accomplished are discussed in Chapter 8.

Implementation of CPO by GVD

Introduction

7.75 A GVD is a form of expedited procedure by which acquiring authorities can secure title to land more quickly than by a notice to treat. GVDs were first introduced (although not by that name) by section 17(3) of, and Schedule 6 to, the 1945 Act. Initially, they required to be authorised specifically by the Minister making or confirming the CPO, but in 1969 it was provided that any acquiring authority could execute such a declaration.[57] The relevant provisions are now set out in Schedule 15 to the 1997 Act. A GVD may be viewed as a variant on a notice to treat, since they share many of the same features. For example, the service of a GVD is deemed to constitute the service of a notice to treat upon every person on whom such a notice would have been required to have been served by section 17 of the 1845 Act. A GVD can be made in relation to part or all of the land to be acquired by the acquiring authority, and when it has taken effect, it vests all the land described in it in the authority. Questions of compensation are therefore deferred.

Procedure

7.76 Before an acquiring authority can make a GVD they must give notice of their intention to do so, either in the notice required to be given as to the confirmation of the CPO (see paragraph 5.33 above),[58] or separately. They may not make the GVD less than two months after that notice, other than with the consent in writing of all the proprietors affected.[59] The notice must set out the effect of the GVD, and invite all persons who consider that they are entitled to compensation in relation to the land to be acquired, to communicate with the acquiring authority. We deal with the requirements for describing the land in Chapter 8.

7.77 A GVD must be in the prescribed form.[60] As well as executing the GVD, the acquiring authority must issue notice in the prescribed form[61] to every occupier of the land and every other person who has given information to the authority in respect of the land, specifying the land comprised in, and stating the effect of the GVD.

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[57] See 1969 Act, s 31 and Sch 2.
[58] 1947 Act, Sch 1, para 6.
[59] 1997 Act, Sch 15, para 3.
[60] 1997 Act, Sch 15, para 1; 2003 Regs, reg 5(a) and sch 1, form 6. The form assumes that the CPO has itself been recorded or registered, as it may be.
[61] 1997 Act, Sch 15, para 4; 2003 Regs, reg 5(e) and sch 1, form 10.

7.78 The acquiring authority does not need to serve this notice in relation to land in which there subsists a short tenancy or a long tenancy which is about to expire.[62] A "short tenancy" is a tenancy for a year, or from year to year or any lesser interest.[63] A "long tenancy which is about to expire" means one granted for an interest greater than a short tenancy, but having at the date of the declaration a period to run which is not more than such period, exceeding a year, as may be specified in the declaration.[64] We see no reason to exclude these interests from the notice provisions, and accordingly ask the question:

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year to run?

7.79 At the end of the period of notice specified in the GVD, either party is entitled to insist on having the issue of compensation settled.[65] The relevant compensation provisions – i.e. the provisions of the 1845 Act, section 6 of the 1845 Railways Act, and the 1963 and 1973 Acts - apply as if on the date on which the GVD was made, a notice to treat had been served.[66] It has been held that the date of vesting will serve as the appropriate date for valuing the interest to be acquired.[67]

Objection to severance

7.80 Sometimes a GVD applies to part only of a house or factory, or part only of the park or garden attached to a house. As we noted above, at paragraphs 7.54 to 7.58, in relation to notices to treat, paragraph 4 of Schedule 2 to the 1947 Act enables a landowner, where only part of his or her house or factory, or garden, is being compulsorily acquired, to force the acquiring authority to acquire the whole property.

7.81 Paragraph 19 of Schedule 15 provides that paragraph 4 does not apply to land in respect of which a GVD has been made. Instead, where a GVD comprises only part of a house, building or factory, or only part of a garden or park belonging to a house, paragraph 20 enables the owner to require the acquiring authority to purchase the whole. Such a notice must be served within the 28 day period following the service on the landowner of the notice (mentioned in paragraph 7.76) that a GVD has been made.

7.82 The effect of a notice under paragraph 20 is to prevent the vesting of the land in question in the acquiring authority, and to prevent the authority from entering on to the land, until the notice has been disposed of.[68] Paragraph 22 of the Schedule gives the acquiring authority three options. They may:-

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[62] 1997 Act, Sch 15, para 4(a).
[63] 1997 Act, Sch 15, para 38. This will include an agricultural tenancy which was begun before 2003 as this will run from year to year. See the Agricultural Holdings (Scotland) Act 2003, s 1.
[64] 1997 Act, Sch 15, para 38. We consider whether such tenants should be entitled to notice at paras 8.51 to 8.54.
[65] The acquiring authority must pay the appropriate compensation, together with interest, equivalent to what they would have paid if possession of the land followed the service of a notice of entry under Sch 15, para 30 to the 1947 Act.
[66] However, s 39 of the 1963 Act, regarding the power to withdraw a notice to treat, is not applicable where a GVD has been executed. See the 1997 Act, Sch 15, para 18.
[67] *Renfrew's Trustees v Glasgow Corporation* 1972 SLT (Lands Tr) 2.
[68] Para 21.

- withdraw the notice to treat deemed to have been served on the landowner on the date on which the GVD was made;

- accept the notice of objection to severance, in which case the GVD will have effect as if the land severed had been included in the GVD (and the CPO) from the start; or

- refer the notice of objection to severance to the LTS, and notify the landowner that they have done so.

If the acquiring authority fail to take any of those options within the three months allowed by paragraph 22, they will be deemed to have withdrawn the deemed notice to treat.[69]

7.83 Where the acquiring authority withdraw the deemed notice to treat, the land affected is excluded from the GVD. Where they accept the paragraph 20 notice, all the land is included in the GVD and, if it was not so already, in the CPO.

7.84 Where a question is referred to the LTS, it considers, as with references under the 1947 Act, whether the severance will cause material detriment to a factory or house, or will seriously affect the amenity of a park or garden. As is the case with notices of objection to severance served following a notice to treat, the LTS is to have regard to the factors set out in section 54 of the 1973 Act. Chapter 18 examines the process for referring disputes to the LTS.

7.85 We note, with regard to the procedure outlined above, that the timescales are reasonably demanding. The landowner must serve a notice of severance within 28 days of the making of the GVD, and, therefore, before the authority can enter on to the land; and the authority have three months to make a choice of the options open to them.

7.86 Our preliminary view is that the provisions of paragraphs 19 to 29 of the Schedule strike a reasonable balance between the interests of the acquiring authority and the affected landowner. But it would be useful to know whether these arrangements cause any difficulty in practice. We ask the question:

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

Effect of GVD

7.87 The GVD cannot take effect before the end of a period of 28 days from the date on which it is made. It vests the land in the acquiring authority, and empowers them to enter upon the land and commence operations. Paragraph 7 of Schedule 15 provides:

> "At the end of the period specified in a general vesting declaration, the land specified in the declaration, together with the right to enter upon and take possession of it, shall vest in the acquiring authority as if the circumstances in which under the said Act of 1845 an authority authorised to purchase land compulsorily have any power to expede a notarial instrument (whether for vesting land or any interest in land in

[69] Para 23.

themselves or for extinguishing the whole or part of any feuduty, ground annual or rent, or other payment or incumbrance) had arisen in respect of all the land and all interests in it, and the acquiring authority had duly exercised that power accordingly at the end of that period."

7.88 From the perspective of the acquiring authority, the first advantage of the GVD is that it obviates the requirement for individual notices to treat and effectively transfers all the land described to the acquiring authority. This is particularly useful where a large number of different persons hold rights in the land to be acquired,[70] where it is difficult to identify the owners of the land, or of any rights in the land, or where there is uncertainty over boundaries. This convenience may be a significant factor as to why the GVD procedure is used so often.[71]

7.89 The second advantage for the acquiring authority is that a GVD takes effect quickly. However, there are questions as to the speed with which the acquisition can take place. The effect of the statutory provisions is that a GVD can take effect, irrespective of the wishes of the landowners concerned, within around 12 weeks of the confirmation of the CPO. This is the result of statutory changes made over the years, from a situation in which expedited compulsory purchase could take place only after a decision by a Minister, to a situation in which any acquiring authority can use the procedure. It would be as well to consider again whether it remains appropriate for GVDs to be available in all situations. We ask the question:

51. Should a GVD be available in all circumstances?

52. Are the time limits for implementing a GVD satisfactory?

Issues relevant to both notices to treat and GVDs

Date as at which value is assessed

(a) Notices to treat

7.90 We noted, at paragraph 7.28 above, that one effect of serving a notice to treat is to fix the interests in respect of which compensation is payable. But that service does not, of itself, fix the date as at which those interests are to be valued. For many years, it was assumed that valuation was to be as at the date on which the notice to treat was served. However, the matter was re-examined in the *West Midland Baptist* case.[72] The Corporation compulsorily acquired a church belonging to the respondents by a CPO dated 26 June 1947. A notice to treat was deemed to have been served on 14 August 1947. In September 1958, the Corporation offered the respondents a new site for their church, and, in September 1959, the respondents accepted that offer. It was agreed that 30 April 1961 was the earliest date upon which construction of the new church could have been commenced. The ownership of the existing chapel was the subject of a vesting declaration made on 24 June 1969. The dispute between the parties was whether the cost of equivalent reinstatement was to be

[70] Although a GVD can confer title over a large area in one deed, it is perhaps also worth noting that there does not seem to be any impediment preventing the acquiring authority from using several declarations for one large project. This may be advantageous in terms of financial planning and for managing the practical issue of notification over a number of stages.
[71] Rowan Robinson & Farquharson-Black, para 3.25.
[72] [1970] AC 874.

assessed as at the date of the deemed service of the notice to treat, or as at the earliest date on which work on the new church could have been begun.

7.91 The House of Lords held, unanimously, that the latter date (the earliest date on which work on the new church could have begun) was the correct one. Lord Reid observed:

> "It appears to me to be self-evident that, if anything is taken, compensation should be assessed as at the date when it is taken. But taking or acquisition under the Lands Clauses Act involves a series of steps spread over a period of time and so it is necessary to determine at what stage the promoters can properly be regarded as having taken the land and the owner can properly be regarded as having had it taken from him."[73]

More specifically, Lord Donovan remarked:

> "Upon the whole of the argument and after considering all the material put before us, I am of the opinion that the contention of the appellants that the date of the notice to treat is the date when values are to be ascertained for the purpose of compensation is invalid: and that the true date for such purpose is the date when the title to the property passes or compensation is agreed or paid. It may be that these dates will frequently coincide, and unlikely that there will be much difficulty in practice in determining the relevant date. The guiding principle should be, I think, that the date when the promoter becomes the owner of the property, whether in law or in equity, in place of the expropriated owner, or enters into possession of it, is the date according to which the necessary values should be ascertained."[74]

7.92 This still leaves room for some slight ambiguity, where the date of vesting is different from the date when compensation is assessed. The *West Midland Baptist* case was considered in a Scottish case, *Renfrew v Glasgow Corporation,*[75] in which Glasgow Corporation had, on 12 January 1966, recorded a notice of title in the Register of Sasines by virtue of the then equivalent of a GVD. The Corporation had indicated to the landowner that it did not require entry to the premises at that time, and the landowner remained on the premises, conducting business. In the proceedings before the LTS to assess compensation, there was a question as to whether that should be calculated as at the date of vesting (12 January 1966), in which case the agreed figure was £40,447.30, or as at the date of assessment by the LTS, in which case the agreed figure was £52,068.05.

7.93 In its judgment the LTS observed:

> "The Tribunal is of opinion that the several opinions in [the *West Midland Baptist* case] are wholly consistent with the view that the land is "taken" as at the date when the acquiring authority obtain a vested title in the same - in this case on January 12, 1966. In many cases the former owner remains in physical occupation of the subjects but not as owner, his interest as owner is lost and the now expropriated owner remains in occupation on some other basis, e.g. as tenant of the acquiring authority, or on sufferance or some special understanding; but so far as ownership is concerned the axe has fallen at the date of vesting and his interest in the land has been taken. … Once the Corporation was vested in the land it could not withdraw

[73] At page 894.
[74] At page 911.
[75] (1972) 24 P & CR 143.

> and on the other hand it was open to the claimants to compel the Corporation to adjust and settle compensation at that stage."[76]

7.94 Therefore the compensation awarded was £40,447.30, being assessed at the date of vesting.

7.95 The matter was considered again in the case of *Birrell Ltd v City of Edinburgh District Council*.[77] In that case the Council had intimated that they would expede a notice of title on 8 September 1969, although they did not require possession of the property at that date. The notice of title was recorded on 1 October 1969. The pursuers continued to occupy the premises, and conduct business from them, until 27 May 1970. The figure for compensation was agreed between the parties, but they disagreed as to the date from which interest should be payable. The pursuers claimed interest from 8 September 1969, but the Council said that no interest should be payable for the period prior to their entry on to the premises. The case ultimately reached the House of Lords, where it was decided essentially on the same basis as the *Renfrew* case. Lord Fraser of Tullybelton observed:

> "I would adopt the view of the learned judges of the Second Division who considered that the respondents' occupation of the premises after 8th September 1969 was only by permission of the appellants and as their licensees. From and after that date the appellants were the owners of the premises. They alone had the right to decide how they were to be used and by whom. They might have been able to let the premises for a rent until they were required for demolition, or they could have permitted any person they liked to occupy the premises rent free until that time came. If I may borrow the apt expression of the Lord Justice-Clerk, 'the fruits were the defenders', to dispose of as they chose.' In fact they chose to permit the respondents to occupy the premises, but the fact that the respondents were the sellers, although it may explain why the arrangement was convenient to both parties, does not put them in any different position from that of any other party who might have been permitted to occupy the premises rent free. They occupied as representatives and by permission of the appellants.[78]

7.96 The House of Lords arrived at that conclusion after an exhaustive survey of the statutory provisions, and a consideration of whether those provisions corresponded with Scots common law. As Lord Fraser put the matter:

> "The consequence which follows from the provisions to which I have referred is in my opinion consistent with the common law in Scotland which requires a purchaser who has acquired land before he has paid the price to pay the seller interest on the price from the date of the purchase."[79]

7.97 Therefore, interest was payable from the date of vesting.[80] In our view that is a principled position. The date on which the land vests in the acquiring authority is the date on which the landowner is deprived of his right to remain in the property, and equally it is the date upon which – or at least from which – the acquiring authority can be compelled to pay compensation. Rowan Robinson & Farquharson-Black suggest that, as a general principle, interests subsisting at the date of the notice to treat should be valued according to their

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[76] At p 149.
[77] 1982 SC (HL) 75.
[78] At pp 111-112.
[79] At p 110.
[80] See Ch 18, paras 18.37 and 18.38 for a discussion of the rate of judicial interest.

nature or extent at the valuation date.[81] It appears to us that it would be sensible to state that position, as the default position, in the proposed new statute. We accordingly propose that:

53. Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.

7.98 It may be that there will be cases, particularly where a notice to treat is used, where the acquiring authority will secure entry to the land before it vests in them. We have considered the implications of this in a case where the acquiring authority have sought to withdraw after they had secured entry to the land.[82] But where there is no such complication, and the development actually proceeds following entry on to the land, we suggest that the appropriate date at which to fix the value of the land, and the date from which interest should run on the compensation, should be the date of entry. We propose that:

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed as at, and interest on compensation should run from, the date of entry.

7.99 We consider one exception to the appropriate date for assessing compensation[83] being either the date of vesting, or the date of entry, in situations where rule 5 (section 12(5) of the 1963 Act) applies. Where the building to be compulsorily acquired is of such a nature that there is no demand or market for it, the compensation under rule 5 is designed to meet the costs of reinstating an existing facility in another place. The measure of compensation is not the valuation of the building, but the actual cost of replacement on another site. This was the situation in the *West Midland Baptist* case. In such cases, the appropriate date for fixing compensation is the date upon which the reinstatement might reasonably be begun. We see no reason to re-consider the desirability of such an approach. Accordingly, we propose that:

55. In a situation falling within section 12(5) of the 1963 Act, the date upon which compensation should be assessed, and the date from which interest on the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

(b) GVDs

7.100 Where the CPO is implemented by means of a GVD, the land vests in the acquiring authority from the date when the GVD takes effect. Accordingly, it is at that date that the value of the land is to be assessed. That will be the case even where the acquiring authority leave the erstwhile owner in possession of the property.[84]

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[81] Para 5-13.
[82] *R v Northumbrian Water Limited, ex parte Able UK Limited,* above, at para 7.42.
[83] Rowan Robinson & Farquharson-Black, paras 5-11 to 5-13 discuss other non-traditional approaches by the courts, e.g., *Lyle v Bexley London Borough Council* [1982] RVR 318.
[84] See the discussion of *Birrell v City of Edinburgh District Council,* above, paras 7.95-7.97.

7.101 Finally, on the matter of assessing the date at value is to be assessed, it may be unwise to have too rigid a rule. There may be cases where, because of the particular circumstances of the transactions, it will be inappropriate, or inequitable, to limit the LTS to one of the three possible dates discussed above. It appears to us that it would be appropriate to confer on the LTS a residual discretion, to be used where the interests of justice so require. We accordingly ask the question:

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date at a date different from any of those mentioned above, where it appears to the LTS to be in the interests of justice?

Can acquiring authorities acquire their own land by compulsory purchase?

7.102 There is one final general matter to discuss again at this point. There are occasions when acquiring authorities already own land which is to be part of a development, and wish to develop it on the same basis as other land which is to be compulsorily acquired. Where the acquiring authority's own land is subject to burdens of one kind or another, obvious difficulties are created. In practice, and in the normal case, where the ownership of the land is clear, an acquiring authority could use compulsory purchase powers to extinguish any burdens and servitudes to which the land is subject. They can then proceed with the development.

7.103 But there are occasions when a acquiring authority exercising compulsory purchase powers are genuinely unsure as to the ownership of land, including land in heavily built up areas of old towns and cities, not yet registered on the Land Register. There will also be occasions where the land in question is common good land. In such a case it may not be competent for an acquiring authority to change the purposes for which the land is to be used without the consent of the court – and there is no certainty that the court will permit that.[85] There are two issues.

(a) Non-competence of acquiring authority to dispone their own land to themselves

7.104 First, we see no reason to dissent from the view, noted above (at paragraph 2.36), that it is not competent for an acquiring authority to dispone their own land to themselves. Where the acquiring authority are a local authority, the discussion, above, in relation to common good land, would also be relevant. The careful provisions which Parliament has made as to the preservation and use of common good land should not be allowed to be circumvented by an authority which seeks compulsorily to acquire its own land. The all-embracing nature of a GVD cannot overrule the ordinary rules as to land ownership.

7.105 In any event, it would be well outside the scope of this project to seek views on, or to make recommendations as to, the circumstances in which local authorities should be able to escape from the duties incumbent upon them in relation to common good land.[86] Such a discussion would have no relevance to the subject of compulsory purchase, since, as noted above, there could be no question of such an authority's compulsorily acquiring their own

[85] See *Portobello Park Action Group Association v City of Edinburgh Council* 2013 SC 184. In that case the court refused permission to the Council to change the use of the land concerned, and primary legislation was required to enable that to be done.

[86] The question of common good land was considered in the Report of the Land Reform Review Group: *The Land of Scotland and the Common Good*" May 2014.

land. As we have already discussed (at paragraph 2.22), we consider that the nature of common good land does not prevent it being compulsorily acquired by acquiring authorities other than the authority which own it.

(b) Ascertaining ownership

7.106 Second, it can be difficult to ascertain who owns the title to certain land which is in the Register of Sasines.[87] We understand that this difficulty arose when Glasgow City Council were acquiring land for the purposes of the 2014 Commonwealth Games. It appears to us that where a acquiring authority are in genuine doubt as to whether they own some part of a particular parcel of land which they intend to acquire, then they should be able to acquire the whole, by means of a GVD, and the GVD should operate as a sound title for the purposes of recording the title in the Land Register. We accordingly propose that:

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular part of a parcel of land which they intend to acquire, where title is in the Register of Sasines, they should be able to:

(a) use a GVD in relation to the whole of the land, and

(b) register the GVD in the Land Register.

Challenges to use of land allegedly inconsistent with basis upon which CPO granted

7.107 On this matter it appears that the courts will be inclined to take a broad view. In *The Queen on the application of Argos Limited v Birmingham City Council,*[88] Argos had a lease on a unit in the Pallasades shopping centre above New Street station in Birmingham. The whole of the station and the shopping centre were included in a scheme to modernise and improve the station, the shopping centre and some adjacent land. The scheme was described in the outline planning permission as the construction of two tall buildings, with public spaces and infrastructure works, including retail space, restaurants and cafes, drinking establishments, hot food takeaways, financial and professional services, business uses and residential accommodation. A CPO was sought in relation to all the property concerned. Argos objected to the granting of the order although, as originally conceived, and as explained by the Council, it appeared that the scheme would not require them to cease trading from the unit.

7.108 The terms of the CPO contained the general purpose of:

> "[F]acilitating the major refurbishment and associated development of New Street Station and adjoining land … [including] changes to the Pallasades Shopping Centre".

7.109 After the confirmation of the CPO, but before the making of a GVD, the original scheme, in particular in relation to the construction of the two towers, became unviable and alternative proposals were put forward, in which the residential and office developments would not be constructed, but a large John Lewis store would occupy much of the shopping centre, including the unit leased by Argos. At the time of the litigation no planning

[87] The Register of Sasines, unlike the Land Register, is not map-based.
[88] [2011] EWHC 2639 (Admin).

permission had been granted for the development which was to include the John Lewis store.

7.110 Nevertheless, GVD No. 8 vested Argos's interest in their unit No. 30 in the Council. Argos challenged the GVD on the ground, *inter alia,* that it was being used to acquire land for purposes outside the scope of the CPO. In support of that contention, Argos suggested that it was legitimate for the court to make a broad comparison between the development which had justified the CPO, and the development now being proposed. If such a comparison were made, it would be seen that there were major differences between the two schemes – particularly with regard to the exclusion of any new residential and office space. Taking a broad, common-sense view of the matter, the court could legitimately hold that the present acquisition was not within the terms of the CPO.

7.111 After examining in some detail various *dicta* as to the duty of the court to make sure that statutory powers were used only for the purpose for which they were granted, Ouseley J observed:

> "The mere fact, therefore, that a particular permission or development proposal may have been the basis for making and confirming the order does not of itself define the scope of a CPO and its purpose, and prevent acquisition for a different development proposal provided the purposed of the acquisition remains within the scope of the CPO."[89]

In essence, Ouseley J concluded that the list of aims in the original planning permission (set out in paragraph 7.107 above) was a non-exhaustive permissive list:

> " … I am satisfied that the listed uses are permissive. Not all have to be provided or provided in the new build. The overall purpose and final phrase are quite important in guiding how the rest of the terms of the CPO should be interpreted. The new build listed uses indicate the mix of uses which can arise from a new build to achieve the overall purpose of the new build within the scheme. It could potentially frustrate that if specific uses, even if only a small amount just to satisfy the CPO, had to be included. There are clearly no floor space minima or maxima in the CPO for those uses either. If one's attention is confined to the statutory powers and the terms of the CPO there is nothing which provides figures even broadly for those uses ….
>
> The phrase 'changes to the Pallasades Shopping Centre' cannot, I accept, cover wholesale demolition and replacement by a new build, but so long as what is done to the Pallasades Shopping Centre comes within the concept of change it is within the scope of the CPO.
>
> Again, nothing in the CPO ties it to an outline planning permission or to any particular degree of change, nor does it require any particular units to be left unaffected. For example, if the location or extent of the atrium changed so that unit 30 were included in it, or a separate atrium were required to be punched through the corners of the Pallasades Shopping Centre, that would remain obviously within the scope of the CPO.
>
> Nor is there ambiguity in the CPO. Although the concept of 'changes to the Pallasades Shopping Centre' is very broad, that does not make the phrase or the CPO ambiguous. A court can judge whether a proposal is in or goes beyond the

[89] At para 102.

proper meaning of that phrase. It is a broad phrase which may be uncertain in its application, but that is not to say that it is ambiguous on that account."

7.112 Argos' challenge accordingly failed.

Implementation of CPO by third procedure – sections 84 to 86 of 1845 Act

7.113 Under section 84 of the 1845 Act it is competent for acquiring authorities who wish to enter upon land before agreement has been reached with the owner, to pay money equal to the amount of compensation into a bank, and, if required, to give a personal undertaking to pay that amount to the landowner. The acquiring authority can then enter the land and begin work. The money deposited in the bank can be invested. After questions of compensation have been settled, and compensation has been paid to the landowner, the acquiring authority can recover the money from the bank, together with any surplus accumulated as a result of any investment.

7.114 We are not aware of any recent case in which this procedure has been used, given the availability of the GVD procedure which enables acquiring authorities to enter upon land without having paid compensation, We note that in their final report, the Law Commission recommended the repeal of the equivalent provisions in the English 1845 Act. We propose that:

58. The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced.

7.115 In general, in relation to time limits throughout the process, we ask the question:

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

Implementation of CPO by proposed single procedure

7.116 We have tried to identify the differences between the notice to treat, on the one hand, and the GVD, on the other. As each has features which are more or less useful in particular circumstances, we wonder whether a combined procedure would be useful.

7.117 The GVD is the more commonly used procedure. It has the great advantage that it gives the acquiring authority the right to the land at an early stage by means of vesting, without any requirement for the granting of a conveyance by the landowner. It can be used in respect of the whole or part of the land covered by the CPO.

7.118 On the other hand, and unlike a notice to treat, the land to which it refers requires to be described in conveyancing terms from the outset. It has longer time limits than those relating to a notice to treat, so that entry cannot be secured until three months from the first notice. In cases of urgency the notice to treat procedure might still be preferable.

7.119 If there were to be a single method of implementation, we propose a procedure which is similar to the current GVD but with the time limits currently applicable to a notice to treat. Thus, the new procedure would have the following features:

- A notice could be served immediately following the making/confirmation of the CPO;

- The notice would require to describe the land in conveyancing terms;
- The notice could apply to the whole or part of the land covered by the CPO;
- The notice would, following the period of four weeks after it was issued, operate as a registrable transfer of the land described in it to the acquiring authority;
- The procedure would, as at present, leave all questions of compensation to be settled at a later stage.

7.120 We ask the questions:

60. Would a new method of implementation of a CPO, along the lines described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

61. If so, what features should it have in addition to, or in place of, those mentioned above?

Chapter 8 Conveyancing procedures

Introduction and scope of Chapter

8.1 In this Chapter we consider the main conveyancing aspects of compulsory purchase of land. We begin by discussing what is meant by "land". We then consider how ownership of land is transferred from the current owner to the acquiring authority. We then look at the effect of the acquisition on subsisting rights affecting the property, such as leases and real burdens. Finally, we examine how new rights subordinate to ownership, such as servitudes, are compulsorily acquired.

Meaning of "land"

8.2 We have already seen,[1] that in an ASP, the term "land" has the meaning given to it by schedule 1 to the 2010 Act and "includes buildings and other structures, land covered with water, and any right or interest in or over the land".[2] Therefore, where any ASP, or Scottish instrument within the meaning of section 1(4) of the 2010 Act, confers a power to acquire "land" compulsorily then, subject to express contrary provision, this will include the acquisition of rights other than ownership such as existing leases and liferents.

8.3 While the definition of "land" in the 2010 Act is a broad one, at a practical level we think that it is sensible to draw a distinction between (a) the ownership of a physical piece of land; and (b) subordinate rights affecting such a piece of land.

(a) A physical piece of land

8.4 Normally it is the ownership of a physical piece of land,[3] such as the Glasgow 2014 Commonwealth Games village site, which an acquiring authority will wish to obtain, rather than lesser rights such as a lease. Indeed in the cases of servitudes and real burdens, these rights are pertinents of the land which they benefit and it would be incompetent to acquire them separately from that land.[4]

8.5 It is also possible for land to be divided legally into what are known as "separate tenements". These are things which can be owned separately from the soil (or *solum*), such as minerals.[5] The acquiring authority may wish to acquire ownership of these too. Some separate tenements are incorporeal (intangible) – for example, the right to fish for salmon. Thus an acquiring authority seeking to develop land beside a river may need to acquire ownership of the salmon fishing rights as well as the river bank to enable the development to proceed.

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[1] See paras 2.47-2.49 above.
[2] Where the term "land" is used in a UK statute then the similar definition contained in Sch 1 to the Interpretation Act 1978 c. 30 applies.
[3] This can also be described as "corporeal heritable property". See e.g. K G C Reid, *The Law of Property in Scotland* (1996) para 12.
[4] Reid, *The Law of Property in Scotland* para 201.
[5] See G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd edn, 2013) paras 14.13-14.17.

(b) Subordinate rights

8.6 In contrast, in relation to subordinate rights what the acquiring authority want to do is to extinguish the rights, rather than acquire them, if they stand in the way of the development for which the compulsory purchase is authorised. For example, if the land is occupied by tenants they will want to be able to acquire the land and remove the tenants. To put this another way, the ownership of the land will still exist following the acquisition but will now be held by the acquiring authority. But the acquiring authority will wish the subordinate rights to cease to exist. In certain cases, and only when they have the express power[6] to do so, the acquiring authority may wish to create new subordinate rights. For example, they might wish to acquire a servitude right for a drainage pipe. Taking a lesser right such as a servitude has the advantage that there is less effect on the landowner and that a smaller amount of compensation is thus payable.

8.7 This logic influences the remainder of the Chapter, which deals in turn with (1) acquiring ownership; (2) the effect on existing subordinate rights; and (3) acquiring new subordinate rights.

Methods of acquiring ownership

Current law

8.8 There would appear to be five separate ways in which ownership can be acquired under the current law of compulsory purchase. These are: (i) the statutory conveyance; (ii) the notarial instrument; (iii) the notice of title;[7] (iv) the GVD; and (v) the ordinary disposition. We take these in turn. We then consider the situation where ownership is acquired consensually but compulsory purchase powers could have been used.

(a) Statutory conveyance

8.9 Section 80 of the 1845 Act provides for a form of statutory conveyance by the landowner to the acquiring authority:

> "Conveyances of lands so to be purchased as aforesaid may be according to the form of Schedule (A.) to this Act annexed, or as near thereto as the circumstances of the case will admit; which conveyances, being duly executed, and being registered in the general register of sasines shall give and constitute a good and undoubted right and complete and valid title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding."[8]

The reference to the General Register of Sasines nowadays means the Land Register as, even if the land is not already on the Land Register the transfer resulting from the

[6] See paras 2.57-2.68 above.
[7] Some doubt has been expressed whether this method is competent. See paras 8.28-8.30 below.
[8] As amended by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, sch 13, para 1.

compulsory purchase will induce first registration in that Register.[9] Sections 81[10] and 82 provide that the expenses of the conveyance will be met by the acquiring authority.

8.10 The use of this so called "statutory conveyance" is not compulsory. It has been said to be the most common means of completing title,[11] but this would now seem to be questionable given the extent to which we understand GVDs are currently used. The form of conveyance in Schedule A is as follows:

> "I, of, in consideration of the sum of, paid to me [or, as the case may be, into the, Bank (or to A.B. of, and C.D. of, two trustees appointed to receive the same)], pursuant to an Act passed, &c., intituled, &c., by the [here name the company], incorporated by the said Act, do hereby sell, alienate, dispone, convey, assign and make over, from me, my heirs and successors, to the said company, their successors and assignees, for ever, according to the true intent and meaning of the said Act, all [describing the premises to be conveyed], together with all rights and pertinents thereto belonging, and all such right, title and interest in and to the same as I and my foresaids are or shall become possessed of, or are by the said Act empowered to convey. [Here insert the conditions (if any) of the conveyance, and a registration clause for preservation and diligence, and a testing clause, according to the form of the law of Scotland].
>
> Note - In the case of a traditional document subscription of it by the granter, will be sufficient for the document to be formally valid, but witnessing of it may be necessary or desirable for other purposes (see the Requirements of Writing (Scotland) Act 1995, which also makes provision as regards the authentication of an electronic document)."[12]

8.11 Since the form of a statutory conveyance is set out in a schedule to the 1845 Act, it is also commonly known as a "schedule conveyance".

8.12 The fact that the form refers to the sum paid to the owner of the land indicates that it cannot be used before the issue of compensation has been settled either through agreement between the parties or through a reference to the LTS.

8.13 Under section 80 the intended effect of a duly executed and registered[13] statutory conveyance is to give the acquiring authority (and their successors and assignees as the case may be) "a good and undoubted right and complete and valid title in all time coming". Despite this superficially clear wording, it has been doubted whether a duly executed and

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[9] 1979 Act, s 29(2) provides that previous enactments made before 1979, excluding those listed in Sch 3 to that Act, which make reference to the Register of Sasines, should be taken as including references to the Land Register, unless the context provides otherwise. In our report on Land Registration we found that this "translation" provision was still necessary due to the large number of private statutes, local statutes and statutory instruments where it remains unclear whether references to the Register of Sasines should be taken as including references to the Land Register. See Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) Appendix A, Draft Bill, s 94. The 2012 Act does not adopt the proposed new section and the 1979 Act s 29(2) remains in force.

[10] As amended by the 1959 Act.

[11] Rowan Robinson & Farquharson-Black, para 3.23.

[12] As amended by 2012 Act, Sch 5, para 1.

[13] The original requirement to record the deed within 60 days was removed by Abolition of Feudal Tenure etc. (Scotland) Act 2000, sch 13, para 1.

registered statutory conveyance will cure defects in the title to the land being sold.[14] If these doubts are justified, the *nemo plus* principle[15] will apply. In other words the acquiring authority will only derive good title where the seller has such title and any defects in the seller's title will be transferred to the acquiring authority. This is unsatisfactory and highlights the general need for reform in this area.

8.14 The special status of the statutory conveyance is evident from the fact that it lacks a number of the standard requirements of an ordinary disposition. The statutory form contains no reference to existing real burdens. It has no date of entry. There is no warrandice clause.[16] The statutory conveyance also defeats occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004.[17]

8.15 It has been questioned to what extent the content of the statutory conveyance must be followed verbatim and whether *any* departure will result in it becoming an ordinary disposition and losing the special quality and privileges of a statutory conveyance.[18] In this regard, however, section 80 provides that the statutory conveyance has some level of flexibility; the form used need only be as near to the prescribed form "as the circumstances of the case will admit". This suggests that the addition of some of the standard requirements of an ordinary disposition may be desirable or necessary in specific cases.[19]

8.16 In *Duke of Argyll v London, Midland and Scottish Railway Company*, Lord President Clyde noted:

> "The defenders' disposition contains clauses of assignation of rents and of writs, and a warrandice clause. These are all inconsistent with a "Schedule" conveyance, which is concerned neither with rents nor with writs, and is its own warrandice."[20]

8.17 This accordingly suggests that a statutory conveyance implementing a confirmed CPO ought not to stray *unduly* from the prescribed form set out in Schedule A to the 1845 Act as to do so may be inconsistent with that prescribed form and affect the deed's special status. In practice, acquiring authorities may deal with this issue by imposing additional conditions by way of back-letters rather than having them included in the body of the conveyance.[21]

8.18 In any event, many of the usual clauses contained in an ordinary disposition may not be necessary in the special case of a statutory conveyance under the 1845 Act and so

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[14] For a vigorous debate, see I J Ghosh, "Statutory Conveyances – Examination of Title" 1990 JLSS 236; A J McDonald, "Schedule Conveyances under the Lands Clauses Consolidation (Scotland) Act 1845" 1992 JLSS 5 and 68; and I J Ghosh, "Schedule Conveyances under the Lands Clauses Consolidation (Scotland) Act 1845" 1992 JLSS 182. See also SME para 110.

[15] See, e.g. Gretton and Steven, *Property, Trusts and Succession* paras 4.41-4.43.

[16] Warrandice is the guarantee of good title. See Reid, *The Law of Property in Scotland* para 701.

[17] Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 6(1A) and (2); Civil Partnership Act 2004 s 106(1A) and (2).

[18] G Welsh, "Taking Title" in The Law Society of Scotland, *Compulsory Purchase in Scotland* (1983) para 6.14; SME para 107.

[19] See e.g. para 8.20 below.

[20] *Duke of Argyll v London, Midland and Scottish Railway Company* 1931 SC 309 at 321.

[21] SME para 107. A "back-letter" is a subsidiary or supplemental agreement between two or more parties which documents certain rights and obligations of those parties which, for some reason, are not included in the principal agreement between them.

acquiring authorities will not need to deviate too far from the prescribed form. This can be demonstrated by considering each of the usual clauses mentioned above in turn.[22]

8.19 Section 106 of the 2003 Act has the effect of extinguishing any existing servitudes and real burdens unless the CPO, or the conveyance implementing it, expressly provides otherwise.[23] This means that it will not be necessary for the conveyance to refer to existing real burdens unless these are to be preserved.

8.20 Although it is unnecessary to insert a clause into the statutory conveyance dealing with the date of entry, in practice this is required to negate the statutory assumption that "where no term of entry is stated in a conveyance of lands, the entry shall be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it shall appear from the terms of the conveyance that another term of entry was intended".[24] In the *Duke of Argyll* case (above), the inclusion of a date of entry in the statutory disposition did not attract adverse comment.

8.21 Finally, the statutory conveyance contains no warrandice clause. This, in contrast, is invariably included in the case of an ordinary disposition.[25] However, warrandice can be inferred from section 80 of the 1845 Act which provides for good and undoubted right in all time coming "any law or custom to the contrary notwithstanding". We note also the comments of Lord President Clyde in the *Duke of Argyll* case (above) where he held that a statutory conveyance is "its own warrandice".[26] It therefore appears unnecessary to add a separate clause to the statutory form in order to cover warrandice.

8.22 Mention must also be made of section 7 of the 1845 Act.[27] This gives power to certain persons to "sell, convey, and dispose of such lands, or of such right therein" to the acquiring authority. The provision lists the relevant persons. These include corporations, liferenters, judicial factors, trustees, executors and administrators. It also includes "tutors, curators, and other guardians for persons suffering from mental disorder within the meaning of the Mental Health (Scotland) Act 1960, or for persons under any other disability or incapacity".[28] The list has been subject to amendment: it originally included married women. The principal purpose of the provision appears to be to allow land to be conveyed to the acquiring authority where the owner lacks capacity or power to do so. In the case of liferenters, however, the provision addresses the problem that a liferent is not transferable.[29] Although section 7 provides a power to sell and convey in the listed cases, it is doubtful whether the provision will cure any defect in the title of the person conveying.[30]

(b) Notarial instrument

8.23 Completion of title by way of notarial instrument is permitted under sections 74 to 76 of the 1845 Act. There is a degree of overlap between the provisions of section 74 and

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[22] See further SME para 107.
[23] See para 8.68 below.
[24] Conveyancing (Scotland) Act 1874, s 28.
[25] See e.g. D Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 10.11.
[26] See para 8.16 above.
[27] See also para 7.6 above.
[28] In relation to tutors and curators see now the Adults with Incapacity (Scotland) Act 2000, Sch 5, para 1.
[29] Gretton and Steven, *Property, Trusts and Succession* para 21.12.
[30] See SME para 110 and the articles cited in fn 14 above.

section 76.[31] Section 74 provides that, upon deposit of the compensation money in the bank,[32] a landowner with limited powers, who has qualified title or who is lacking in capacity, may be required to convey title to the acquiring authority. If that person fails to do so,[33] or fails to adduce good title[34] then title may be competed by way of notarial instrument.

8.24 Section 76 applies where a landowner is not under a disability but refuses to accept the compensation, to execute a conveyance or to make out title or where that person is absent or cannot after diligent inquiry be found or if that person fails to appear at the inquiry into compensation before a jury.[35] In these circumstances, the acquiring authority may complete title by recording a notarial instrument after depositing compensation in the bank in terms of section 75. Once title has been completed the acquiring authority are entitled to immediate possession.[36]

8.25 There is no prescribed form of notarial instrument. However, it must contain a description of the lands in respect of which the notarial instrument is made, recite the purchase or taking of the land by the acquiring authority, recite the names of the parties from whom the land is being taken, the deposit made in respect of the land and declare the fact of the default having been made. The notarial instrument must be stamped with the stamp duty[37] which would have been payable upon an ordinary conveyance to the acquiring authority of the lands described.[38]

8.26 The effect of the duly executed notarial instrument is to vest the seller's right and interest in the acquiring authority.[39] Upon vesting, the acquiring authority have the right to immediate possession of the land.[40] On being registered in the Land Register (or formerly the Register of Sasines)[41] the notarial instrument shall "have the same effect as a [statutory] conveyance so registered".[42]

8.27 Alternatively, a GVD could be used by the acquiring authority to obtain good title when presented with any of the barriers which cause them to resort to the notarial instrument procedure following a notice to treat.[43] Indeed, it has been suggested that, in comparison to GVD procedure, the use of a notarial instrument is "time-consuming and clumsy".[44]

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[31] Rowan Robinson & Farquharson-Black, para 3-24; W M Gordon, *Scottish Land Law* (2nd edn, 1999) para 29-18; J P Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh* (1903) p 396.
[32] 1845 Act ss 67-71. In most cases involving a notarial instrument it is unlikely that the compensation will have been agreed between the parties and it would therefore seem necessary to have the amount determined by the LTS.
[33] *Graham v Caledonian Railway Co* (1848) 10 D 495.
[34] *Miles v North British Railway Co* (1867) 5 M 402; *Thomson v North British Railway Co* (1867) 5 M 410.
[35] 1845 Act, s 75.
[36] 1845 Act, ss 74 and 76; *Alexander v Bridge of Allan Water Co* (1868) 6 M 324.
[37] But stamp duty was replaced by Stamp Duty Land Tax for "land transactions" under part 4 of the Finance Act 2003. S 60 of that Act provides a relief from SDLT for compulsory purchase facilitating development where, following the purchase, the development is carried out by a third party. SDLT will be replaced by Land and Buildings Transactions Tax on 1 April 2015 and the relief is continued by the Land and Buildings Transactions Tax (Scotland) Act 2014, sch 14.
[38] 1845 Act, s 74.
[39] 1845 Act, ss 74 and 76.
[40] 1845 Act, ss 74 and 76. There seems to be a large degree of repetition between these two sections.
[41] See 1979 Act, s 29(2). See fn 9 above.
[42] 1845 Act, ss 74 and 76.
[43] See para 8.31 below.
[44] Welsh, "Taking Title" in *Compulsory Purchase in Scotland* para 6.62.

(c) Notice of title

8.28 Where the seller is unable or unwilling to give title, or cannot be found, it has been said that the acquiring authority can make use of a notice of title instead of a notarial instrument, but the position is not entirely free from doubt.[45] Section 6 of the Conveyancing (Scotland) Act 1924 provided that a notice of title is equivalent to a notarial instrument. However, section 6 has now been repealed.[46] The reason for the repeal was that outwith specialist contexts such as compulsory purchase the notarial instrument had become obsolete in practice as it had been replaced with the notice of title.[47]

8.29 Section 4 of the 1924 Act, however, also equates a notice of title to a notarial instrument.[48] A notice of title narrates, within the prescribed form,[49] that the last recorded title and the midcouple[50] were examined by the solicitor named in the notice and that the grantee of the midcouple "has rights as proprietor" to the property in question. A "midcouple" normally has to be a general conveyance, in other words a transfer of the property which does not use a conveyancing description and therefore cannot be directly registered in the Land Register.[51] A confirmed CPO confers the right to acquire land as opposed to being a general conveyance. But the statutory definition includes any "writing … in virtue of which a notarial instrument could before [28 November 2004] be expede".[52] This covers confirmed CPOs.[53]

8.30 Nevertheless, as the 1845 Act refers only to notarial instruments, it is perhaps desirable for acquiring authorities to make use of these rather than notices of title in order to adhere strictly to the provisions of the Act. As we noted in our Report on the Abolition of the Feudal System: "[In compulsory purchase] the notarial instrument performs the function of setting out the circumstances in which land has been acquired compulsorily. It is not simply a method of completing title where there is an unbroken chain of writs from the person having the last recorded title." In any case, there would seem to be no particular advantage in using a notice to title over a notarial instrument.[54]

(d) GVD

8.31 Where the acquiring authority have used a GVD instead of a notice to treat,[55] title will vest in them under section 195 of and Schedule 15 to the 1997 Act, at the end of the period specified in the GVD (which is a minimum of 28 days).[56] The land, together with the right to enter upon and take possession of it, vests in the acquiring authority as if the circumstances

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[45] Rowan Robinson & Farquharson-Black, para 3.24; SME para 111.
[46] Abolition of Feudal Tenure etc. (Scotland) Act 2000, sch 13, para 1.
[47] Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 168, 1999) paras 7.27-7.33.
[48] SME para 111 and J M Halliday, *Conveyancing Law and Practice* vol 2 (2nd edn, 1997) para 31-66.
[49] Conveyancing (Scotland) Act 1924, Sch B.
[50] A "midcouple" is "[a]ny statute, conveyance, deed, instrument, decree or other writing whereby a right to land or any real right in land is vested in or transmitted to any person…" See the 1924 Act, s 5(1). In order to be an unregistered holder, and therefore be entitled to complete title via a notice of title, a person must be linked by one or more midcouples to the registered holder.
[51] G L Gretton and K G C Reid, *Conveyancing* (4th edn, 2011) para 24-05 and 24-09.
[52] 1924 Act, s 5(1). "Expede" means draw up a legal document.
[53] The competency of using a notice of title in the context of compulsory purchase appears to be confirmed by the 2003 Act, s 106(5)(a)(ii).
[54] See SME para 111.
[55] See generally Ch 7 above.
[56] 1997 Act, Sch 15, para 1.

under the 1845 Act, in which the acquiring authority have power to expede a notarial instrument, had arisen.[57] The owner does not grant any conveyance.

8.32 It has therefore been said that any defects in the title are immaterial.[58] However, the effect of a notarial instrument is that "all estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited shall vest absolutely" in the acquiring authority.[59] This suggests that the acquiring authority will only gain a title equivalent to that of the person for whom the compensation is deposited. If that person has no title then no title will be gained by the acquiring authority.[60] It might be argued that this conclusion, which is not free from doubt[61] and is unappealing in policy terms, is rebutted by sections 74 and 76 of the 1845 Act. These provisions appear to provide that registration of a notarial instrument has the same effect as registration of a statutory conveyance under section 80 of the Act. But, as discussed above, there is controversy over the true meaning of section 80.[62]

8.33 The land vests in the acquiring authority without any need for registration of the GVD in the Land Register. A parallel would be the vesting of a bankrupt person's estate in a trustee in sequestration by virtue of an act and warrant[63] or the vesting of the estate of a deceased person in his or her executor. However, registration in the Land Register is required to obtain a real right of ownership.[64] (Without a real right the acquirer does not own the property in the strict legal sense of that term and consequently there are certain limitations as to the legal acts which can be done in relation to the property. For example, a servitude cannot be granted).

8.34 The notes in the second Schedule to the prescribed form of GVD[65] provide that the GVD should contain a "particular description of the lands affected or a description by reference in the manner provided by section 61 of the Conveyancing (Scotland) Act 1874 or, as the case may be, section 15 of the 1979 Act.[66] Where appropriate the description should refer to a map annexed to the GVD".[67] Any such map must comply with the requirements of the land registration legislation.[68]

8.35 In practice, the description can be by way of reference to the confirmed CPO where its schedule contained a sufficient description and it has been recorded in the Register of Sasines, because the relevant land is still in that Register.[69] However, CPOs in practice are not always recorded. Moreover, where the GVD is executed under a private Act, there will

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[57] 1997 Act, Sch 15, para 7.
[58] See SME para 112.
[59] 1845 Act, s 76.
[60] See Reid, *The Law of Property in Scotland* para 666.
[61] For example Sch 15, para 1 (the general provision on vesting) is not stated expressly to be subject to para 7 (the depositing of compensation provision) which can be interpreted as meaning that payment of compensation to the wrong person is not fatal to the validity of the title acquired.
[62] See para 8.13 above.
[63] Bankruptcy (Scotland) Act 1985, s 31.
[64] The 1997 Act, Sch 15, para 37 provides that at the end of the period specified in the GVD it is to be recorded in the Register of Sasines or, as the case may be, the Land Register and, once registered, will have effect as a conveyance under s 80 of the 1845 Act. A GVD is a "registrable deed" under the 2012 Act, s 49.
[65] 2003 Regs, reg 5(a) and sch 1, form 6.
[66] Section 15 of the 1979 Act has largely been repealed by the 2012 Act, Sch 5, para 19(3).
[67] 2003 Regs, reg 5(a), sch 1, form 6, second schedule, Note (h).
[68] 2012 Act, s 6(1)(a).
[69] As the Land Register is a register of title rather than a register of deeds, it cannot be referred to directly for documents.

be no preceding recorded order to refer to in terms of a conveyancing description and it will therefore be essential that the GVD contain the appropriate description. The first Schedule to the prescribed form of GVD also makes provision for alteration of the conveyancing description when there has been a notice of objection to severance.[70]

(e) Ordinary disposition

8.36 As well as the various statutory methods which are available for acquiring title in the context of compulsory purchase, it is possible simply to use an ordinary disposition.[71] There are also some statutory rights of compulsory purchase which are exercisable by requiring an ordinary disposition from the owner.[72]

(f) Acquisitions by agreement

8.37 In practice, acquisitions may often progress by way of a negotiated settlement reached where compulsory powers could have been used. In such a case there will be no CPO although it remains possible to use a statutory conveyance or a notarial instrument.[73] However, in such circumstances it is perhaps unlikely that an owner would consent to the use of a notarial instrument as any compensation they are entitled to will be consigned to court and they will then be required to persuade the court as to their entitlement.

Reform

8.38 We have seen that there are five ways under the current law whereby the acquiring authority can take title. It seems to us that this is unnecessarily complex and that we should move towards a more simplified system.

8.39 Our provisional view is that the ordinary disposition should be retained as a method of transfer. We think that the parties should have the freedom to use such a deed if they so choose. This is the position in England and Wales.[74] As we have noted above,[75] the ordinary disposition is used under certain existing special schemes of compulsory purchase. Accordingly, we propose that:

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

8.40 The other four methods of transferring title can be divided into two categories. The first category is where a notice to treat has been used and it comprises (a) the statutory conveyance; (b) the notarial instrument and (c) the notice of title. The second category is

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[70] 1947 Act, Sch 15, paras 19 to 29 makes special provision, where the GVD procedure has been used, for the service of a notice of objection to severance of a house, building or factory or of a park or garden belonging to a house. The provisions relating to severance of agricultural land (1973 Act, ss 49 and 50) will also apply to land covered by a GVD. See W M Gordon, *Scottish Land Law* (2nd edn, 1999) paras 29-35 - 29-38.

[71] See D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 29.22.

[72] Housing (Scotland) Act 1987, ss 61-61F (as amended by Housing (Scotland) Act 2010 ss 141 and 143); Crofters (Scotland) Act 1993, ss 12-19; Agricultural Holdings (Scotland) Act 2003, Pt 2; Land Reform (Scotland) Act 2003, Pt 2 and Pt 3. See Gretton and Steven, *Property, Trusts and Succession* para 7.10.

[73] *Caledonian Railway Company v Governors of George Heriot's Trust* 1915 SC (HL) 52.

[74] English 1965 Act, s 23(6).

[75] See para 8.36 above.

the GVD, which is used as an alternative to the notice to treat and is directly registered in the Land Register. In Chapter 7 we discussed the notice to treat and GVD procedures and asked consultees whether a new single procedure would be preferable. Clearly the answer to that question influences reform of the method of acquiring ownership. It would appear to follow that if the separate notice to treat and GVD procedures (although potentially in amended form) are retained, then the GVD would continue to be a way of taking title. Nevertheless we ask the question:

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and

(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

8.41 But, although the GVD may be retained, in our view the opportunity should certainly be taken to rationalise transfer of title following a notice to treat. It seems to us that there is no clear justification in maintaining three different methods.

8.42 Our provisional view is that these methods should be replaced by a unitary model in the form of a new "Compulsory Purchase Notice of Title" ("CPNT"). The new legislation would prescribe the form of the CPNT although, as with the existing statutory conveyance, minor deviations would be possible. The CPNT would narrate how the compulsory purchase was authorised and how the notice to treat procedure had been followed before going on to give a conveyancing description of the land. It would be executed by the acquiring authority, which would remove the problem of the owner not being present or willing to sign a conveyance. This would also avoid any difficulty arising from owners lacking the capacity or power to convey. Clearly, however, a CPNT which was not justified by or within the scope of a confirmed CPO would be invalid. A CPNT would be registered in the Land Register. It would remain competent, as at present, to use an ordinary disposition following a CPNT. We propose that:

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

8.43 If consultees take the view that the notice to treat and GVD procedures should be replaced with a unitary procedure (as suggested in proposal 64 above, we consider that there should be a single method of transferring the land (in addition to the ordinary disposition). The details of this would need to be worked out depending on the form of that procedure. We ask the question:

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

8.44 As was seen above, it is not certain under the current law whether the acquiring authority obtain an unchallengeable title to the land, if, for example they take a statutory conveyance from the wrong person or use a GVD and do not compensate the correct person.[76] We think that this uncertainty requires to be removed. As a matter of general principle, compulsory purchase is only authorised when it is in the public interest. We consider that it is also in the public interest that an acquiring authority proceeding under a confirmed CPO should obtain security of title. That should not be affected by the acquiring authority's making a mistake such as compensating the wrong person. Those truly entitled to compensation would remain entitled and would be able to make a claim. In property law terms, what the acquiring authority would be obtaining is an *original* title, in other words, one not subject to any defects in the title of the previous owner.[77] Given the doubts expressed on the meaning of the existing legislation we would want to pay particular attention to making our draft Bill unambiguous on the matter.

8.45 There is a practical issue here in relation to the Land Register. Unlike the Register of Sasines, it does not provide information on *how* the land has been conveyed. It merely states who the proprietor is. The fact that the proprietor acquired under a GVD or CPNT will not be apparent. The solution to this may be to require the Keeper to insert a note in the title sheet stating that the title was acquired by compulsory purchase. We think that there would be another benefit of such a statement in relation to the extinguishment of servitudes and other conditions affecting the land, which we set out below.[78] We propose that:

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

8.46 We ask the question:

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

Effect of acquiring ownership on rights affecting that land

General

8.47 Specific provision is made by the current law regarding the effect of compulsory purchase on various existing rights subordinate to ownership. We consider these rights now.

Leases

(a) Current law

8.48 Sections 112 to 115 of the 1845 Act deal with land which is subject to a lease. The acquiring authority have two options where they wish to extinguish a lease which is longer

[76] See paras 8.13 and 8.32 above.
[77] A parallel would be with registration in the Land Register under the 1979 Act, s 3(1)(a). See Reid, *The Law of Property in Scotland* para 673. The 2012 Act departs from this approach. See Gretton and Steven, *Property, Trusts and Succession* Ch 6.
[78] See para 8.76 below.

than a year, or from year to year, in length over land which is subject to a notice to treat.[79] They may acquire the landlord's right and wait for the lease to expire through time. Alternatively, they may acquire the right of the lessee, in which case the lessee will be entitled to a notice to treat and compensation reflecting the value of the unexpired term of the lease.[80]

8.49 Where only part of the land which is the subject of a lease is to be acquired, section 112 makes provision for the apportionment of the rent and provides that the lease is to remain in force with regard to that part of the land which is not to be acquired. Section 112 also applies where the land is acquired by way of GVD and takes effect "as if for references to the time of the apportionment of rent mentioned in it there were substituted references to the time of the vesting of the tenancy in the acquiring authority".[81] Moreover, sections 107 to 111 of the 1845 Act make provision for the apportionment of annual or recurrent charges affecting the land. This also applies where acquisition is by way of GVD.[82]

8.50 Under the notice to treat procedure, if the land is in the possession of a person who has no greater interest therein than as a tenant for a year or from year to year (a "short tenant"), the acquiring authority may terminate the tenancy. The tenancy is not acquired but is "simply snuffed out by entry".[83] The short tenant will be entitled to compensation under section 114 for the value of the unexpired term or interest in the land and for any just allowance which ought to be made to the tenant by the incoming tenant and for any loss or injury that the tenant may sustain or, where the land is severed, compensation for damage caused by the severance of the land. Where the amount of such compensation is disputed, it is to be determined by the sheriff.[84]

8.51 On the other hand, although a GVD has the power to extinguish "the whole or part of any rent, or other payment or incumbrance",[85] it has no effect on a short tenancy or a long tenancy which is about to expire.[86] Where such a tenancy exists the acquiring authority may let the tenancy expire in the normal way or they can serve a notice to treat on the tenant and then serve on every occupier of the tenanted land, a notice that they intend to enter and take possession at the end of the specified period (not less than 14 days from service of the notice).[87] This is the only situation in which a tenant in a short tenancy will be entitled to a notice to treat; under normal notice to treat procedure a short tenant is not so entitled.[88]

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[79] This will invariably include an "old" agricultural lease granted under the Agricultural Holdings (Scotland) Act 1991 which provides (s 3) that leases shall continue from year to year by tacit relocation. Although it will not necessarily include any "new" agricultural lease granted after 30 November 2003 which have significantly adjusted periods of tacit relocation: see the Agricultural Holdings (Scotland) Act 2003 ss 4 and 5.

[80] Section 115 provides that the acquiring authority may require the claimant to produce, or provide legal evidence of, the lease, missive of lease or grant in respect of which such a claim shall be made.

[81] 1997 Act, Sch 15, para 33.

[82] 1997 Act, Sch 15, para 32 and para 34.

[83] *Greenwood Tyre Services Ltd v Manchester Corporation* (1971) 23 P & CR 246 at 250 (concerning the equivalent provision in the English 1965 Act, s 20).

[84] Below at paras 20.6-20.10, we discuss compensation for short tenancies and ask whether the specific procedure for compensation of such tenancies under s 114 of the 1845 Act should be retained.

[85] 1997 Act, Sch 15, para 7.

[86] 1997 Act, Sch 15, para 38. This defines a "short tenancy" as a tenancy for a year, or year to year, or a lesser interest. A "long tenancy which is about to expire" is defined in essence as a tenancy granted for an interest greater than a short tenancy but having at the date of the GVD a period still to run which is no longer than the specified period i.e. the period, longer than one year, specified in the GVD as to when it will take effect.

[87] 1997 Act, Sch 15, para 8.

[88] 1947 Act, Sch 2, para 3.

However, the service of a notice to treat on a short tenant will not alter the basis of compensation established in section 114 of the 1845 Act.[89]

(b) Reform

8.52 The current law as to the effect of compulsory purchase on leases seems unduly complex. It seems to us that the acquiring authority should be entitled to serve a notice to treat (or equivalent)[90] on any tenant. It will probably choose not to do this if the lease is due to come to an end naturally within a matter of months.[91] But in other cases the effect of the notice to treat will be to entitle the tenant to a compensation claim.

8.53 Under the current law a notice to treat allows the acquiring authority to acquire the lease. But in reality what will be sought is the extinguishment of the lease. We believe that it is preferable for the notice to treat to be viewed as giving an entitlement to extinguishment of the lease rather than to acquisition. It must be remembered that the current context is the acquisition of ownership and its effect on subordinate rights. In the, probably rare, situation where an acquiring authority have the appropriate power, and wish only to acquire an existing lease and not ownership, they should be able to do so. That might be where the lease is a very long one. However, once the Long Leases (Scotland) Act 2012 is brought fully into force in 2015, most ultra-long leases will be converted into ownership and such a scenario will be even rarer.

8.54 In the above scenario, the acquiring authority would be able to execute a deed narrating that the lease has been brought to an end. If the lease was a long lease which had been registered in the Register of Sasines or Land Register, the deed would need to be registered there. Accordingly, we propose that:

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

Liferents

(a) Current law

8.55 A liferent is a right to use and enjoy property during life without destroying or wasting its substance.[92] Liferents can be either proper or improper. In a proper liferent, the property owner is known as the "fiar" and has the "fee". The liferenter has a real right of liferent which encumbers the fee. The liferenter must be a natural person.[93] Improper liferent is a beneficial interest under a trust. In such a liferent, the trustees have the real right of ownership of the property and the liferenter and fiar only have personal rights against the trustees.[94] Proper liferents are relatively rare; improper liferents are often preferred as they allow more flexibility as the rights and liabilities of the parties can be regulated in the trust deed.

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[89] *Smith and Waverley Tailoring Co v Edinburgh District Council (No 2)* 1977 SLT (Lands Tr) 29.
[90] See above at paras 7.116-7.120 where we ask whether notices of treat should be retained.
[91] Although here an ordinary notice to quit will nonetheless be required to prevent tacit relocation. See A McAllister, *Scottish Law of Leases* (4th edn, 2013) para 10.17.
[92] Erskine, *Institute* II, 9, 39; Gretton and Steven, *Property, Trusts and Succession* Ch 21.
[93] See W M Gloag and R C Henderson, *The Law of Scotland* (13th edn, by H L MacQueen and Lord Eassie, 2012) para 41.31. See also Reid, *The Law of Property in Scotland* para 74.
[94] See, e.g. *Inland Revenue v Clark's Trustees* 1939 SC 11 at 22 and *Sharp v Thomson* 1995 SLT 837 at 851.

8.56 As there has been little, if any, judicial or academic consideration of this issue, it is difficult to determine the effect of compulsory purchase on a liferent. Where there is an improper liferent, as the land is in the ownership of the trustee, the acquiring authority would proceed by acquiring the interest of the trustee. The compensation paid would become trust property to which the beneficiaries (liferenter and fiar) would be entitled. Where there is a proper liferent, the acquiring authority will wish to extinguish the liferenter's right. Under normal circumstances, the subordinate real right of a proper liferenter cannot be transmitted to another person.[95] However, section 7 of the 1845 Act enables parties such as liferenters to sell and convey their interest to the acquiring authority.[96]

(b) Reform

8.57 It seems to us that proper liferents should be treated conceptually in a similar way to leases, i.e. the acquiring authority should have the right to extinguish them. An acquiring authority should be able to serve a notice to treat (or equivalent) to bring a proper liferent to an end. The liferenter would be entitled to compensation for the premature termination. The acquiring authority would thereafter be able to execute a deed extinguishing the liferent which could be registered in the Land Register. We propose that:

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

Standard securities

(a) Current law

8.58 Nowadays securities affecting land will normally be standard securities as this is the only type of heritable security which it has been competent to grant since 1970.[97] Section 99 of the 1845 Act provides that the acquiring authority may purchase or redeem the interest of any existing security by paying the security holder the principal and interest due on the security, together with any expenses and charges and six months additional interest.[98] The security holder must then immediately convey its interest to the authority. Section 99 additionally provides that the acquiring authority may notify the security holder that they will pay off the principal sum and interest due on the security at the end of a period of six months. Upon payment of the principal sum and interest by the acquiring authority at the end of the six months, together with any expenses and charges, the security holder will discharge its interest in the lands comprised in such security to the acquiring authority or as they shall direct. Thus the acquisition of land under the notice to treat procedure followed by a statutory conveyance etc., does not by itself discharge the security.[99]

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[95] Gloag and Henderson, *The Law of* Scotland para 41.41.
[96] See para 8.22 above.
[97] Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3). A floating charge, which companies and certain other entities may grant, can also affect land. But a transfer of the land has the result that the charge no longer affects it provided that the charge has not yet crystallised. On the exact moment as to when the property escapes from an uncrystallised charge see *Sharp v Thomson* 1997 SC (HL) 66.
[98] Although there would appear to be no compulsitor on the acquiring authority to do so. If the acquiring authority does not then the security holder will continue to be able to enforce the security: *Caledonian Railway Company v Governors of George Heriot's Trust* [1915] AC 1046 at 1078.
[99] See D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) pp 405-408.

8.59 Section 100 of the 1845 Act provides that, in terms of either case described in section 99, where the security holder fails to convey or discharge the interest in the land following payment or if that person fails to adduce a good title thereto, then it shall be lawful for the acquiring authority to deposit in the bank the relevant principal sum and interest, together with any expenses, if due, on the security and then expede a notarial instrument, upon which all the right and interest of the security holder, any person in trust for him or the party entitled to the land under burden of the security, shall vest in the acquiring authority.[100]

8.60 Where the acquiring authority have proceeded by means of GVD under Schedule 15 to the 1997 Act, the effect on existing securities is less clear. As previously noted,[101] at the end of the period specified in the GVD, the land and the right of entry will vest in the acquiring authority as if they had expeded a notarial instrument. The effect is that any "rent, or other payment or incumbrance" is extinguished.[102] This would seem to include a security.[103]

8.61 Nevertheless, there appears to be no provision contained in Schedule 15 which obliges the acquiring authority to settle any outstanding security debt. Compulsory purchase will often involve property which is subject to a security and non-payment of this debt may conceivably result in a claim by the security holder to the LTS. In other jurisdictions, there is an obligation on the acquiring authority to discharge any existing security in the first instance where the equivalent to a GVD is used.[104]

8.62 It is unclear whether actual registration of the deed of discharge will be required in order to obtain unencumbered title when land subject to a security is compulsorily acquired. In some cases, the legal effect of discharge occurs before registration of any deed - the registration of a discharge merely evidences the fact of the discharge having already happened.[105] Section 99 of the 1845 Act suggests that the security is discharged at the point of purchase or redemption of the security by the acquiring authority, as the security holder must "immediately" convey that person's interest to the acquiring authority at this point. We also understand from our Conveyancing Advisory Group that in practice the Keeper will not enter securities which pre-date the GVD into the title sheet when the GVD procedure is used. Payment of the sum due to the security holder, together with the Keeper's practice, may therefore be sufficient to protect the title of the acquiring authority even where the security holder refuses to execute a deed of discharge.

8.63 In practice, securities may contain a condition which requires the debtor to inform the security holder if the debtor becomes aware of an impending compulsory purchase. They

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[100] This part of the 1845 Act also deals with the situation where the security is of less value than the principal. Where the landowner is in negative equity, issues of fair compensation arise. See paras 11.35-11.42 below.
[101] See para 8.31 above.
[102] 1997 Act Sch 15 para 7.
[103] See also 1997 Act, Sch 15, para 34 which provides: "Where any of the land specified in a GVD under this Act has become vested in an acquiring authority under paragraphs 6 to 8, any person who, in consequence of it, is relieved from any liability (whether in respect of rent, interest on a heritable security or any other payment) and makes any payment as in satisfaction or part satisfaction of that liability shall, if he shows that when he made the payment he did not know of the facts which constituted the cause of his being so relieved, or of one or more of those facts, be entitled to recover the sum paid from the person to whom it was paid." Moreover, s 195 of the 1997 Act which introduced GVDs falls under the heading "extinguishment of certain rights affecting acquired or appropriated land."
[104] For comparison see the Land Acquisition Act 1989, s 65 (Australia) and the Public Works Act 1981, s 99 (New Zealand).
[105] This is the case where there is a fixed sum standard security and there has been full repayment: *Cameron v Williamson* (1895) 22 R 293 (This case is about an older form of heritable security but the principle is the same).

may also provide that the security holder is enabled to negotiate with the acquiring authority or that any compensation is assigned to the security holder.[106] The security may also contain a facility which provides the security holder with an absolute right of repayment where the value of the security is in jeopardy, such as where there is a real risk that the property will be subject to a CPO by a local authority.[107]

(b) Reform

8.64 Once again we think that the law would benefit from clarification and simplification. An acquiring authority will not want the land to be subject to a security. It seems to us that securities can be distinguished from leases and liferents because securities are not possessory rights. There appears to be no compelling justification for requiring a specific notice of termination. The security holder will have been alerted at an earlier stage to the intention to exercise compulsory purchase powers and had the chance to object then. And the security holder will be entitled to compensation for loss of the security.

8.65 As we noted above, there is some doubt under the current law as to whether a deed of discharge is needed following a GVD or whether, more generally, a deed of discharge needs to be registered. Our view is that it should be made clear that such a deed is not required. On the registration of the acquiring authority's title, the Keeper should be required to remove the standard security from the Land Register and thus extinguish the security.[108] The security will continue to affect any land over which it was granted which is not being acquired. In practice the Keeper would give effect to this in the new title sheets for the acquired and non-acquired land. The security will not appear in the former but will appear in the latter. Therefore we propose:

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

Servitudes and real burdens

(a) Current law: introduction

8.66 It is necessary to consider the effect of compulsory purchase on the acquired land where the acquired land is a benefited property and where it is a burdened property in relation to servitudes and real burdens.

(b) Current law: acquiring a benefited property

8.67 Servitudes and real burdens are pertinents of a *benefited* property which means that rights to enforce them are attached to and run with that property without the need for express assignation.[109] This means that a person acquiring the property will automatically acquire title to these pertinents and the valuation of these will be factored into the compensation to the former owner.

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[106] *Shewu and Richmond upon Thames London Borough Council v London Borough of Hackney* [2000] JPL 498.
[107] *Cinema Holdings 2 Ltd v Irish Bank Resolution Corp Ltd* [2013] EWHC 745 (Ch).
[108] Or in a first registration where the property has been in the Register of Sasines prior to the acquisition, not add the security onto the Land Register.
[109] See Gretton and Reid, *Conveyancing* para 13-09. See also *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120 per Lord President Dunedin at 125.

(c) Current law: acquiring a burdened property

8.68 For many years, the law was unclear as to the effect of compulsory purchase on servitudes and real burdens[110] where a *burdened* property is being acquired. The enactment of section 106 of the 2003 Act, as a result of our Report on Real Burdens,[111] remedied this. Where land is acquired compulsorily by virtue of a CPO[112] then, except where the CPO or the conveyance provide otherwise, on a conveyance in implement of a compulsory acquisition being registered, any real burden or servitude over the land is extinguished and any development management scheme applying as respects the land is disapplied.[113]

8.69 Each of the five methods of acquiring title described in this Chapter will have the effect of extinguishing existing real burdens and servitudes. This is because of the definition of "conveyance" in section 106(5). It provides that a "conveyance" means any disposition,[114] notice of title or notarial instrument (which includes a reference to the application of section 106(1)), a statutory conveyance under Schedule A of the 1845 Act or a GVD as defined in section 1(1) of schedule 15 of the 1997 Act.[115]

8.70 Paragraph 2 of schedule 1 to the Title Conditions (Scotland) Act 2003 (Consequential Provisions) Order 2003[116] adds to the form of a conveyance in Schedule A to the 1845 Act in order to allow for exceptions to be made to the general rule that any existing real burdens or servitudes over the land shall be extinguished. It provides:

> "In Schedule A (form of conveyance) after the second "convey" insert–
>
> "Registration of this conveyance shall not extinguish the following real burdens [or, as the case may be, servitudes, or shall not disapply the development management scheme applied by] [Here set out in full, or refer to a deed setting out in full in such a way as to identify them, any real burdens or servitudes which are not to be extinguished by virtue of the exception to section 107(1) of the Title Conditions (Scotland) Act 2003, or, as the case may be, identify by reference to its deed of application any development management scheme which is not to be disapplied by virtue of that exception.]"

8.71 The extinguishment of existing rights is also dealt with in the 1997 Act, section 194. Section 194(1) provides:

> "(1) Subject to the provisions of this section, upon the completion by the acquiring authority of a compulsory acquisition of land under this Part—

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[110] See D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) para 17.42 and Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000) para 13.14.
[111] Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000).
[112] S 106(5) provides that "compulsory purchase order" has the meaning given by section 1(1) of the 1947 Act (procedure for compulsory purchase of land by local authorities etc.) except that it includes a compulsory purchase order made under the Forestry Act 1967. This will cover most CPOs except those made under the provisions contained in those Acts mentioned in section 1(4) of the 1947 Act (on which see paras 5.7-5.12 above), under private legislation or under the 2007 Act.
[113] 2003 Act, s 106(1).
[114] Compare, however, SME para 105: "This method [ordinary disposition] does not, however, attract the benefits which flow from statutory methods, one of which is that (whether following on a negotiated agreement or notice to treat) the conveyance will have the effect of extinguishing all real burdens and servitudes …". This seems to be incorrect.
[115] See Compulsory Purchase of Land (Scotland) Regulations 2003 (SSI 2003/446) sch 1, form 6, para 2.
[116] SSI 2003 No 503.

(a) all private rights of way and rights of laying down, erecting, continuing or maintaining any apparatus on, under or over the land and all other rights or servitudes in or relating to that land shall be extinguished, and

(b) any such apparatus shall vest in the acquiring authority."

It can be seen that this provision does not apply to real burdens but is more extensive than servitudes as it applies to all rights of laying down etc. These may be statutory rights such as under the Electricity Act 1989.

8.72 Where compulsory purchase powers could have been used, but acquisition proceeds by agreement, section 107 of the 2003 Act applies. Upon registration of a conveyance, together with a "relevant certificate" annexed thereto, in implement of an acquisition then, unless the conveyance provides otherwise, all existing real burdens and servitudes are extinguished and any development management scheme is disapplied. A "relevant certificate" will be obtained through an application to the LTS. It must state that no objection has been timeously received or that all objections have been withdrawn or that objections only related to certain burdens or were only made by certain benefited proprietors.[117]

8.73 It has been suggested to us that it is perhaps unclear when section 107 will apply in practice. In other words, does it apply where (a) an acquiring authority could have obtained a CPO but did not, or (b) where a CPO was in place but was not used because a negotiated agreement was reached, or does it apply in both these scenarios? In our view it is clear that when section 107 is contrasted with section 106, and when the relevant part of the Report on Real Burdens,[118] on which the provisions are based, is considered, the answer is both. A confirmed CPO is not required. Doubt perhaps remains as a result of the wording of section 107 as to what interpretation (a) actually requires. Does (i) the acquirer merely have to hold compulsory purchase powers or (ii) must it show that it could have obtained a confirmed CPO in the specific circumstances? In our view the correct interpretation is (i), but we would welcome the comments of consultees as to whether the matter should be put beyond doubt.

8.74 Section 107(4) requires the acquiring authority, before registering the conveyance, to notify the owner of a benefited property or the holder of a personal real burden or the owners' association in relation to a development management scheme. A person entitled to such a notice may make an application to the LTS for renewal or variation of the servitude or real burden (or preservation of the development management scheme) within 21 days of the notice. There appear to be no reported cases on this yet.

(d) Reform

8.75 Unlike many of the provisions considered in this Discussion Paper, the 1997 Act section 194 and the 2003 Act sections 106 and 107 are recent. As far as we are aware they work in practice. We understand from consultation with the Scottish Government that, while section 194 is not a general power, it would perhaps be desirable to consolidate this provision with section 106 of the 2003 Act. But, as the former is limited to where land is being acquired for planning purposes and has a different scope, we incline against this. We ask the question.

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[117] An application for the relevant certificate must be made in the form set out in sch 12 to the 2003 Act.
[118] Report on Real Burdens paras 13.10-13.28.

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation?

8.76 A practical problem which has been drawn to our attention is how a third party checking a Land Register title sheet, can ascertain that the land has previously been compulsorily purchased and that one or more of the statutory provisions discussed here have operated to extinguish rights. A title sheet is ahistorical. It only sets out the current details of the land, such as who the owner is, but not how that person acquired ownership. For real burdens there does not appear to be a difficulty as they must appear on the title to a burdened property to be valid.[119] The Keeper will therefore have removed them when she registered the acquiring authority's title. Other rights, however, such as servitudes do not have to appear on the title to the property. We think that it would therefore be helpful to have a statement on the title sheet if the land was compulsorily acquired in the past so that someone checking the register can conclude that rights such as servitudes created before that date will have been extinguished.[120] For other reasons we asked earlier[121] whether the Keeper should make such a statement. We think that the issue identified here is another justification for this. We would welcome the comments of consultees in this regard when they are addressing question 67 above.

Public rights of way

8.77 We have discussed the issues in relation to public rights of way in Chapter 5.

Where no physical piece of land is being acquired

8.78 Sometimes an acquiring authority such as a local authority may already own land but wish to extinguish existing subordinate rights affecting it. It would seem that the notice to treat or GVD procedures can be used to do this and the rights are then extinguished in return for compensation, but the position should be made clear in the new statute.[122]

Acquisition of new rights subordinate to ownership

8.79 In this section we consider the acquisition of new rights subordinate to ownership. Thus an acquiring authority may wish to obtain a new servitude right or impose a new real burden. As we have seen, the acquisition of new rights requires express provision in the authorising legislation.[123] But, following such authorisation, there are issues as to what sort of deed should be used to create the new right. Whilst the statutory conveyance, the GVD and the other methods identified above, are used to transfer ownership, there is less said in the existing legislation about creating new rights subordinate to ownership. The 1973 Act section 63 simply provides, subject to minor modifications, that the provisions of the 1845 Act and 1947 Act, apply to the creation of new rights in the same way as to the acquisition of land.[124]

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[119] S 4(5) of the 2003 Act. This was also the common law.
[120] Unless they were expressly preserved, in which case the preservation should appear on the title sheet. For discussion on registration of CPOs, see also paras 5.48-5.50, above.
[121] See paras 8.45-8.46 above.
[122] We note in this context that the 2003 Act ss 106 and 107 and the 1997 Act s 194, which we discussed at paras 8.68-8.75 above, are inapplicable here as no physical piece of land is being transferred.
[123] See paras 8.45-8.46 above.
[124] These Acts, however, do not regulate GVDs.

8.80 In practice we understand that GVDs and ordinary forms of deeds are normally used to create such rights. For example, if a CPO authorises the acquisition of a new servitude, the acquiring authority will present the affected landowner with a deed of servitude and request that person's signature. Following signature, the deed will be registered in the Register of Sasines or Land Register in the usual way. Assuming that the landowner is present and willing to sign, this method may be satisfactory, but this may not necessarily be the case. We therefore invite views on whether the new legislation should provide that a Compulsory Purchase Notice of Title (CPNT)[125] can be used to acquire lesser rights than ownership. Alternatively, and subject to any decision to assimilate the GVD and notice to treat procedures, we propose that this should continue to be competent.

8.81 In some cases the acquiring authority will wish to acquire the new right at the same time as a physical piece of land and here we see no reason why the acquisition could not be done by means of the one deed. We understand that this is currently done in practice using the GVD and we are of the view that this should continue to be possible. Alternatively, a CPNT (or equivalent if the GVD and notice to treat procedures were assimilated) could be used, for example, to vest both a field and a new servitude right of drainage across a neighbouring field in the acquirer. We propose:

72. It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent.

[125] See para 8.42 above.

Chapter 9 Mining Code

Introduction

9.1 Ownership of land extends to everything above and beneath that land.[1] This means that where land is compulsorily acquired, any minerals it contains will also pass to the acquiring authority, unless there is provision in the conveyance to the contrary.[2] Accordingly, compensation for the land paid by the acquiring authority must cover the value of any minerals (although the value will depend on whether planning permission has, or is likely to be, granted for their extraction).[3]

9.2 To reduce liability to pay compensation, the acquiring authority may therefore wish to exclude the minerals from the acquisition.[4] The "Mining Code" (described in this Chapter as "the Code") is a fasciculus of provisions included in the 1845 Railways Act, but not in the 1845 Act, which, if incorporated into a CPO, prevents the minerals under the land being acquired by the acquiring authority.

9.3 While any Act authorising compulsory purchase could provide specifically for the incorporation of the relevant provisions of the 1845 Railways Act, section 1(3) of, and paragraph 6 of second Schedule to, the 1947 Act, make general provision allowing the acquiring authority to incorporate the Code into a CPO.[5]

9.4 Paragraph 6(1) of Schedule 2 provides:

> "A compulsory purchase order may make provision for the incorporation with the enactment under which the purchase is authorised of section seventy of the Railways Clauses Consolidation (Scotland) Act 1845 (which relates to the exception of minerals from purchases) and sections seventy-one to seventy-eight of that Act (which relate to restrictions on the working of minerals) as originally enacted and not as amended for certain purposes by section fifteen of the Mines (Working Facilities and Support) Act 1923, or the said section seventy only."

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[1] This is subject to any "separate tenements" which exist in other words a section of land or a right to do something on the land which is capable of being owned separately. See G L Gretton and A J M Steven, *Property, Trusts and Succession* (2nd edn, 2013) para 14.8.

[2] If minerals are in separate ownership, they will have to be acquired separately. Certain minerals such as gold, silver, petroleum and coal are known as "legal separate tenements" because by law they are owned separately from the land where they are found. See Gretton and Steven, paras 14.16 and 14.17.

[3] The value of the minerals will be assessed under rule 2 with any development potential also considered. See, generally, Ch 13, Establishing Development Value. Many of the issues regarding the assessment of the planning prospects of ordinary cases will apply to mineral cases but some issues will be peculiar to minerals e.g., the need to assess the quantity and quality of the mineral reserves. An example of a case in which the value of minerals was considered is *Colneway Ltd v Environment Agency* [2004] RVR 37.

[4] A number of cases have considered whether or not particular substances are to be regarded as "minerals". For discussion, see R Rennie, *Minerals and the Law of Scotland* (2001), para 2.4 ff.

[5] For discussion of the Code, see Rowan Robinson & Farquharson-Black, para 2-06 and SME, para 39.

9.5 Therefore, for cases of compulsory purchase which do not involve railways, where an acquiring authority wishes to exclude minerals, it is necessary for the CPO (or special Act)[6] to incorporate section 70 of the 1845 Railways Act. The section is incorporated as originally enacted, and not as amended by section 15 of the Mines (Working Facilities and Support) Act 1923 ("the 1923 Act")[7], (which relates to railways). Section 70 of the 1845 Railways Act provides:

> "The company shall not be entitled to any mines of coal, ironstone, slate, or other mineral under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall, have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

9.6 The incorporation of section 70 means that the acquiring authority do not acquire the minerals. However, this alone may be of limited benefit to an acquiring authority if the scheme is later disrupted by the activities of the mineral owners exercising their right to work the minerals on, or under, the acquired land. Therefore, paragraph 6 of the second Schedule to the 1947 Act provides that a CPO may make provision for the incorporation of section 70, together with sections 71 to 78 of the 1845 Railways Act. These sections impose various constraints on the working of the minerals by the mineral owners. They therefore ensure that the CPO scheme cannot be compromised by mineral extraction by the owner of the land underneath the acquired land.

9.7 Upon incorporation of the Code in modern practice, the terminology of the 1845 Railways Act, which refers to railways and railway companies, needs to be modified to refer to the compulsorily acquired land and the acquiring authority. We adopt this approach here.

"As originally enacted" and as modified

9.8 At present, as we stated above, there are two versions of the Code: the "original version", which applies in most cases of compulsory purchase, and the "modified version", which applies to railways. These are relatively similar and include many of the same principles but the modified version has more detail about compensation.

9.9 The Code is relevant wherever there are minerals under the land to be acquired, including in relation to the extraction of shale gas. Some difficulties have been identified in the current application of the Code. For example, it may not be apparent to someone working minerals that the Code applies to the land in question.[8]

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[6] See, eg Waverley Railway (Scotland) Act 2006, s 52 and Airdrie-Bathgate Railway and Linked Improvements Act 2007, s 57(1)(b).

[7] 1923 c. 20, which amends the Code as it applies to railways. It substitutes new ss 78 78A, 79, 79A, 79B, 80-85, 85A-E for ss 78-85 of the 1845 Railways Act.

[8] SME, para 39. E.g. if the mineral owners own minerals which are within 40 yards of, but not part of the land being acquired, they may not have an interest in any of the land which was the subject of the CPO and are therefore not entitled to notice under the Code.

Provisions of Code

9.10 We now consider the content of both the original and modified versions of the Code.[9] We welcome consultees' views on how best, if at all, to apply the Code in the proposed new statute.

Notice of non-working of minerals near railway line

9.11 Section 71, as originally enacted, provides that if the mineral owner intends to work the minerals within 40 yards, or such other distance as may be prescribed, of the works carried out on the acquired land, it must give the acquiring authority notice of its intention to do so at least 30 days before the commencement of the work.[10] If it appears to the acquiring authority that the mining is likely to damage the works, and it is willing to pay compensation for the mines or minerals that will be left unworked, it shall give a counter-notice to the mineral owner at any time after the receipt of the original notice and the minerals shall be required to be left unworked.[11]

9.12 Section 71, as amended, provides for the protected area to extend beyond 40 yards, depending on the depth of the minerals below the railway.[12] It refers to the notice where the acquiring authority considers that the mining is likely to damage the works as a "counter-notice".

Compensation for non-working of minerals

9.13 The modified version of the Code includes section 71A, which provides for the situation where loss is caused by the specified minerals being left unworked. Compensation under this head will be determined, in the absence of agreement, by arbitration, on the basis of the rules set out.[13] The mineral owners will also be entitled to be paid by the amount of any increase in the cost of working any part of their minerals (other than the specified minerals) which may have been caused by the failure of the acquiring authority to give the counter-notice within a reasonable time.[14]

Entitlement to work minerals on non-payment by acquiring authority

9.14 Section 72, as originally enacted, provides that if the acquiring authority do not agree within the 30 day period to leave the mines unworked and do not agree to make such compensation as necessary, "it shall be lawful for such owner, lessee, or occupier, to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for

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[9] See also SME, para 39.
[10] Although a person who has started to work the minerals without having given proper notice and has had to desist is not debarred from serving notice in respect of the remaining minerals: *Edinburgh and District Water Trustees v Clippens Oil Co* (1898) 25 R 504.
[11] See *National Grid Gas plc v Lafarge Aggregates Ltd* [2006] EWHC 2559 (Ch).
[12] Section 71(5) as substituted by the 1923 Act.
[13] *Bwllfa and Merthyr Dare Steam Collieries Ltd v the Pontypridd Waterworks Company* [1903] AC 426 discussed the basis for calculating compensation under similar legislation. It set out the question to be answered as "what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it".
[14] S 71A(2) as substituted by the 1923 Act.

the purpose of getting the minerals contained therein…". Any damage or obstruction to the railway or works caused by the working of any such minerals which the acquiring authority required to be left unworked and for which they agreed to pay compensation, shall be made good by the owner, lessee or occupier of such mines or minerals at his own expense.

9.15 Section 72, as amended, is substantively similar to the original version but is more accessible in terms of language and layout. Section 72A provides that, if a mineral owner works the minerals, he shall become liable, on demand of the acquiring authority, to contribute towards the expenses properly incurred by the acquiring authority in making good any damage caused by such working to the railway or works. The appropriate percentage of the expense to which the mineral owner will be liable is specified according to the depth of the minerals being worked.[15] Section 72B provides that the acquiring authority shall, when and so far as reasonable and practicable, give notice to the mineral owner (and royalty owner (if any)), specifying the particulars of the damage caused, the nature of the damage and the nature of the works intended to be carried out to remedy the damage.

Communications between mines on both sides of railway

9.16 Section 73, as originally enacted, provides that if the working of the minerals is prevented by "apprehended injury to the railway" (i.e. where the acquiring authority serves a counter-notice), it shall be lawful for the mineral owner, whose mines cover both sides of the railway (or works) to "cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata the working whereof shall be so prevented as may be requisite to enable them to ventilate, drain and work their said mines". Section 73 also provides that such airway, headway, gateway or water level shall not be of greater dimensions than the prescribed dimensions and sections and in any case, not greater than eight feet wide and eight feet high.

9.17 Section 73, as amended, is similar but provides different limitations on the use of airways, headways, gateways or water levels: these shall not "injure any part of the protected works" nor shall they be cut or made upon within 40 yards of any other such airway, headway, gateway or water level. It also provides that they should not (without the consent of the acquiring authority, which is not to be unreasonably withheld) be greater than eight feet wide and eight feet high. Nevertheless, this limit can be extended in certain circumstances.

Compensation for injury to mines

9.18 Both versions of section 74 provide for the acquiring authority to make compensation for injury done to the mines. As originally enacted, it provides that the acquiring authority shall pay the additional expenses and losses that are incurred by the owner, lessee, or occupier in three circumstances. These are: (1) where there is severance of the land due to the mine extending to both sides of the railway, (2) where there is interruption of the continuous working of the mines, and (3) where, the mine is required to be worked under restrictions imposed so as not prejudice or injure the railway. As amended, section 74

[15] The liability of the mineral owner shall not exceed a specified amount (see s 72A(2)).

makes reference only to the second and third of these three heads. It also provides for the additional expenses and losses to be paid at the "appropriate percentage".[16]

Compensation to landowner over minerals due to works necessitated by prevention of mining

9.19 Both versions of section 75 provide that where any loss or damage is sustained by the owner, lessee or occupier of lands which lie over any specified minerals (and he is not the owner of said minerals) by reason of making an airway or other such authorised work[17] and where that work would not have been necessary if it were not for the prevention of the working of the minerals by the service of a counter-notice, then the acquiring authority shall make full compensation to this owner, lessee or occupier.

Entry upon land

9.20 Section 76, as originally enacted, enables the acquiring authority to better ascertain whether any mines are being worked or have been worked so as to damage the railway or works. Thus, the acquiring authority may, upon giving 24 hours' notice, enter upon any lands through or near which the railway passes wherein any such mines are being worked or are supposed to be. Furthermore, for this purpose, the acquiring authority may make use of any apparatus or machinery connected with the mines which are owned by the owner, lessee or occupier of the mines. In doing so, however, payment of a reasonable cost associated with the use of the apparatus or machinery will be made by the acquiring authority to the owner, lessee or occupier.

9.21 Section 76, as amended, provides the acquiring authority with the same power, but goes into more detail. It provides that a mine owner who desires to work any minerals (and a royalty owner (if any)) may, at any time, upon giving at least 24 hours' notice, and subject to reasonable conditions as may be imposed by the acquiring authority, enter upon on the railway or works and inspect the same and take levels or particulars thereof. In our view, it seems reasonable that both the acquiring authority and the mineral owner should have equivalent powers of reasonable temporary access to the land to assess the situation in relation to minerals.

Penalty for refusal of entry

9.22 Section 77 is related to section 76. It provides for a penalty for refusing to allow an inspection as described in section 76. As originally enacted, section 77 provides that where an owner, lessee or occupier refuses to allow the authorised representative of the acquiring authority to inspect the land, for every such refusal they shall forfeit to the company a sum not exceeding twenty pounds. Section 77, as amended, provides that this penalty will be a sum not exceeding level 2 on the standard scale.[18] Section 77, as amended, also provides that where the acquiring authority refuses to allow an inspection, it too will be liable to a fine not exceeding level two on the standard scale.

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[16] See s 74(2).
[17] See s 73.
[18] Criminal Procedure (Scotland) Act 1995, c. 46, s 225. Level 2 is currently £500.

Minerals being worked contrary to provisions of Act or special Act

9.23 Both versions of section 78 provide that where it appears that minerals have been or worked or are being worked contrary to the provisions of the Act or the special Act, the acquiring authority may give notice to the mine owner, requiring him to construct such works, and adopt such means as may be necessary or proper, for making safe the railway or works or preventing injury thereto. If, after such notice, the mine owner does not proceed to construct such works, the company may construct them and recover the expense from the mine owner.

Agreement to alter, extend or vary rights

9.24 In addition to these provisions, the 1923 Act added sections 78A, 78B, 78C and 78D to the Code. Section 78A provides that the mine owner, royalty owner and the acquiring authority may, by agreement, alter, extend or vary their rights under the provisions of the 1845 Railways Act with regard to minerals, so long as this does not prejudice the rights of a third party who does not agree. Section 78B provides that the Act does not prevent an agreement between the mine owner and the royalty owner regarding the payment of rent or royalty.

9.25 Section 78C is a useful interpretation section which provides definitions for key terms used in the Code. Section 78D provides that the mine owner shall not be liable to leave support either inside or outside the area of protection. Furthermore the mine owner shall be entitled to remove such support without being liable for any damage thereby caused, unless there is provision to the contrary in the Act, the special Act or under an agreement between the mine owner and the acquiring authority.

Conclusion

9.26 It seems to us that the relevant provisions in the 1845 Railways Act and the 1923 Act, taken together, are a sound basis for provisions required to deal with the interface between land compulsorily acquired and the working of minerals for all cases of compulsory purchase that do not involve railways. We do not intend to amend the 1845 Railways Act or the provisions of the modified version of the Code as these are beyond the scope of our Paper and may still have an application in a railways context.[19] The proposed new statute should contain provisions along the lines of those contained in the Code. But it may be that there are other provisions which could usefully be included. We accordingly ask the question:

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

[19] Although in practice we understand that most railways are now created by special Act. See, for example Waverly Railway (Scotland) Act 2006, asp. 13.

PART 3: COMPENSATION

Chapter 10 Compensation – General issues

Introduction

10.1 Compensation is in many ways the most contentious aspect of the compulsory purchase system. As we have noted in Chapter 2, the justification for compulsory purchase lies outwith the scope of this project. The process of making and confirming a CPO is important, and of immediate interest and relevance to those engaged in operating the system, but they tend to be professionals of one description or another. The fact of having their property compulsorily acquired must be particularly traumatic, however, for ordinary citizens. But, once a person has come to terms with that, so far as that may be possible, the assessment and payment of fair compensation becomes of critical importance. It is certainly the aspect of compulsory purchase which occupies most space, by volume, in the modern treatises on the law.[1]

10.2 It is accordingly the area where it appears to us to be most important to set out the rules as clearly and coherently as possible. As we note in this and the following Chapters, that aim is not assisted by the way in which the current statutory rules are set out, and by the fact that, in some areas at least, the courts appear to be operating a parallel regime which overlaps with, and is sometimes inconsistent with, the statutory rules.

10.3 In this Chapter we mention the statutory provisions under which compensation is currently paid, set out the categories of compensation which the law currently recognises and outline the way in which those categories are dealt with at present. We then discuss whether it would be possible to set out the various aspects of that regime in a more logical, coherent manner, so that those subjected to the compulsory purchase process, as well those who operate it, would be able to work out more easily upon what bases compensation would be payable, and how much it would be.

Duty to pay compensation

10.4 In Chapter 3 we discussed the historical basis upon which compensation is paid. We noted that it is a principle of very long standing that, if the state finds it necessary to acquire the property of a citizen in the public interest, it must compensate the citizen for that acquisition. It appears that compensation has always been paid in the UK when a public authority has acquired the property of an individual.[2]

10.5 That has accordingly always been the law in the United Kingdom. And, by virtue of Article 1 of Protocol 1 to the Convention, as interpreted by the ECtHR, it is now a requirement of the Convention.

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[1] For example, in Rowan Robinson & Farquharson-Black, compensation takes up about three-fifths of the book.

[2] See the quotation from Lord Atkinson in *Attorney General v De Keyser's Royal Hotel* (at para 3.6): "The conclusion, as I understand it, is this: that it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative."

10.6 Any compulsory acquisition of private property can only be justified by the general interest of society as a whole,[3] and it is right that society as a whole should bear the cost. It would be inequitable if an individual were required to contribute more to that acquisition than his or her share of the general liability. The payment of fair compensation results in the affected landowner bearing no more than his or her fair share of that cost.

What is meant by "compensation"?

General

10.7 A general right to compensation can be derived, as an inference, from the 1845 Act. Section 48, which is in a group of sections relating to the assessment of compensation, provides, so far as material:

> "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict … ".

Section 61 provides:

> "In estimating the purchase money or compensation to be paid by the promoters of undertaking … regard shall be had not only to the value of the land to be purchased or taken … but also to 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 lands … ".

Finally, section 6 of the 1845 Railways Act, which is almost invariably incorporated into statutes authorising the compulsory acquisition of land, sets out an express right to compensation. It provides:

> "[A]nd the company shall make to the owners of … any lands taken for the purposes or the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken … and for all damage sustained by such owners … ".

10.8 When Parliament sought, in the 1919 Act, to adjust the approach to the awarding of compensation, it did so by way of setting out six rules. These rules have been consolidated in section 12 of the 1963 Act, which now provides:

> "Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:
>
> (1) No allowance shall be made on account of the acquisition being compulsory;
>
> (2) The value of land shall, subject 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;
>
> (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

[3] See the quotation from Lord Denning in *Prest*, at para 3.9.

pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers;

(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;

(5) Where 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 land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is *bona fide* intended, be assessed on the basis of the reasonable cost of equivalent reinstatement;

(6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land:

and the following provisions of this Part of this Act shall have effect with respect to the assessment."

On the face of the provisions of the 1845 and 1963 Acts mentioned in this paragraph and paragraph 10.7, compensation is payable for the land acquired, for any injurious effect which that acquisition has on other land owned by the same landowner, and for damage sustained by the owner by the carrying out of the works.

Other losses and expenses

10.9 Landowners whose land is expropriated almost inevitably incur other losses or expenses, such as removal costs, loss of business profits, or the costs of re-establishing a business in another location. It is only reasonable that they should receive compensation for these losses also. The difficulty was that there was no specific provision in the 1845 Act which would have justified such compensation.

10.10 The courts were accordingly driven to interpret the requirement to pay compensation for the land acquired as including an obligation to compensate for consequential losses. The effect was that the landowner was entitled to receive payments which would put him or her, so far as money could do so, in a position equivalent to his or her position prior to the compulsory purchase.

Three categories of compensation

(1) Compensation for land acquired

10.11 As regards the value of the land acquired, the courts developed the principle that the real owner of the land was entitled to no more than the price which a hypothetical willing seller would have received for the land had it been sold on the open market. That statement of principle disguises the fact that the assessment of the value of the land is carried out by reference to detailed rules set out by Parliament and the courts. These rules essentially represent policy choices, reflecting a changing perception as to what elements of actual or potential value should or should not be taken into account. Over the years, Parliament (and the courts) have intervened on a number of occasions so as to change the basis upon which the value of the land acquired is to be assessed. (For example, the Town and Country

Planning (Scotland) Act 1947[4] limited the compensation for land to its "existing use" value, and that restriction remained in force until 1959.[5])

10.12 Further detailed rules as to aspects of the assessment of the value of the land to be acquired are consolidated in the 1963 Act. They mostly concern the assumptions which are to be made as to the effect of other developments on the value of that land, or the methods by which the landowner can seek to ensure that he or she will receive the maximum potential value of the land.

10.13 The function of anyone assessing the value of land, whether it be the district valuer, a surveyor acting for a landowner, or a tribunal determining compensation, is to apply whatever may be the current rules to the assessment of the value of the land which is being acquired. As we discuss in Chapter 12, that task has become more complicated by reason of the divergence which has appeared, in some cases, between the statutes and the decisions of the courts.

(2) Compensation for consequential loss

10.14 By contrast, consequential loss is, or at least should be, largely ascertainable by finding out what the landowner has actually lost, subject to the application of concepts such as causation, remoteness and a duty on the part of the landowner to mitigate his or her loss. In practice, inclusion of a right to compensation for consequential loss, as part of the right to compensation for the land acquired, has produced some unintended consequences.[6] It may also have caused the courts' approach to be less logical than it might have been. We discuss these matters in Chapters 15 and 16.

10.15 Finally, in relation to consequential loss, a person who is in lawful possession of land, but who has no compensable interest in the land itself, may receive a disturbance payment to recompense him or her for the cost of moving, and for any losses consequent upon the disruption of any trade or business. We discuss this in Chapter 16 too.

(3) Compensation payments for non-financial loss

10.16 Section 12(1) of the 1963 Act makes it clear that no allowance is to be made for the fact that the acquisition is compulsory. That rule has attracted considerable adverse comment.[7] In fact, in the 1973 Act there is provision for payments, additional to those mentioned above.

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[4] 1947 c. 53.
[5] The regime was changed by the 1959 Act.
[6] In *Commissioners of Inland Revenue v Glasgow and South-Western Railway Company* (1887) 14 R (HL) 33, there was an argument as to whether compensation in respect of loss of business should be included in the "price" paid as compensation (and whether, therefore, the stamp duty in relation to the conveyance should be fixed at a level reflecting that element of the compensation). The House of Lords held that the only matters which a jury was asked to determine, under s 48 of the 1845 Act, were the value of the lands acquired, and any compensation for retained lands. Accordingly, the element in relation to loss of business was properly included in the price, for the purposes of stamp duty.
[7] Rowan Robinson & Farquharson-Black deals with the question of the basis for compensation at pp 106-121, and, after discussing a range of alternative approaches, puts forward the view (at p 121) that "In the absence of a national emergency, it is arguable that [section 12(1)] has had its day".

10.17 The first is a home loss payment, which can be made where a natural person is dispossessed of a dwelling.[8] It is calculated, within limits, as a proportion of the value of the dwelling.

10.18 The second is a farming loss payment, which may be made to a person who is dispossessed of an agricultural unit, and who begins to farm another such unit elsewhere in Great Britain within three years.[9] It is calculated by reference to the profits made on the farm. Home and farming loss payments are discussed further in Chapter 17.

Organisation of discussion of compensation

10.19 The order of the Chapters on compensation follows the logic of the discussion above. The first matter dealt with is the assessment of the value of the land acquired (Chapters 11 to 14); the second is consequential loss (Chapters 15 to 16); and the third is compensation payments for non-financial loss (Chapter 17). The content of these Chapters is described in some detail in paragraphs 1.28 to 1.36, and we do not repeat that description here.

Summary

10.20 Our principal suggestion, in relation to compensation, is that the proposed new statute should set out the different heads of compensation, with the different rules which apply to each of them, in a clear and coherent manner, which is accessible to, and easily understood by, practitioners and members of the general public.

[8] 1973 Act, ss 27 to 30.
[9] 1973 Act, ss 31 to 33.

Chapter 11 Valuation of the land to be acquired - the basic position

Introduction

11.1 As we have noted in Chapter 10, section 48 of the 1845 Act refers to the "value of the land to be purchased". In this Chapter we examine the basic law and practice relating to the assessment of that value. We discuss how the courts dealt with the matter prior to the passing of the 1919 Act, and how they applied those of the rules set out in that Act[1] which relate to the valuation of the acquired land. We also discuss whether the severance of the acquired land should be taken into account in assessing compensation, and the question of negative equity.

11.2 It might have been thought that a discussion of the historical aspects of these matters, in a Paper setting out and seeking views on the law in the twenty-first century, would be purely academic, given Parliament's intervention in the 1919 Act and (more extensively) after World War II. But if the various statutory provisions were intended to establish a comprehensive statutory framework for compensation, they have failed. It would appear that aspects of the compensation system are still to some extent governed by principles developed on a case by case basis by the courts. Two recent judgments of the House of Lords have discussed the matter in some detail, but without producing any clear guidance for practitioners or the public.[2] We accordingly set out the background from which the current position has emerged.

Period preceding 1919 Act

11.3 Between 1845 and 1919, the courts interpreted the "value of the land" in section 48 as meaning its value to the seller. Since the owner of the land was normally unwilling to sell, the courts postulated a hypothetical willing seller, a person who, having decided to sell the property, would take the price available on the open market. In *Stebbing v Metropolitan Board of Works*,[3] Chief Justice Cockburn said:

> "When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it."[4]

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[1] Now set out in s 12 of the 1963 Act.
[2] *Waters v Welsh Development Agency* [2004] 1 WLR 1304; Transport for London (formerly London Underground Ltd) v *Spirerose Ltd (in administration)* [2009] UKHL 44.
[3] (1870-71) LR 6 QB 37.
[4] See above footnote, at p 42.

Factors influencing value to seller

11.4 The open market price may be affected by factors tending either to increase or decrease its value to the seller. On the one hand, it is open to a landowner, who is being asked to sell land, to consider not only what it is worth in relation to the purposes for which it is currently being used, but what it might be worth if used for other purposes. An obvious example is farmland at the edge of a town, which is equally suitable, because of its position, for use as building land. Where the owner of such land decides to sell, he or she might reasonably look to receive a price which would take into account its value as building land, rather than as farmland.

11.5 On the other hand, the open market price would also take into account any restrictions on use to which the land might be subject in the hands of the seller. In *Stebbing*, the land was held, by the Church authorities, as burial grounds, and could not be used by them for any other purpose. Its value to them was accordingly subject to serious restrictions.[5]

"Market value" where no market

11.6 Another difficulty about valuing land by reference to its market value arose where there was in practice no market, actual or within reasonable contemplation: in other words, to what extent should – or could – compensation reflect the fact that the purpose for which the property was being acquired was one for which only a public authority would require land. Further, should compensation reflect the fact – in the cases where it was a fact – that the land to be acquired was particularly suitable for the purpose to which the acquiring authority intended to put it? The attempts by the courts to reconcile the notion that compensation should reflect the market price with the fact that in many cases there was no rational potential for any market, and (accordingly) no evidence of such a market, gave rise to some puzzling judgments.

Summary

11.7 In a series of decisions on the 1845 Act and the equivalent provisions in other jurisdictions the courts developed a number of principles on the factors to be taken into account in assessing the value of the land being acquired. The most frequently quoted of these cases are *Gough*,[6] *Lucas*,[7] *South Eastern Railways Company*,[8] *Cedar Rapids*,[9] *Fraser*[10] and *Gajapatiraju.*[11]

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[5] See Cockburn CJ at p 42: "The plaintiff, as rector, could never have parted with those churchyards, and therefore, to him, they were perfectly valueless.". See also *Corrie v MacDermott,* [1914] AC 1056, at paras 1.24-1.25.

[6] *In Re An Arbitration between Gough and the Aspatria, Silloth and District Joint Water Board,* [1904] 1 KB 417.

[7] *In Re An Arbitration between Lucas and the Chesterfield Gas and Water Board,* [1909] 1 KB 16.

[8] *South Eastern Railway Company v London County Council,* [1915] 2 Ch 252.

[9] *Cedar Rapids Manufacturing and Power Company v Lacoste and Others,* [1914] AC 569 (PC). (We are aware that in the reports of all the proceedings following those at first instance "Cedar" is expressed in the plural, but we are reliably informed that that is incorrect.)

[10] *Fraser and Others v City of Fraserville,* [1917] AC 187.

[11] *Raja Vyricheria Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam,* [1939] AC 302. (This case was obviously decided 20 years after the passing of the 1919 Act, but the statutory provisions in India did not reflect the changes made by that Act.)

11.8 While constraints on space prevent us from analysing each of these cases in detail, the net effect of these decisions (including, for these purposes, the *Gajapatiraju Case*) is that, in assessing full compensation for the purposes of the 1845 Acts, the courts had decided that the following principles or rules applied:

(a) The value to be assessed was the value to the seller;[12]

(b) In assessing the compensation, the potential value of the land acquired was to be taken into account;[13]

(c) That potential value was to be assessed as at the date when the land was acquired, that is to say, without taking into account what its value would be after it had been developed in consequence of the statutory acquisition;[14]

(d) The assessment of the potential value was to be carried out even when the only possible purchaser of the land was the acquiring authority.[15]

11.9 This summary is of importance because of the way in which the Judicial Committee of the Privy Council dealt with the matter in the *Pointe Gourde* case, discussed in Chapter 12.[16]

Scott Committee

11.10 It was against that background that the Scott Committee was appointed, by the Prime Minister, in 1917. It is worth spending a little time describing some aspects of the Committee's work,[17] because theirs was the first formal consideration of the working of the 1845 Acts.

11.11 Among their general conclusions, the Committee came to the view that "the Lands Clauses Acts are out of date, and fail to give effect to the requirements of the community of to-day, and therefore that they should be repealed and replaced by a fresh Code". They went on to set out their view of the principle underlying the whole question of compulsory acquisition, which they expressed as follows:

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[12] See Eve J in *South Western Railway Company v London County Council* (above): "The value to be ascertained is the value to the vendor, not its value to the purchaser".

[13] See Lord Buckmaster in *Fraser and Others v City of Fraserville,* (above): "The possibility of an added utility for any expropriated property due to existing possibilities of development is … a right and proper subject for consideration in ascertaining the compensation to be paid on expropriation.".

[14] See Lord Dunedin in *Cedar Rapids Manufacturing and Power Company v Lacoste and Others,* (above): "Where, therefore, the element of value over and above the bare value of the ground itself … consists in adaptability for a certain undertaking … the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give.".

[15] See Lord Romer in the *Gajapatiraju Case* (above): "[E]ven where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same what that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is the latter.".[In this context the "poramboke" value of the land is its value without taking into account its potentialities.]

[16] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (PC). For detailed discussion of *Pointe Gourde,* see Ch 12.

[17] Scott Committee Report.

> "It ought to be recognised, and we believe is to-day recognised, that the exclusive right to the enjoyment of land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion, no landowner can, having regard to the fact that he holds his property subject to the right of the State to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value apart from compensation for injurious affection etc."[18]

We considered the question of justification, briefly, in Chapter 3. Here we note only that the Scott Committee's formulation of the matter is entirely consistent with the other statements of principle to which we have referred.

11.12 The Scott Committee agreed that the (proper) aim of the compensation provisions under the Lands Clauses Acts was to provide full compensation to the owner, but were of the view that, for a variety of reasons, awards had become excessive. In particular they noted:[19]

> "There is no provision in the Lands Clauses Acts for any addition to the compensation in respect of the fact that the land has been compulsorily acquired. But in practice a percentage is invariably added to, or included in, the price of the land. In England and Wales, this additional allowance is usually 10 per cent … .".

11.13 They went on to note that while the allowance in Scotland for urban property was also about 10 per cent, the allowance for agricultural land in Scotland came to something approaching double value. They recommended, consistently with their statement of principle, above, that no allowance should be made for the fact that the acquisition is compulsory.

11.14 They then dealt with the question of "special adaptability", which is a feature of the cases of *Gough, Lucas, Cedar Rapids* and *Fraser* (above), and which the Committee saw as applying in circumstances where there might – at least in theory – be a competition for the land from other potential users. Where that competition would only exist among statutory undertakers, the Committee were of the view that it should not give rise to any increase in the valuation of the land:

> "So far as this potential competition includes the possible competition of statutory undertakers, we are of opinion that it should not be taken into account in assessing the compensation to be paid. We do not think that the Tribunal is justified in having regard to the possibility that undertakers to whom the State has granted statutory powers may compete with each other for the same land. Such competition is only possible under an imperfect system for the granting of statutory powers."[20]

They did not exclude consideration of competition, or possible competition, among persons who might require the land for purposes for which statutory powers are not required. Their recommendation, that "the owner should not be entitled to any increased value for his land which can only arise, or could only have arisen, by virtue of the suitability of the land for a

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[18] Scott Committee Report, at para 8.
[19] See above footnote, at para 9.
[20] See above footnote, at para 10.

purpose to which it could only have been applied under statutory powers" is reflected in rule 3.

11.15 They also recommended that increases in value attributable to the use of property in a manner contrary to law should not be taken into account (rule 4), and that there might be circumstances, where there is no market for a property for the special purpose for which the owner wishes to use it, in which the correct measure of compensation is the cost of equivalent reinstatement (rule 5).

11.16 It would therefore appear, even from this very brief summary that, in relation to compensation, the intention of the Committee was to set out a comprehensive set of rules, adjusting, rather than replacing, those which had been developed by the courts. Their recommendation as to the repeal and replacement of the 1845 legislation was not taken forward. But, in regard to compensation, the solution they suggested – essentially set out in six rules – was given statutory effect in the 1919 Act, and thereafter consolidated, along with other provisions relating to compensation, in the 1963 Act. We set out section 12 in paragraph 10.8, above.

Effect of 1919 Act

11.17 We refer to two decisions which show how the courts dealt with the new rules. In *Venables v Department of Agriculture for Scotland,*[21] there was a question as to whether the tenant of a deer forest was entitled to compensation, under rule 6, for losses said by him to have been incurred when he was required to move from the estate. The basis for the opposition to the claim was that disturbance, under rule 6, should be limited to disturbance in relation to business. We discuss that aspect of the case in Chapter 16. But in the course of considering the general principle, Lord Justice Clerk Alness observed:

> "The sound principle would seem to be that the person dispossessed should get compensation for all loss occasioned to him by reason of his dispossession. The Act of 1845 recognises that; the text-books recognise it; judicial authority recognises it; and the Act of 1919 continues to the evicted owner all claims formerly open to him, including that claim."[22]

11.18 The Court of Session's decision in *Venables* was quoted with approval in the English judgment which is widely regarded as setting out some of the fundamental principles. That is the case of *Horn v Sunderland Corporation.*[23] Sunderland Corporation obtained a CPO in respect of a farm, and also in respect of sand, gravel and limestone lying in and under the land. The farm was used for the breeding of horses. The landowner, who made a claim in response to the notice to treat, claimed compensation under rule 2 on the basis that the land was "a building estate ripe for immediate development and should be valued as such and not as a farm".[24]

11.19 In his judgment, Scott LJ looked first at the effect of the English Act 1845, and observed:

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[21] 1932 SC 573.
[22] At pp 580, 581.
[23] [1941] 2 KB 26.
[24] See above footnote, at 28. He also made a claim for disturbance under rule 6, in respect of the costs to him of setting up business in another farm. We deal with that aspect of the case in Ch 16.

> "[The 1845 Act] possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation - 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 the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater."[25]

In setting out the principles, his Lordship also said:

> "In the case of a sale by private treaty or auction the seller cannot put in his pocket more than the net market value. He can recover no loss to which he is put by his decision to part with his land, but on a compulsory sale the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, because otherwise he will not be fully compensated.
>
> But here we come to the other side of the picture. The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and **it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss**."[26] (emphasis added)

Against that background, we turn to look at the individual rules relating to the valuation of the land to be acquired.

Rule 1

11.20 Rule 1 was designed to correct the tendency to award additional compensation because the acquisition was compulsory. We discuss it in Chapter 17.

Rule 2

11.21 Rule 2 provides:

> "The value of land shall, subject 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."

11.22 The rule makes it clear that the price is that which would be achieved by a willing seller, not the price which would be paid by a willing buyer. The implications of this formulation have been considered by the courts, and a number of useful points have emerged. In addition, and in the absence of a contrary intention on the face of the statute, it is to be assumed that the earlier decisions as to the implications of this formulation of the principle were to apply after the passing of the 1919 Act as they had applied beforehand.

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[25] [1941] 2 KB 26, at p 42.
[26] Above, at p 49.

Securing best price

11.23 The hypothetical "willing seller" is entitled to sell the land in the most advantageous way. In the case of *Robertson's Trustees v Glasgow Corporation,*[27] the property being acquired comprised a block of tenement property, a number of the component units of which were let out as commercial undertakings, including a public house and a number of shops. The acquiring authority wished to buy the block as a single unit. But, if the owners had been selling them voluntarily, they would have sold the various units individually, because that would have produced a higher net price. The court held that the units should be valued individually. Lord Justice Clerk Grant observed:

> "We are not directed to look at the *actual* acquisition or to assume a single purchaser. We have to assume a *hypothetical* sale by a willing seller (that mythical twin of the hypothetical tenant in valuation law) in the open market. One cannot assume that in such a sale the seller will act without due regard to his own interests. We must assume, I think, that he will test the "open market" and if, on testing that market, he finds that, without troublesome and artificial subdivision, he can sell to a plurality of purchasers at a greater cumulo [combined, total] price than any single purchaser is prepared to pay, it is that cumulo price which, in the open market, the land 'might be expected to realise'".[28]

There is, accordingly, some practical flexibility in the concept of a willing seller.

Date of valuation

11.24 The next question is the date as at which the property is to be valued for the purposes of the "sale". That matter is fully discussed in paragraphs 7.90-7.101.

Valuation of land subject to restrictions

11.25 The price which the acquiring authority will be required to pay to the landowner may be adjusted in the light of any restrictions to which the landowner is subject. For example, where the land is held subject to a lease, the value of the land to the landlord will be diminished by the value of the lease. The leading authority on this point is the case of *Corrie v MacDermott,*[29] which was an appeal to the Judicial Committee of the Privy Council from the High Court of Australia.

11.26 The facts were that an area of land had been transferred by the Government of Queensland to the Acclimatisation Society of Queensland. The deed, as later amended, gave the Society's trustees only a very limited power to sell the land. The Government gave notice that it intended to resume possession. The question was whether the land should be valued as freehold land unrestricted in any way (in which case the agreed value would have been £7,490) or as land "required for a public purpose" (in which case the agreed value would have been £3,835). The High Court of Australia decided that the appellants were entitled to only £3,835, and the appellants appealed to the Privy Council against that decision. Lord Dunedin, giving the judgment of the Court, observed:

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[27] 1967 SC 124.
[28] At p 129.
[29] [1914] AC 1056.

> "If this case be viewed as an ordinary case of compensation their Lordships think that the law is not doubtful. The general principle was restated in the very recent case of *Cedar Rapids Manufacturing and Power Co. v. Lacoste*,[30] before this Board, which approved of the general statement by Lord Moulton in the case of *In re Lucas and Chesterfield Gas and Water Board*. The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions, it is a necessary point of inquiry how far these restrictions affect the value. It is evident that in this case, always under the assumption above stated, this view is destructive of the arbitrators' finding for 7490l. being applicable; for that value is only upon the view that the ground is 'unrestricted in any way'."[31]

The court accordingly limited the amount of compensation to £3,835.

11.27 In further consideration of the matter, his Lordship mentioned an (unreported) case in which Lord Shand had acted as an arbitrator. That was a dispute between the North British Railway Company and Edinburgh Corporation in relation to the acquisition by the Company of a part of West Princes Street Gardens. The Corporation were prohibited by Act of Parliament from building on the land, or alienating it; and were obliged to keep it for all time as a public garden.

11.28 The company argued that the land was essentially worthless, since the Corporation could not sell it. The Corporation argued that it should be valued at what it would cost to buy a strip of Princes Street – the most valuable site in Edinburgh. In the event Lord Shand held that:

> "[T]he corporation being restricted, the value could not be measured by the value of unrestricted land in a similar position; but that on the other hand the land was of value to the corporation who enjoyed it with the rest of the adjoining land, for the use of the citizens as a garden, which garden would be so much the less valuable because it was smaller; and he assessed on that view. Their Lordships consider that this judgment proceeded on correct principles."

11.29 The matter was also considered in the case of *Odeon Associated Theatres Ltd. v Glasgow Corporation,*[32] in which the Corporation acquired by compulsory purchase a derelict cinema owned by a subsidiary company which was effectively controlled by its holding company. For commercial reasons the companies had created a situation in which the holding company paid rent to its subsidiary; but in the event of a sale of the cinema the holding company would not have paid rent to the purchaser. On the question of what, if any, value should be put on the lease, Lord Fraser, in the Inner House, observed:

> "I think that we ought to give effect to the realities as far as possible and that in order to do so we must look beyond the bare terms of the lease. … The practical result of a valuation on the basis that I have suggested would, I think, probably be that the lease would add nothing to the value of the [land]."[33]

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[30] [1914] A.C. 569.
[31] [1914] AC 1056, at p 1062.
[32] 1974 SC 81.
[33] At p 95.

11.30 This position, that the valuation should take into account any restrictions on the valuation which the owner could receive from a sale of the property, appears to us to be sensible. We propose that:

74. The concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

Compensation for severance of acquired land

11.31 As we discuss in Chapter 15, the 1845 Act makes specific provision for compensation to be paid for the effect on the land *retained* by the landowner of the compulsory acquisition of the acquired land. But no provision is made for the effect of the severance of the *acquired* land from the remainder of the landowner's property. It is valued as a free-standing parcel of land.

11.32 In the case of *Abbey Homesteads,*[34] farmland was acquired for the construction of the Witney Bypass. The claimant argued that the totality of the land should be valued and apportioned to its various parts because the land only had value in terms of development potential as a whole. However, the Lands Tribunal held that compensation for the acquired land must be assessed separately from compensation for severance or injurious affection and not on the "before and after" basis. Separate assessments of compensation must be made for the acquired land and the retained land and severance compensation is available only in respect of the retained land.[35]

11.33 This may result in a claimant receiving less compensation than the whole loss suffered as the depreciation in value to the acquired land as a result of the loss of "marriage value" is not taken into consideration. As Sams notes, depreciation due to severance arises much more often in respect of the acquired land than in respect of the retained land.[36] Where the acquired land forms only a small part of the owner's entire land it will often be undevelopable in isolation from the whole, and loss due to severance will have occurred.

11.34 This will always be true unless the value of the land as a whole was nil or the acquired land forms a significant and developable unit in its own right. For instance, consider the example of a householder who has part of his garden compulsorily acquired. He has no intention of moving house but will feel aggrieved that the compensation which he is entitled to for the piece of garden that is taken is less than what it is worth to him when held with his retained land. We ask the question:

75. *S*hould depreciation of the value of the acquired land, caused by its severance from the retained land, be taken into account when assessing its value?

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[34] *Abbey Homesteads Group Ltd v Secretary of State for Transport* [1982] RVR 171. See also *ADP & E Farmers v Department of Transport* (1988) 28 RVR 58.

[35] S 61 of the 1845 Act makes clear that the claimant will be entitled to damage sustained "by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land." The section is thereby intended to confer a right to compensation only in respect of "the other land" i.e., the land retained.

[36] G S Sams, "Severance and the Land Taken" (1982) 1 *Journal of Valuation* 9.

Negative equity

11.35 Where land held under burden of a heritable security is compulsorily acquired, the assessment of compensation to be paid will require to reflect the value of the owner's interest. In some cases, and particularly where there has been a downturn in the local property market, the value of that interest may be insufficient to cover the value of the outstanding security (i.e. the property is in negative equity).

11.36 This issue was considered in the case of *Kerr v Northern Ireland Housing Executive,*[37] in the Northern Ireland Lands Tribunal. Mr Kerr purchased a property for £152,000 on a 25-year mortgage. The Housing Executive compulsorily acquired the property three years later. By agreement, Mr Kerr remained in the property until one year after the CPO and continued to make the mortgage repayments during this time. By way of compensation, he was offered £91,000 although the outstanding mortgage debt stood at £145,665. Mr Kerr argued that he should be able to recover his residual mortgage debt, i.e. "negative equity", under the heading of disturbance. The acquiring authority argued that the loss arising from negative equity was based on the value of the land and so did not fall under the heading "disturbance".[38] Mr Kerr also argued that the proper construction of the English 1845 Act, and in particular section 110 (equivalent to section 99 of the 1845 Act) should result in him being offered sufficient compensation to be able to clear the outstanding mortgage debt, taking into account the rights set out in Article 8 and Article 1 of Protocol 1 of the Convention.[39]

11.37 The Tribunal held that compensation had to be fair and full and in accordance with the principle of equivalence. The loss suffered was undisputedly directly based on the value of the land and had occurred well before the vesting as a result of the collapse in the property market, which was unrelated to the compulsory acquisition by the acquiring authority. The value of the land had to be taken as at the time of vesting and not at the time the property was purchased three years previously, even though there were significantly more favourable economic conditions at that point.

11.38 In terms of the human rights arguments relied upon by Mr Kerr, the Tribunal found that Mr Kerr had not been required to bear an "individual and excessive burden".[40] Full compensation in all circumstances was not guaranteed and certain cases may call for less reimbursement than full market value. The existence of some individual hardship in certain specific cases was acceptable as the statutory framework itself was not "manifestly without reasonable foundation".

11.39 The result of this case was unfortunate for Mr Kerr. However, his loss resulted from the arrangement between him and his creditor, as affected by wider market conditions. It was not caused directly by the compulsory acquisition. The purpose of compensation for compulsory purchase should be to satisfy the principle of equivalence. There was no suggestion that the compensation paid to Mr Kerr did not meet the requirements of rule 2.

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[37] *Kerr v Northern Ireland Housing Executive* [2012] RVR 137.
[38] In Northern Ireland, compensation for "disturbance" is derived from the Land Compensation (Northern Ireland) Order 1982, art 6(1)(6), and is in the same terms as the 1963 Act, s 12(6).
[39] See Ch 3.
[40] *James v United Kingdom* [1986] 8 EHRR 123 at 145. Human rights within the context of compulsory purchase is discussed generally in Ch 3.

11.40 Further, under rule 1, no account could be taken of the fact that the acquisition was compulsory.[41] Although the result may seem unfair in a case such as that of Mr Kerr, it was simply unfortunate that the acquiring authority elected to exercise its compulsory purchase powers at a time where the value of Mr Kerr's property had been significantly damaged by factors outwith his control.

11.41 We note that under section 36 of the 1973 Act, where, in various circumstances including the acquisition of land by an authority possessing compulsory purchase powers, a person is displaced from residential accommodation on any land and suitable accommodation on reasonable terms is not otherwise available to that person, the local housing authority have a duty to secure the provision of such accommodation.[42] Under section 38, the local housing authority may satisfy the rehousing obligation by making an advance to displaced residential owner-occupiers. The principal of this advance, together with interest is to be secured by way of a heritable security on the borrower's interest in the dwelling and the principal, is not to exceed the value of the borrower's interest.

11.42 There is nothing to suggest that these obligations would not apply where the homeowner is in negative equity (although an advance in terms of section 38 may be of limited utility to an owner in negative equity). Indeed, we understand from consultation with our Advisory Group that North Lanarkshire Council, for instance, have undertaken an effective scheme of rehousing those in negative equity. We ask the question:

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made?

Rule 3

11.43 Rule 3 is an additional factor in relation to the value of the land acquired. It effectively protects public authorities from paying a premium to a seller, where the purpose of the acquisition can only be realised by a body possessing statutory powers, or where there is no market for the land, other than for the requirements of an authority possessing such powers. That rule, and the various judicial and statutory glosses on it, form what is almost a separate topic. We accordingly deal with it in Chapter 12.

Rule 4

11.44 Rule 4 provides:

> "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".

11.45 As originally envisaged by the Scott Committee, this rule was aimed at the circumstances where property was being used contrary to sanitary laws and regulations. But the wording is quite general. There seems no reason to limit it in that way. Thus, if, for example, a business sought a licence to operate as a sex-shop,[43] and the licence was

[41] See Ch 17.
[42] This duty will also apply to certain caravan dwellers under s 37.
[43] See *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, and paras 3.40-3.42.

refused, the continued, unlawful, use of the premises as a sex-shop would not enable the proprietors to claim for loss of business in the event of the premises being compulsorily acquired.

11.46 On the other hand, the rule has been held not to apply to a use of land which was unauthorized, in the sense that no planning permission had been granted for that use, but where it was no longer possible to take enforcement action under the planning legislation. In *Hughes v Doncaster Metropolitan Borough Council,*[44] the acquiring authority compulsorily acquired the claimants' land. That land comprised two adjoining parcels. On the first, the claimants and their predecessors in title had been carrying on business as scrap metal merchants since 1959. That use would have been liable to be barred by enforcement action, if any such action had been taken by the planning authority within 4 years' of its inception. But, not having been challenged within that period, the claimants were entitled to an established use certificate, having acquired a right analogous to a prescriptive right. The claimants had acquired the second parcel of land in 1972, and used that, too, for the purposes of the business. That part of the land was accordingly still liable to enforcement action under the Planning Acts. The Tribunal treated the use of the first parcel of land as not being contrary to law, for the purposes of rule 4; and treated the use of the second parcel as subject to that rule.

11.47 The House of Lords essentially agreed with that assessment. As Lord Bridge of Harwich observed:

> "In the light of 'the well known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms' (see *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343, 359, *per* Lord Warrington) and in the light of the provisions of the Act of 1971[45] to which I have referred it seems to me impossible to treat an established use under the Act of 1971 as being 'contrary to law' within the meaning of rule 4 of the compensation rules. The right to such a use is aptly described by Lord Wilberforce in *Hartnell* v. *Minister of Housing and Local Government* [1965] A.C. 1134, 1169D, as 'analogous to a right established by prescription' and the legitimate status of the use is now expressly recognised by the statutory procedure for giving it the imprimatur of an established use certificate."[46]

Rule 5

General

11.48 Rule 5 provides:

> "Where 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 land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement".

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[44] [1991] 1 AC 382.
[45] Town and Country Planning Act 1971.
[46] [1991] 1 AC 382, at p 395.

11.49 In most cases, compensation on the basis of the market value of the acquired property will be satisfactory to meet the loss of the claimant. However, the claimant's property may not actually have a market value because it is adapted and used for a particular purpose for which there is no general demand. Common examples may be where the body operating from the building is non-profit making and carries out some public or social function such as a charity[47] or a religious organisation.[48] Business premises may also be included where the business can only be carried on under special conditions or by means of a specific licence. If compensation were to be assessed on the basis of market value then the owner of such specially adapted property would be likely to receive little in the way of compensation.[49] As the Scott Committee found:

> "In all such cases, it is obvious that if the property were put on the market for sale, the absence of competition would force the owner to accept very much less than the property had cost him and, consequently, if the property were compulsorily expropriated, a strict application by the Assessing Tribunal of the principle of 'market value as between a willing buyer and a willing seller' in determining the price to be made might result in the owner receiving only a small proportion of the sum which he must necessarily expend in order to reinstate himself on another site. Where the particular use or adaptation of the property which makes it unmarketable serves a public purpose, it is plain that market value would not afford to the owner 'just satisfaction'."[50]

11.50 The Committee therefore recommended that compensation should be assessed in such circumstances, not on the basis of market value, but on the basis of equivalent reinstatement.

11.51 The onus is on the claimant to show the "official arbiter" (likely to be the LTS) that the three criteria in rule 5 are satisfied. These are that:

(1) the property must be devoted to a particular purpose;

(2) there must be no general demand or market for land for that purpose; and

(3) there must be a *bona fide* intention to reinstate the property in some other place.

11.52 If these three criteria are satisfied then it is within the discretion of the "official arbiter" to make an award on the basis of equivalent reinstatement in the claimant's favour. The "reasonable cost of equivalent reinstatement" will be assessed as at the date at which the claimant can reasonably begin replacement.[51] We understand from discussions with our Advisory Group that it is now relatively uncommon for an equivalent reinstatement case to arise in the context of compulsory purchase. Nevertheless, we see no reason why the law should not continue to accommodate such situations.

11.53 Generally, in relation to rules 2 and 4, as well as 5, we propose that:

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[47] See e.g. *Kolbe House Society v Department of Transport* (1994) 98 P & CR 569.
[48] See e.g. *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874.
[49] See also s 42 of the 1973 Act which provides that where a dwelling has been specially adapted for the purposes of a disabled person the compensation shall, if the person in question so elects, be assessed as if the dwelling were land which devoted to a purpose of such a nature that there is no general demand or market for land for that purpose.
[50] Scott Committee Report.
[51] *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874.

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute.

Criteria for operation of rule 5

11.54 If the law is to continue to provide a right to equivalent reinstatement compensation in appropriate circumstances, it is then necessary to consider how such a right should be expressed in statute. We consider each of the three criteria in rule 5.

(a) Devoted to a purpose

11.55 This test has been taken to mean that the land must be "given up wholly or exclusively"[52] to a particular purpose. Whether the property is devoted to a particular purpose will be assessed as at the date of the notice to treat.[53] In England, these words have been interpreted to require a consideration of the *intended* purpose of the building in question – *present* use is not necessarily sufficient. There must have been a clear intention to adopt the premises for the particular purpose in question[54] but it is not necessary that the building was specifically designed for the purpose in question. The Law Commission was of the view that, in order properly to reflect case-law, the phrase "adapted and normally used" should be substituted for "devoted to a purpose."[55] Nevertheless, the "devoted to a purpose" test remains in England[56] and is also used in other jurisdictions such as New Zealand.[57] We ask the question:

78. Should a test along the lines of the "devoted to a purpose" test be retained?

(b) No general demand or market for land for that purpose

11.56 "General" demand suggests that latent or intermittent demand will be insufficient. The possibility of a general demand for such premises in the future is also insufficient – there must be a general demand or market at the date of the notice to treat. The term "market" suggests that there must be identifiable buying and selling of land for that specific purpose – it is not sufficient that there are potential users of the land for that purpose.[58] In *Harrison and Hetherington Ltd v Cumbria County Council*[59] for example, there was no general demand for the premises, a livestock market, even though such premises might occasionally sell.

11.57 There has been some suggestion that the application of this rule in practice may lead to some claimants receiving compensation in terms of rule 5 which is unduly generous as compared to neighbouring landowners who are unable to satisfy the "no general demand or market" test. Evidence from our Advisory Group suggests that acquiring authorities will be keen to draw plans so as to avoid the chance of having to pay substantial compensation on an equivalent reinstatement basis. It may therefore be desirable to strengthen the tests which must be satisfied by the claimant. This might include a requirement that equivalent

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[52] *Vaughan v Cardiganshire Water Board* (1963) 14 P & CR 193 at 199.
[53] *Zoar Independent Trust Trustees v Rochester Corporation* [1975] QB 246.
[54] *Central Methodist Church, Todmorden (Trustees of) v Todmorden Corporation* (1960) 11 P & CR 32.
[55] Law Com 286, para 4.49.
[56] The 1961 Act, s 5(5).
[57] Public Works Act 1981, s 65(1) (New Zealand).
[58] *Wilkinson v Middlesbrough Borough Council* (1983) 45 P & CR 142 at 148 per Waller LJ.
[59] (1985) 50 P & CR 396.

reinstatement compensation will only be available where evidence suggests that compensation on the basis of ordinary market value would be insufficient in the circumstances. The DETR Review recommended:

> "[P]lacing an onus on the claimant to show that the value of the site for any purpose for which planning permission could be assumed (and including any compensation payable for disturbance) would be insufficient to enable the activity or use to be resumed on another site."[60]

11.58 We ask the question:

> **79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that compensation assessed on the basis of market value (and disturbance, where appropriate) would be insufficient for the activity to be resumed on another site?**

(c) Reinstatement is bona fide *intended*

11.59 A *bona fide* intention to reinstate may require an assessment of the claimant's financial circumstances and the financial viability of the reinstated building.[61] The claimant may be able to argue that there was a *bona fide* intention to reinstate even where the building is relocated a significant distance from its original location – this is ultimately a question of degree.[62]

(d) Reasonable costs

11.60 Where these three criteria are satisfied, rule 5 allows for the "reasonable costs of equivalent reinstatement" to be recovered. There may be some circumstances, however, in which the reinstatement of the particular property in question would be considered by some to be of limited utility in terms of its public or social value to the community. In order to guard against excessive claims which may be to the significant detriment of the acquiring authority, it has been suggested that the claimant should be required to demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportionate to the public or social value of the building in question and the activity carried out therein.[63] On the other hand, there seems to be little logic in such an approach. The essence of the principle of equivalence is that, society having decided to expropriate the land, the owner should receive full recompense for that expropriation. To allow a value judgment as to the public or social value of the building and of the activity carried on there is analogous to the considerations which the Court of Session rejected so decisively in *Venables.*[64] If a building is used for some legitimate purpose, and the criteria for equivalent reinstatement are met, then it would in our view be unfair to enter into a consideration of whether or not reinstatement could on some basis be said to be "proportionate".

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[60] DETR Review, para 161.
[61] See *Sparks v Leeds City Council* (1977) 34 P & CR 234.
[62] See *Aston Charities Trust Ltd v Stepney Corporation* (1952) 3 P & CR 82.
[63] See DETR Review, paras 158-161.
[64] Above.

(e) Amount of equivalent reinstatement compensation

11.61 The reinstatement of a building will almost inevitably involve the replacement of old with new. This may be to the considerable benefit of the claimant, and there is an argument that the acquiring authority should not be liable for the extra benefit that the claimant will receive. In terms of equivalence, it has been argued that it may be fair for the claimant to bear some of the costs of reinstatement which reflects the difference in value between the old buildings and the new.

11.62 An example of how this might be formulated is to be found in section 25(6) of the Expropriation Act 1985 (Canada), which provides:

> "Despite subsection (3), if any parcel of land to which a notice of confirmation relates had any building or other structure erected on it that was specially designed for use for the purpose of a school, hospital, municipal institution or religious or charitable institution or for any similar purpose, the use of which building or other structure for that purpose by the owner or holder has been rendered impracticable as a result of the expropriation, the value of the expropriated interest or right is, if that interest or right was and, but for the expropriation, would have continued to be used for that purpose and at the time of its taking there was no general demand or market for that interest or right for that purpose, the greater of
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> (a) the market value of the expropriated interest or right determined as set out in subsection (2), and
>
> (b) the aggregate of
>
> (i) the cost of any reasonably alternative interest in land or immovable real right for that purpose, and
>
> (ii) the cost, expenses and losses arising out of or incidental to moving to and re-establishment on other premises, but if those costs, expenses and losses cannot practically be estimated or determined, there may instead be allowed a percentage, not exceeding 15, of the cost referred to in subparagraph (i),
>
> minus the amount by which the owner or holder has improved, or may reasonably be expected to improve, their position through re-establishment on other premises."

11.63 The clause at the end of this provision seems intended to deal with the issue of the benefit which the claimant may receive from the replacement of their old property with a new property. It recognises that the new premises will not have suffered a depreciation in value as the old premises have. The application of such a rule is, however, complicated – it will be difficult to cater for all the possible circumstances in which an issue of reinstatement might arise. The Australian Law Reform Commission identified flaws in the statutory formulation which has been adopted in Canada and instead favoured an approach whereby the court should have a free discretion to subtract from the sum of equivalent reinstatement compensation the amount, if any, by which the claimant has improved, or is likely to improve, his financial position by the reinstatement.[65]

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[65] Law Reform Commission of Australia, *Lands Acquisition and Compensation*, (Report No 14, 1980), para 259.

11.64 In terms of the United Kingdom's approach to these matters, these attempts to impose additional costs on the landowner seem very questionable. The owners of the building are, *ex hypothesi*, unwilling to move. They are conducting their activities in the current building. It seems almost inevitable that a new building in another place will have to meet higher standards as to construction, drainage, power supplies, sanitary provision etc. than was the case with the old building, whether or not such higher standards could have been enforced in relation to the old building. That will no doubt, on one view, be an advantage to the owners. On the other hand, it is equally the case that they may not be able to recreate any interesting or exceptional architectural features of the old building in the new construction.

11.65 Nor is it clear that they would have the means to finance whatever sum was arrived at by way of "improvements". It might be that the operation of a rule requiring them to pay for "improvements" would effectively prevent them from erecting a new building at all. In our view provision along the lines of that apparently in force in Canada would not meet the requirement for "equivalent reinstatement", and we make no suggestion that that example should be considered for the purposes of the proposed new statute.

(f) Will reinstatement actually take place?

11.66 One further concern is ensuring that compensation for equivalent reinstatement is used for its intended purpose. We have not identified any Scottish case in which equivalent reinstatement compensation has been misappropriated.[66] Nevertheless, there may be scope for making payments in stages or providing that the acquiring authority is entitled to recoup the compensation paid, or any excess, where this is not used for the purposes of equivalent reinstatement.[67] In our discussions with the LTS, it was agreed that there is scope for providing the Tribunal with discretion to direct that the whole or part of any compensation awarded should be retained and paid only when reinstatement actually takes place. We accordingly ask the question:

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

Rule 6

11.67 Rule 6 is discussed in Chapter 16.

[66] Although see the Irish case of *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468. In this case, compensation was based on the evidence of the claimant's *bona fide* intention to relocate. The claimant did not reinstate and the acquiring authority brought an action in terms of unjustified enrichment. Keane J in the Irish Supreme Court held that under the 1919 Act, s 6, the award of a property arbitrator was final and could not be disturbed by the law of unjustified enrichment.

[67] Law Com 286, 4.52.

Chapter 12 Valuation of land to be acquired - rule 3 and "no-scheme" world

Introduction

12.1 Rule 3 provides:

> "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 requirements of any authority possessing compulsory purchase powers."

12.2 When enacted in the 1919 Act, rule 3 represented the first attempt (since 1845) by Parliament to define factors which were not to be taken into account when the value of land to the seller was being assessed. There have been further Parliamentary interventions since then. In this Chapter we examine rule 3 and those further interventions in some detail, as well as the way in which the matter has been dealt with by the courts.

12.3 Our impression is that a combination of over-complicated statutory provisions and judicial activism have left the whole matter in a state of considerable confusion; so that only a comprehensive re-statement of the law in a new statute could produce a set of rules which would enable acquiring authorities, landowners and practitioners to work out what compensation might be payable in any particular circumstances. In an attempt to demonstrate the implications of the various decisions on the matter, we have included, at page 189, a diagram to which we refer in the course of this Chapter.

12.4 The immediate driver for the enactment of rule 3 was the report of the Scott Committee.[1] We consider the effect of the courts' decisions on the rule below; but we begin with a discussion of what the rule may be taken to mean on the face of it.

Rule 3

12.5 The first part of rule 3 provides that the special suitability or adaptability of the land for a 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. Even at the time the rule was originally enacted, it was the case that certain works tended to be carried out only in consequence of the grant of statutory powers. In spite of the efforts of the courts to introduce an element of competition into their consideration of the cases, the decisions in *Gough, Lucas* and *Cedar Rapids* (above, at paragraph 11.7) were all in cases where statutory bodies were seeking to purchase land for the purpose of waterworks of various kinds, and by virtue of statutory powers. Thus, and as pointed out in Rowan Robinson & Farquharson-Black,[2] in *Cedar Rapids* the Judicial Committee had found that, if the land had been put up for auction:

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[1] See paras 11.10-11.16, above.
[2] At para 6-09.

> "There was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realised scheme."[3]

The effect of the rule in such cases was to prevent the value of the land being inflated by reference to such essentially unrealistic and speculative considerations. An example of the application of the principle was the case of *Livesey v Central Electricity Generating Board,*[4] in which the Tribunal held that agricultural land being acquired for the construction of a power station could not be valued other than as agricultural land, because the construction of a power station could be carried out only under statutory powers.

12.6 On the other hand, the fact that the land being acquired was linked to other land being used for a "statutory" purchase was not sufficient to justify the application of the rule. In *Hertfordshire County Council v Ozanne and Others*,[5] the council compulsorily acquired 1.605 hectares of the applicants' land for the realignment and improvement of Thorley Lane in Bishop's Stortford. The agricultural value of the land was agreed at £5,500. The Land Tribunal, however, awarded compensation of £1,240,000 on the basis that rule 3 did not apply, and that the land was a "ransom strip", which was required to allow development of housing to take place to the north of Thorley Lane. The Court of Appeal upheld the Tribunal's decision. The council appealed to the House of Lords. They argued that the first limb of rule 3 should be applied. The acquired land could only be used for highway purposes if a stopping up order was made under the Town and Country Planning Act 1971, although it was conceded that no part of the acquired land would be subject to such an order. The council said, in support of that argument, that the *Cedar Rapids* decision was an example of the kind of development intended to be covered by the enactment of rule 3 in the 1919 Act.

12.7 In giving the judgment of the court, Lord Chancellor Mackay of Clashfern observed:

> "The special suitability or adaptability of the land for any purpose is directed to be left out of account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers. This is expressed in the passive voice but the context shows that the application referred to is by a person using the land and, therefore, the statutory powers in question must be powers enabling a person entitled to use the land to apply it to the purpose in question and since the purpose in question is one to which the land could be applied *only* in pursuance of the statutory powers the statutory powers must be necessary to enable such person to use the land for that purpose. I do not see how statutory powers not related to the use of the land acquired could form a basis for the application of this part of the rule."[6]

12.8 His Lordship went on to consider whether the *Cedar Rapids* case was, as the council had argued, an example of the kind of development intended to be covered by the enactment of rule 3, and decided that it was:

> "I consider, therefore, that the council's submission was correct that the Cedars Rapids decision provides an illustration of the cases that Parliament has covered by the part of the rule founded upon, although wrong in contending that it applies to the

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[3] At p 580.
[4] (1965) EGD 205.
[5] (1991) 62 P & CR 1; [1991] 1 WLR 105.
[6] (1991) 62 P & CR 1, at p 6.

present case. In Cedars Rapids the purpose giving rise to the enhancement of value, namely the use of the lands in question as part of a water power development of the type in question, could only arise where the appropriate statutory powers had been granted, whereas in the present case the land acquired could have been used for a highway without the exercise of any statutory power and certainly was not dependent upon the Secretary of State exercising any statutory power to stop-up any part of Thorley Lane."[7]

12.9 The second limb of rule 3 provides:

> "The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose … for which there is no market apart from the requirements of any authority possessing compulsory purchase powers."

The effect of that provision is that where land is particularly suitable for use for a purpose for which there is no demand in the open market, that particular suitability is not to be taken into account.

12.10 On one view, this part of the rule overlaps with the first part. If land is especially adaptable for a purpose to which it could be applied only in pursuance of statutory powers, it may well also be the case that that purpose is a purpose for which there is no market apart from the requirements of an authority possessing compulsory purchase powers.

12.11 But it may not be necessary, at this point, to analyse in too great depth, the possible significance of the second limb of the rule. We are content to adopt the Law Commission's summary of the effect of the various decisions on the interpretation of rule 3.[8] The Commission said that the decisions on rule 3 had established that:

> "(1) the 'adaptability' must be a quality of the subject land itself, not a quality of its products (*Pointe Gourde),* or of the nature of the interest (*Lambe);*[9]
>
> (2) 'special' implies something 'exceptional in character, quality or degree' rather than qualities shared with other possible sites (*Batchelor)*;[10]
>
> (3) the purpose requiring use of statutory powers must relate to the subject land, not to other land (*Ozanne)*; (above*)*[11]
>
> (4) the need for general forms of consent, such as planning permission or stopping up orders, is not sufficient to bring the rule into play (*Ozanne)*;
>
> (5) the 'market' may include a mere speculator, with no direct interest in the use of the land (*Blandrent)"*[12].

12.12 In any event, as the Law Commission have pointed out, the courts' interpretation of and extrapolation from the decision in the *Pointe Gourde* case (below) has largely rendered the rule nugatory.[13] We turn to consider that decision.

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[7] Above, at pp 7-8.
[8] Law Com 286, p 203.
[9] *Lambe v Secretary of State for War* [1955] 2 QB 612.
[10] *Batchelor v Kent County Council (*1990) 59 P & CR 357.
[11] Paras 12.6-12.7 above.
[12] *Blandrent Investment Developments Ltd v British Gas Corporation* [1979] 2 EGLR 18.

***Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands*[14]**

12.13 Following an agreement between the United Kingdom and the United States in 1941, certain land in Trinidad was to be leased to the US Government for the purpose of building a naval base. There were two parcels of land, one of 141 acres, and one of 10 acres. The smaller parcel was acquired because it comprised a quarry, functioning as a going (and profitable) concern, and the intention was to use stone from the quarry to construct the naval base. Both parcels were accordingly acquired compulsorily by the Crown.

12.14 The legislation in Trinidad with regard to compulsory acquisition was, so far as material, identical to the 1919 Act. In particular, section 11(2) of the Ordinance of 1941 (the equivalent of section 2(3) of the 1919 Act) was as follows:

> "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 the Government or the Government of the United Kingdom or any department of either of such Governments or any local or public authority."

12.15 A tribunal of a judge sitting with two assessors valued the land at $101,000. Within this figure, $86,000 represented the value of the quarry as a going concern. The remaining $15,000 was awarded in respect of the increase in profits which might have been anticipated had the undertaking remained in the hands of the current owners, and was, therefore, the measure of the loss of this element of prospective extra profit. The judge presiding over the Tribunal took the view that the ready availability of workable stone constituted a "special suitability or adaptability", but one which was not excluded by the remaining words of section 11(2).

12.16 The Judicial Committee of the Privy Council took the view that the word "purpose" in section 11(2) must have the same meaning throughout and, accordingly, that the subsection applied only to the land itself, and not to the use of the products of the land elsewhere. They therefore agreed that the award was not excluded by the terms of the section.

12.17 But that was not the end of the matter. After stating that the section did not apply, Lord MacDermott went on to say:

> "But it does not follow [from the inapplicability of section 11(2)] that this part of the award can stand. It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South Eastern Ry. Co. v London County Council*:
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> 'Increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded.'

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[13] Law Com 165, para 6.15(3): "[R]ule (3) of the 1919 Act (s 12(3) of the 1963 Act) has been so narrowly interpreted as to have little practical effect. In any event, the problems to which it was directed, so far as they still exist, seem to be adequately met by the judicial version of the rule. Rule (3) seems to have become effectively redundant."

[14] 1947 AC 565 (PC).

> This rule was recognized by the Full Court and, indeed, appears to be the basis of its main conclusion, for in the course of his judgment Blackall CJ, after a reference to Lord Buckmaster's statement of the principle in Fraser v Fraserville proceeds:
>
> 'In the present case, although a value as a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required. In other words, the value was enhanced by the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded.'"[15]

On that basis the court disallowed the award of $15,000.

12.18 Lord MacDermott's formulation of the matter has been analysed, interpreted and developed very extensively in the intervening years; and, as we shall see, the courts have in fact begun to draw back from some of the more far-reaching consequences of that development. As appears from the quotation above, Lord MacDermott's statement of the principle was based on the *South Eastern Railway Company* case. As Lord Scott of Foscote remarked, in *Waters*,[16] Lord MacDermott's judgment was extempore, and rehearsed very little of the past jurisprudence on the subject. In such circumstances any further analysis by this Commission would be of little value. We only observe that a great deal has been built on the foundation of that statement.

12.19 For present purposes, it appears to us that the essential point of this principle is the phrase "consequent on the **execution** of the undertaking" (emphasis added). This makes it clear that the principle is the well-known one that the value of the land is the value to the seller, not the buyer. The valuation must be on the basis of the land as it is being sold, not as it will be following the carrying out of the scheme which is the reason for the compulsory purchase.[17]

12.20 That was precisely the point which Lord MacDermott was making. The owners of the quarry were entitled to compensation for the loss of the quarry as a going concern, taking into account its profitability as shown by their business records. They were not entitled to an increase in that compensation because of the increased demand for stone as a result of the construction of the naval base which was the justification for the compulsory acquisition of both parcels of land. We emphasise (because of the way in which the courts later expanded the concept of a "scheme") that in *Pointe Gourde* the "scheme underlying the acquisition" was the discrete, self-contained and unique project for the construction of the naval base.

Contemporary background

12.21 At the time the *Pointe Gourde* judgment was issued, compensation for compulsory acquisition in the UK was assessed, not by reference to the development value of land, but by reference to existing use value. This was the effect of the 1947 Planning Act and the

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[15] See above footnote, at pp 572-573.
[16] *Waters v Welsh Development Corporation* [2004] 2 P & CR 29
[17] That was where, in the *Cedar Rapids* case, (see above) Davidson CJ was found by the Privy Council to have misdirected himself. It was the principle enunciated by Vaughan Williams LJ in *Lucas,* that it is the value of the potential of the land as it is at the time of sale for which the landowner is entitled to be compensated.

[English] Town and Country Planning Act 1947.[18] The judgment must therefore have been of only academic interest at that time to practitioners in the UK. That state of affairs continued until compensation by reference to development value was again allowed, by the Town and Country Planning Act 1959[19] and the 1959 Act. It is not surprising that those preparing the legislation should have made specific provision in relation to the assessment of compensation, in the light of the change in planning policy following World War II The line of authority up to and including the *Pointe Gourde* case was an adequate guide where compulsory purchase was usually done on the basis of a single scheme.[20] But it was manifestly unsuitable for the kind of development undertaken by local authorities and others to meet the needs of the post-war society.

12.22 Section 9 of, and Schedule 1 to, both 1959 Acts, dealt with the matter in terms of considerable complexity. For the purpose of determining what Parliament's intention was, it is worth noting the beginning of section 9:

> "(1) In addition to the rules applicable in accordance with section 2 of the Act of 1919 (which prescribes rules for the assessment of compensation), the following provisions of this section shall have effect for the purpose of assessing the compensation payable in respect of compulsory acquisitions to which section one of this Act applies:
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> Provided that, in cases falling within Part I of the First Schedule to this Act, those provisions shall have effect subject to the provisions of that Part of that Schedule."

12.23 The legislation made no reference to the jurisprudence as developed by the courts, in the sense that there was no provision to the effect that these measures were without prejudice to the courts' decisions on any aspect of the matter. The ordinary reader would have assumed that Parliament's intention had been to elaborate on the statutory provision already made in the 1919 Act so as to reflect the changed circumstances of the post-war United Kingdom. That is how section 9 was interpreted by the House of Lords in the first decision on the new measures.[21]

12.24 Section 9 and Schedule 1 went on to set out the particular rules. They traversed much, if not all, of the ground covered by the decisions leading up to, and including, the *Pointe Gourde* case. But they took account of the fact that the circumstances of planning and acquisition had become much more complex. That complexity was reflected in the complexity of the provisions. Nevertheless, it was possible, as the courts in fact did, to determine an underlying policy. The provisions set out a series of circumstances in which, where the effect of actual or proposed development was to increase or decrease the value of the acquired land, that increase or decrease was to be disregarded in assessing its value for the purposes of compulsory acquisition. It is convenient to adopt the analysis set out by

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[18] C. 51.
[19] 1959 c. 53.
[20] See, for example, *Kaye v Basingstoke Corpn* (1968) 20 P&CR 417, where Sir Michael Rowe QC observed (at p 455): "Before the 1939 war it is broadly, perhaps entirely, true to say that the application of the common law rule was comparatively simple in so far as discovering what "the scheme underlying the acquisition" was. There was usually an Act, public but more often private, or an Order which defined the scheme and the area wherein it was to operate. But in the post-war years a new conception of planning led to a series of measures which gave to local authorities, of one kind or another, planning powers of a much less detailed although more far-reaching character."
[21] See para 12.29 below.

Lord Nicholls of Birkenhead in *Waters*[22] (made in relation to the provisions, as consolidated in section 6 of the 1961 Act):

> "Their complexity makes summary difficult. For present purposes it is sufficient to say that the broad thrust of section 6 of the 1961 Act as amended appears to be as follows. The value attributable to development, or prospect of development, of land other than the subject land is to be disregarded in a variety of circumstances specified in Part I of the First Schedule. These are: that the other land and the subject land are within the same compulsory purchase order (case 1), or within an area of comprehensive development (case 2) or within a site designated under the New Towns Act 1946 (case 3) or the extension of such a site (case 3A) or a town development area (case 4) or an urban development area (case 4A) or a housing trust action area (case 4B). In these cases changes in the value of the subject land attributable to development or the prospect of development for the same purposes of other land in the same compulsory purchase order are to be disregarded if 'the development … would not have been likely to be carried out if … the acquiring authority had not acquired and did not propose to acquire any of the land comprised in the compulsory purchase order': section 6(1)(a). Additionally, where land is within cases 2 to 4B the disregard extends to the effect in value on the subject land of any development, past or prospective, which would not have been likely to be carried out if the area had not been designated, for example, in case 4B, as an urban development area: section 6(1)(b).
>
> In the case of urban development areas the disregard net is cast even wider by paragraphs 10 and 11 of Schedule 1, introduced by the Local Government, Planning and Land Act 1980. A change in value is not to be excluded from the scope of the disregard merely because it is attributable to a development which was carried out before the area was designated as an urban development area, or to a development of land outside the urban development area, or to development by an authority other than the acquiring authority: paragraph 10. Further, in an apparent reference to the Pointe Gourde principle, paragraph 11 provides that paragraph 10 shall apply also to any change in value to be left out of account 'by virtue of any rule of law relating to the assessment of compensation in respect of compulsory acquisition'."[23]

12.25 As his Lordship points out, the method adopted is to set out a range of specific circumstances, or "cases", in the first column of the Schedule, and then, in the second column, to define the development whose effect on the value of the acquired land is to be disregarded. In what follows, the "relevant" land (marked "C" in the diagram) is the land the value of which is being assessed for compensation.

12.26 Case 1 was where the acquisition is for purposes involving development of any of the land authorised to be acquired; and the development to be disregarded was:

> "Development of any of the land authorised to be acquired, **other than the relevant land,** being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired." (emphasis added)

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[22] [2004] 2 P. & C.R. 29, at p 545, para 49.

[23] In terms of the diagram at page 189, the 1980 Act provided that where there had been development in area D – land in a different authority's area – which had increased the value of the relevant land (area C), that increase was to be disregarded when C was being compulsorily acquired.

12.27 The same phrase appeared in each of the other six cases set out in the Schedule. Applying the ordinary rules of statutory interpretation, the presence of the emphasised words would have led the reader to assume that an increase in the value of the relevant land, attributable to the development for which it was being acquired, would not be disregarded. In terms of the diagram, an increase in the value of C by reason of the increase in the value of D (as a result of the development) would be disregarded, but an increase in the value of C itself (as a result of the development) would be taken into account.

What difference would such an assumption make?

12.28 The effect of this, where the land was being acquired for, say, housing, would be that the relevant land would be valued not only as land where housing would be permitted, but as land where houses would actually be built, in accordance with the local development plan. The effect on the value of the land would depend upon a number of factors. The most obvious would be the timeframe within which it was envisaged that the relevant land would be built on. Another would be the extent to which a valuer would have to allow for the provision of services (roads, sewerage etc.) in the somewhat artificial situation of a notional development of only the relevant land. And the value would still be the value to the (willing) seller. But, even accepting all these limitations, the net effect of a literal interpretation of the statute would be to tend to increase the value of the land to the owner from whom it was being compulsorily acquired.

12.29 The provisions of the Town and Country Planning Act 1959[24] (equivalent to the 1959 Act) were considered first in the case of *Davy v Leeds Corporation.*[25] While the point raised above did not feature in that case, it is useful as showing the courts' approach to the statute. The appellants owned two separate groups of houses which were unfit for habitation in a slum district in Leeds; the land in the district was in the ownership of many different persons and it was established that there was no prospect of private redevelopment, the district being zoned as residential in the development plan. Leeds Corporation, acting under Part III of the Housing Act 1957, declared an area including the appellants' land to be a clearance area; within a month they resolved to acquire the land in the area compulsorily. If the claimants' land were to be valued on the basis that, once cleared, the sites would be surrounded by similarly cleared sites, the value of the two sites would be £830 and £500. If it were to be valued on the basis that, once cleared, it would be surrounded by uncleared sites, the value of the sites would be £625 and £330.

12.30 The case turned on the interpretation of section 9(2) of the (English) 1959 Act, a provision, like its Scottish counterpart, of considerable complexity.[26] In the Court of Appeal, Lord Denning MR observed:

> "I am inclined to think that this statute specifies the method of valuation in such detail that there is not much room for the application of general principles, but I am glad to find that the conclusion which I have reached is in accordance with the general law which would have applied in the absence of express provision. In *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendment of Crown Lands*, Lord MacDermott put it in one sentence in the Privy Council when he said: 'compensation

[24] 1959 c. 53.
[25] (1965) 16 P & CR 24 (Court of Appeal); (1966) 17 P & CR 83 (House of Lords).
[26] See para 12.24, above.

for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.

I regard section 9 (7) (a) of the Act of 1959 as saying very much the same thing in this statute. In assessing compensation you are to have regard only to such development as would be likely to take place in any event, even if there were no compulsory acquisition, and you must disregard any development that was unlikely. On this basis you should not have regard to the fact that the 30 acres were declared to be a clearance area, but should regard it on the same basis as if the corporation had not undertaken any acquisition of the clearance area. This means that the site must be assessed on the 'no clearance area' basis."[27] (emphasis added)

12.31 In the circumstances, the site was to be valued as a site cleared of buildings and available for development, but without any increase in value attributable to the clearing of the surrounding land, and therefore the sites were valued at £625 and £330.

12.32 This judgment was approved in the House of Lords. Section 9 of the 1959 Act attracted just as much criticism but, as described by Viscount Dilhorne, its effect, in relation to the *Davy* case, was as follows:

> "[I]n the case of every acquisition involving the clearing of the land, no account is to be taken of any increase or diminution of the value of the relevant land which is attributable to any clearing of any of the land authorised to be acquired other than the relevant land or of the prospect that any such clearing will or may be carried out in so far as the clearing (whether actual or prospective) is or would be clearing arising from the circumstances of the case."[28]

12.33 Making allowances for the different circumstances of the cases, this appears to be the principle which had guided Lord MacDermott in *Pointe Gourde* (above).[29] Indeed, this is clearly how it appeared to Viscount Dilhorne, who went on to say:

> "By section 9 (2) of the Act of 1959 Parliament, it seems to me, has given statutory expression to the principle which Lord MacDermott stated was well settled."[30]

12.34 Lord Cohen indicated that he had written a judgment, but having read Viscount Dilhorne's judgment, agreed with it so completely that there was nothing which he wished to add. The other judges delivered concurring opinions, but without mentioning the *Pointe Gourde* case. In particular, Lord Guest observed:

> "Case 1 [of the Table contained in section 9(2)] provides in effect that if the clearing would have been likely to have been carried out with government intervention then the owner is not to receive any benefit or disadvantage from that intervention. Section 9 (7) safeguards the ease where the clearing would have come about without government intervention and provides for the owner being entitled to an enhanced value if it was due to that development."[31]

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[27] At pp 30-31.
[28] (1966) 17 P & CR 83, at p 90.
[29] "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition."
[30] (1966) 17 P & CR 83, at p 91.
[31] At p 101.

12.35 Since this project is largely centred on the legislative structure within which compulsory purchase operates, we should at this point discuss that structure, in relation to the statutory disregards. As Lord Scott of Foscote put the matter in *Waters* (below)*:*

> "My Lords, it must be right that section 9(2) of the 1959 Act, coupled with section 2 rule (3) of the 1919 Act, constituted the statutory intention as to the matters to be excluded from the value of compulsorily acquired land for the purpose of the assessment of compensation."[32]

We observe that although, in a number of cases, the *Pointe Gourde* ratio is referred to as a common law principle,[33] it is not. It is no more and no less than an interpretation of an aspect of a statutory code dating from 1845.

12.36 We note that the circumstances of the *Davy* case were analogous to those of the *Pointe Gourde* decision. In both the question was whether the prospect of development (including, in *Davy,* demolition) on land *other* than the land being compulsorily acquired could legitimately be used as a factor influencing the compensation to be paid in respect of the latter land.

12.37 This indication, at the highest level, that section 9(2) of the 1959 Act was the statutory expression of the *Pointe Gourde* decision, was not followed in many of the subsequent decisions. As noted by Lord Scott of Foscote in *Waters v Welsh Development Agency,* the Court of Appeal in a series of decisions, effectively disregarded Viscount Dilhorne's view and proceeded as if the *Pointe Gourde* decision and the provisions of section 9 of the 1959 Act, were operating in parallel, with the result, over a period, that the statutory provision has ceased to have much, if any, practical effect. This is in accordance with the opinion of the majority of the judges in the House of Lords in *Waters,* Lord Nicholls of Birkenhead observing:

> "The first and most obvious oddity of this enactment is that it makes no provision regarding value attributable to the prospect of development of the subject land itself. **It is frankly impossible to believe that Parliament intended that enhancement of value attributable to the prospect of development of associated land should be disregarded but not enhancement in value attributable to the prospect of development of the subject land itself.** The statutory assumptions regarding planning permissions in respect of the subject land, set out in sections 14 to 16 , do not provide an adequate explanation for this difference in treatment. Planning permission is one thing, the prospect of development is another."[34] (emphasis added)

12.38 In *Camrose v Basingstoke Corporation*,[35] the claimant owned two parcels of land suitable for housing, one parcel being closer than the other to the town of Basingstoke. The town was being expanded to receive overspill population from London. The land was being acquired by agreement, but on the same terms as if it had been acquired compulsorily. The tribunal valued the land by considering the probable normal development of the existing town, absent the scheme, but taking into account the fact that under section 15 of the 1961

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[32] At para 101.
[33] See, for example, *Kaye v Basingstoke Corpn.* (1968) 20 P&CR 417, where Sir Michael Rowe QC observed (at p 455): "Before the 1939 war it is broadly, perhaps entirely, true to say that **the application of the common law rule** was comparatively simple in so far as discovering what "the scheme underlying the acquisition" was." (emphasis added).
[34] At p. 546, para 51.
[35] [1966] 1 WLR 1100.

Act, planning permission for housing development was to be assumed. The parcel of land (150 acres) nearer to the town was accordingly valued as if development there would take place in due course. The parcel of land (233 acres) further away from the town was valued as if there was no more than a "hope" of development in the ordinary course of events.

12.39 In relation to the 233 acres, the claimant appealed on the basis that section 6 of the 1961 Act required the valuer to disregard any increase in the value of the claimant's land due to the development of land other than the claimant's land, but, by implication, did not authorise the valuer to disregard the increase in value to the claimant's land due to the development to be carried out on that land by virtue of the scheme. In terms of the diagram at page 189, Viscount Camrose's land would be "C", and the total land being acquired would be "B". Any increase in the value of C by virtue of the proposed development of D (the remainder of the land being compulsorily acquired) would be disregarded, but any increase in the value of C itself, as a result of the proposed development, would be taken into account. Lord Denning MR dealt fairly summarily with this argument:

> "I can see that, on a literal reading, there is something in this argument. But it is contrary to common sense. I cannot see how any valuer could value on that footing. It is an impossible hypothesis. In many cases the 'relevant land' cannot be developed unless the 'other land' is developed first. Sewers and roads may have to be inserted in the 'other land' before you reach the 'relevant land'. In such cases you cannot envisage the 'relevant land' as being developed while the 'other land' is not developed.
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> The explanation of section 6(1) is, I think, this: The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition. That was settled by *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands*, where the Privy Council disallowed the $15,000 increase in value of the quarry (which was compulsorily acquired) which was due to the scheme for a naval base.
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> That decision has since been approved by the *House of Lords in Davy v. Leeds Corporation*. It is left untouched by section 6 (1). But there might be some doubt as to its scope. So the legislature passed section 6 (1) and the First Schedule in order to make it clear that you were not to take into account any increase due to the development of the other land, namely, land other than the claimed parcel. I think that the decision in the *Pointe Gourde* case covers one aspect: and section 6 (1) covers the other: with the result that the tribunal is to ignore any increase in value due to the Town Development Act, both on the relevant land and on the other land."[36]

12.40 It is certainly true that it would have been difficult for a valuer to work out a realistic value for the "relevant" land in the absence of the roads, sewers and other services which would have been put in place other than on that land. But valuers are accustomed to making judgments as to the cost of installing such services in reaching a valuation.[37] It is not clear that it is any more unrealistic to impute a potentiality value to land where its prospects of development are to be considered in isolation from those of the surrounding land than it is

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[36] At p 1107.
[37] See, for example, the detailed calculations carried out by the valuer, and described in *Stokes v Cambridge Corporation* (1962) 13 P & CR 77, at p 80.

to impute a value to land in isolation from a long-standing scheme which has been developing for years.

12.41 Nor is it clear how much difference such an exercise would have made to the value eventually put upon the land in question. But it seems reasonable to suppose that it would have tended to increase the compensation due to the owner of the land. In 1971, in the case of *Wilson and Another v Liverpool Corporation,*[38] Lord Denning MR restated the point, and indeed expanded upon it with some cogent remarks as to the nature of a "scheme" for the purposes of the *Pointe Gourde* principle. Liverpool Corporation had, by voluntary agreement, purchased 305 acres of land (out of a total of 391) for the purposes of building houses. They made a CPO in relation to the remainder, of which 74 acres were owned by the claimants. The claimants submitted that, the 305 acres having been acquired by agreement, that land was self-evidently *not* "land authorised to be acquired" in terms of Case 1 of Schedule 1 to the 1961 Act. In terms of the diagram, the 305 acres would be the part marked "A" and the 74 acres would be the relevant land, "C".

12.42 The Tribunal held that the *Pointe Gourde* principle applied to supplement the provisions of the 1961 Act in a case which would have fallen within Case 1 had the land not been acquired by agreement.[39] They also held that there had, as at the date of the notice to treat, been a "scheme" within the meaning of the *Pointe Gourde* principle, in that by the date of the notice to treat, a purchaser would have known enough about the Corporation's plans to have been able to allow for its effect in deciding what price he would pay for the subject land. The Tribunal also discussed the then jurisprudence on the statutory provisions and the continuing validity of the *Pointe Gourde* case, concluding in terms which very usefully point out the difficulty caused by the approach adopted by the courts:

> "[W]hatever conclusion is reached on this question seems to us to involve considerable difficulties of construction. For if the common law principle is that there shall be excluded from compensation any betterment resulting from the scheme underlying the acquisition, and if the statute was intended entirely to replace this principle, then it is difficult to see why words should have been used which do not cover so clear an instance of the principle as the present case affords. If on the other hand it was not intended entirely to replace the common law we find it difficult to see, despite the explanation given by Lord Denning in *Camrose*, why the statute was necessary at all. For in our view all the cases in the First Schedule (as far as they go) fall fairly and squarely within the common law principle as stated by Lord MacDermott. However this may be we think that in the present case we are bound by the *Camrose* decision and for the reasons given above we propose to assess compensation on the basis that increase in value due to the scheme must be excluded from our award."[40]

12.43 The Court of Appeal decided the question of the application, or otherwise, of the *Pointe Gourde* principle. Lord Denning MR observed:

> "[The 1961 Act] contains an elaborate provision about prospective development. It sets out in a schedule the circumstances in which no account is to be taken of any increase in value due to the prospect of development: see section 6 (1) and the First Schedule. It is suggested that this provision contains a code which defines

[38] (1971) 22 P & CR 282.
[39] (1970) 21 P & CR 452.
[40] See above footnote, at p 469.

> exhaustively the increases which are *not* to be taken into account, so that any other increase *is* to be taken into account, and, accordingly, that there is no room for the *Pointe Gourde* principle. But this Court has rejected that argument. In *Camrose (Viscount) and Another v Basingstoke Corporation*, we held that the Pointe Gourde principle still applied to development which was not mentioned in the Schedule to the Act of 1961. Mr. Pigot … says that the Pointe Gourde principle does not apply here. The principle only applies, he says, when the scheme is precise and definite and is made known to all the world. He referred us to the cases in Chancery on building schemes, such as *Elliston v Reacher* and *Reid v. Bickerstaff*.
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> I do not accept Mr. Pigot's submission. A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite and known to all. Correspondingly, its impact has a progressive effect on values. At first, it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed."[41]

Widgery LJ, concurring, said:

> "The scheme will always exist in some shape or form by the time the notice to treat is served. It must, indeed, be in some shape or form at the time of confirmation of the compulsory purchase order itself, and then, as my Lord has said, it may develop almost from day to day, and the ultimate question for the valuer is to decide to what extent the dead–ripe value of the land on the day upon which the valuation is to be made has been increased by reason of the existence of the scheme."[42]

12.44 As we have noted, in *Davy,* the only two judges in the House of Lords who mentioned *Pointe Gourde*, did so on the basis that section 9 of the 1959 Act, as consolidated in section 6 of the 1961 Act (the English equivalent of the 1963 Act), had given statutory expression to the principle set out in that judgment. In the event, not only did the courts brush aside the *dicta* in *Davy,* they proceeded effectively to make the relevant provisions of the 1959 Act, and the 1961 consolidation, redundant. As pointed out by the Tribunal in *Wilson*, there is no logical room for the statute and the *Pointe Gourde* principle to co-exist side by side (see paragraph 12.42 above).

What is the "scheme"?

12.45 In *Pointe Gourde* the "scheme" was a straightforward plan compulsorily to acquire two parcels of land so as to construct a naval base on one of the parcels of the land acquired, while using the other parcel of land, comprising the quarry which gave rise to the litigation, as a convenient source of raw materials. Such a scheme is very far from the broad-reaching development plans which were in contemplation when the 1959 Act was passed. It is even further from the expansion of the concept described above in *Wilson*.

12.46 In the case of *Myers v Milton Keynes Development Corporation*,[43] the appellant was the owner of land proposed as part of the site of a proposed new town. The proposal for the development of the appellant's land was that it should be used as a residential area, but not

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[41] At p 292.
[42] At pp 293-294.
[43] (1974) P & CR 518.

for ten years. In the event, vacant possession to the land was given as at 18th March 1970, which was accordingly the date of valuation. By virtue of section 15 of the 1961 Act, it was to be assumed that planning permission would have been granted for the land, such as would permit development in accordance with the proposals of the acquiring authority. The Tribunal took the view that the operation of the *Pointe Gourde* principle required it to disregard the notional grant of planning permission. The Court of Appeal found that that was not correct. The effect of section 15 was to treat the land as land with planning permission. The effect of *Pointe Gourde* was that it was then to be valued as if there were in fact no plan to develop either that land, or the surrounding land, at all. As Lord Denning MR, giving the opinion of the court, put the matter:

> "It is apparent, therefore, that the valuation has to be done in an imaginary state of affairs in which there is no scheme. The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town but where there is to be supposed the old order of things continuing: a county planning authority which will grant planning permissions of various kinds at such times and in such parcels as it thinks best, but with an assurance that in March 1980 planning permission will be available for the residential development of the Walton Manor estate."[44]

12.47 In the event, the court found, as it had done in the *Camrose* case, that the correct valuation was one based on the "hope" value. *Myers*, like the *Camrose* case, shows rather well the difference between the scheme of the legislation set out by Parliament, and the scheme in fact adopted by the courts. If section 6 of the 1961 Act had been applied, the land in question would have been valued as if there had been a settled decision to develop it for housing after ten years. It is impossible to say what difference that would have made: but it is likely that the valuation would have been much greater than that actually found.

12.48 Further, as we noted in paragraph 12.18, the way in which Lord MacDermott related his statement of principle to the previous jurisprudence was by reference to a statement of Mr Justice Eve. That statement made it abundantly clear that what was being excluded was an addition to the value of the acquired land by reference to the execution of the scheme. That exclusion was entirely in line with the earlier authorities, but those authorities also made it clear that an increase in the potential value of the land by reason of its suitability for development of a particular kind, could legitimately be taken into account; the only exceptions being where the suitability was of a kind which was only useful to an authority exercising statutory powers. That exception was expressed in rule 3 of section 2 of the 1919 Act.

12.49 The jurisprudence in relation to the statutory provisions, and to the *Pointe Gourde* principle, was further developed in a number of subsequent cases,[45] which we need not consider in detail, because the whole matter was discussed in the (House of Lords) cases of *Waters*[46] and *Transport for London v Spirerose.*[47]

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[44] At p 527.
[45] See, for example, *Margate Corporation v Devotwill Investments Ltd,* (1971) 22 P & CR 328.
[46] [2004] 2 P & CR 29.

Waters v Welsh Development Agency

12.50 It was recognised that one of the consequences of the construction of a barrage across Cardiff Bay, pursuant to an authorising statute passed in 1993, would be the destruction of inter-tidal mud flats. The mudflats were a site of special scientific interest, and their destruction would be incompatible with European Directives on Wild Birds[48] and Habitats.[49] The government accordingly undertook to create a wetland reserve to compensate for the destruction of the mudflats. In 1997 the claimants' land was compulsorily acquired as part of that reserve.

12.51 The compensation payable to the claimants was subject to the "no-scheme" rule, resulting in a disregard of any increase in the value of the land which was due entirely to the scheme underlying the acquisition. The claimants maintained that the value of the land was enhanced by the government's need to comply with its European obligations, and that that enhancement should be taken into account in assessing compensation. The Lands Tribunal essentially dismissed that consideration. It held that the scheme underlying the acquisition was the barrage project, not the nature reserve, and that the government's requirement to provide a compensating nature reserve must be left out of account in valuing the land. The Court of Appeal rejected the claimants' appeal, and the claimants appealed to the House of Lords.

12.52 In the House of Lords, substantive judgments were given by Lord Nicholls of Birkenhead and Lord Brown of Eaton under Heywood. Lord Woolf and Lord Steyn indicated their agreement with both of the substantive judgments. Lord Scott of Foscote, while agreeing that the appeal should fail, delivered a substantive dissenting judgment on the nature and extent of the *Pointe Gourde* principle.

12.53 Lord Nicholls analysed the judgments, from *Countess of Ossalinsky and Manchester Corporation* to the more recent judgments of the Court of Appeal. We have noted, in paragraph 12.24, how his Lordship deftly described the effect of the provisions consolidated in the 1961 Act, taking note of the widening of the disregards by the provisions inserted into the 1961 Act by the 1980 Act. In addition to the perceived lacuna[50] that the statutory disregards did not apply to an increase in value of the acquired land as a result of the scheme, his Lordship identified a further lacuna. That is in relation to the situation where an authority has acquired a certain amount of land by agreement. So far as the statute is concerned, the increase in value of the compulsorily acquired land by reason of the non-statutory purchase of the adjoining land does not require to be disregarded. That was what was decided in the case of *Wilson v Liverpool Corporation* (above). Here, again, the courts have found it necessary to remedy the perceived deficiencies in the legislation. As Lord Nicholls points out:

> "The courts therefore found themselves driven to conclude that the statutory code is not exhaustive and that the Pointe Gourde principle still applies. This conclusion is open to the criticism that in many instances this makes the statutory provisions

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[47] [2009] 1 WLR 1797.
[48] Council Directive 79/409/EEC.
[49] Council Directive 92/43/EEC.
[50] Lacuna is "an unfilled gap".

otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative."[51]

12.54 By way of comment, we note that if the legislation had been interpreted in accordance with the normal rules, the effect would in some cases have been to increase (albeit probably not by a great deal) the compensation to be awarded to citizens whose property was being expropriated by the state. Rather than interpret the legislation in this "repugnant" manner, the courts have chosen to render the statute "otiose".

12.55 We have come to the conclusion, from an examination of the terms of the 1959 Acts, and of the consolidation in the 1961 and 1963 Acts, that Parliament did in fact intend to create an exhaustive code. The policy underlying such a code may not be agreeable to all: it may not even be considered to be internally consistent. But the difficulties which arise when the courts depart from such a code are clear. As we have pointed out, the "scheme" in *Pointe Gourde* comprised a straightforward, coherent project for the purchase of two parcels of land, one as the site of a naval base, and one to supply the necessary raw materials. That concept has been adopted and developed and expanded by the courts into the imaginary world into which Lord Denning MR has propelled surveyors charged with the valuation of compulsorily acquired land.

12.56 Nevertheless, the judgment in the *Waters* case represents a serious (but not final) attempt by the House of Lords to define, and indeed to limit, the scope of the *Pointe Gourde* principle. Lord Nicholls recognised that the concept of a scheme might have been developed too far, and set out some principles which should guide courts in the future. He said, by way of definition of a "scheme":

> "A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory acquisition of the subject land is an integral part of such a scheme, the *Pointe Gourde* principle will apply accordingly. Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works should be regarded as a single scheme when applying the *Pointe Gourde* principle to the subject land.
>
> The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood."[52]

12.57 His Lordship went on to consider the circumstance in which a number of linked, but discrete, operations might be said to constitute a single scheme for the purposes of the principle. He observed:

> "A similar judgmental exercise is required with regard to the works said to comprise one scheme for the purposes of the Pointe Gourde principle. When deciding, for instance, whether a phased development constitutes a single scheme or more than one scheme the tribunal will consider all the circumstances and decide how much weight, or importance, to attach to the various relevant features. The tribunal will attach to these features the degree of importance it considers appropriate having

[51] [2004] 2 P & CR 29, at para 54.
[52] See above footnote, at para 58 and 59.

> regard to the purpose of the Pointe Gourde principle. What, then, is the purpose of this principle? Its purpose, in separating 'value to the owner' from 'value to the purchaser', is to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land. They are to receive fair compensation but not more than fair compensation. This is the overriding guiding principle when deciding the extent of a scheme.
>
> This statement of general principle does no more than articulate the approach already adopted intuitively by tribunals when faced with making a choice between competing views of the extent of a scheme in a particular case. It is to be hoped that bringing this principle into the open will assist decision-making in difficult cases.
>
> In applying this general principle there is of course no magical detailed formula which will provide a ready answer in every case. That is in the nature of things, circumstances varying so widely. But some pointers may be useful. (1) The *Pointe Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. Otherwise the principle would thwart, rather than advance, the intention of Parliament. (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible. (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired. (4) When applied as a supplement to the section 6 code, which will usually be the position, the *Pointe Gourde* principle should be applied by analogy with the provisions of the statutory code. Thus in the class 1 type of case the area of the scheme should be interpreted narrowly, for instance, so as to embrace the property acquired under the compulsory purchase order and property which would probably have been so acquired had it not been bought by agreement. In other cases, such as case 2, Parliament has spread the 'disregard' net more widely. Then it may be appropriate to give the scheme a wider scope. (5) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be regarded as conclusive. (6) When in doubt a scheme should be identified in narrower rather than broader terms."[53]

12.58 It appears to us that these criteria still leave ample room for uncertainty as to the effect of the disregards. They appear to suggest that a tribunal faced with a decision as to a disregard, should dip in and out of the statute, and the jurisprudence following the *Pointe Gourde* decision, to meet the particular circumstances of the case, with the overall objective of achieving what is (presumably in the view of the relevant tribunal) a "fair and reasonable" result. They do not assist at all in solving what we see as the essential problem, that the two systems, the statutory provisions, and the decisions of the courts, are seeking to regulate the same factual situations by reference to conflicting, and in some cases irreconcilable, principles.[54] This is in fact acknowledged by the House of Lords: the "pointers" set out by Lord Nicholls sit awkwardly beside his earlier observation quoted at paragraph 12.53 above.

12.59 As we have noted,[55] the usual rule is that where statute has dealt with a matter, there is no room for the common law to exist alongside it. The difficulties caused by a departure

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[53] See above footnote, at para 61 to 63.
[54] In *Jelson Ltd v Blaby District Council* (1977) 34 P & CR 77, Lord Denning MR observed: "The position is, to my mind, that there is a depreciation here which is covered both by the Pointe Gourde principle and by section 9 of the Act of 1961." (at p 81).
[55] In para 3.9.

from this principle are well illustrated by the cases mentioned above. Like Lord Scott of Foscote, who dissented from the view of the majority that the matter was governed by the *Pointe Gourde* decision, we would much have preferred a series of decisions which sought to apply the (admittedly complex) criteria which Parliament had set out. For completeness, we should note that there was some sympathy for the approach adopted by Lord Scott of Foscote. Lord Brown of Eaton-under-Heywood observed:

> "Again in common with Lord Scott … I believe that rule 3 has been too narrowly construed … . But again, rather than attempt to put back the clock and reinstate rule 3 at the expense of the Pointe Gourde rule, I am inclined to treat the latter as the prevailing law. For my part, therefore, I propose to address the arguments advanced on the appeal on the footing that the principle embodied in the Pointe Gourde line of decisions remains a rule of law."[56]

12.60 In the case of *Spirerose*, the judges in the House of Lords were less inclined to treat the *Pointe Gourde* principle as settled law.

Transport for London v Spirerose (in Administration)[57]

12.61 While the *Waters* case involved a consideration of rule 3, the *Spirerose* decision involved statutory assumptions. The claimant's land, a small building, was to be compulsorily acquired for the purposes of the extension of the London Underground. The claimant applied for a CAAD[58] on the basis of a (notional) proposal to erect a small block of offices and flats. Had a CAAD been granted in respect of that development, there would have been a statutory assumption that planning permission would have been obtained for it.

12.62 The local authority were willing to grant a CAAD, but were apparently under the (erroneous) impression that the appropriate date, under the legislation, for a decision as to the granting of a certificate, was the date of the valuation of Spirerose's claim for compensation, that is, the date of entry by the acquiring authority on to the land, in December 2001. At that time, had it not been for the compulsory acquisition, there would have been reasonable prospects of an application for the notional development being granted.

12.63 But the correct date for a decision as to the granting of a CAAD was the date of the application for the original CPO, which was in the autumn of 1993, at which time the local authority had a policy of restricting residential development. So no CAAD could be granted.

12.64 Nevertheless, the Tribunal found that, on the balance of probability, planning permission would have been granted as at the valuation date. It then decided that the land should be valued on the assumption that planning permission would actually have been obtained. That was on the basis that, even although the statutory assumptions in the 1961 Act did not in terms apply, the *Pointe Gourde* principle could be prayed in aid as an adjunct to the statutory assumptions, with the result that, for valuation purposes, it could be assumed that planning permission would certainly have been granted in any event.

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[56] [2004] 2 P & CR 29, at para 143. A similar point was made by Lord Woolf at para 72: "I have also read Lord Scott of Foscote's speech. At an earlier date there would have been much to be said for his approach."
[57] [2009] 1 WLR 1797.
[58] See Ch 14 for detailed discussion on CAADs.

12.65 Accordingly, it treated that hypothetical probability of a grant of planning permission, as a certainty, with the result that the claimant was awarded more than would have been the case had the award been discounted in consideration of the possibility that permission might not have been granted. The difference was that on the full valuation, the compensation would be £608,000. On the lesser valuation, the compensation would be £400,000. The Court of Appeal agreed with the decision of the Tribunal.

12.66 The judges in the House of Lords were unanimously of the view that the *Pointe Gourde* principle had no application in the case before them. They also noticeably drew back from the position adopted by the House in *Waters*. The two major opinions were given by Lord Walker of Gestingthorpe and Lord Collins of Mapesbury, both of whom analysed the decision in *Waters* in some detail. Lord Neuberger, Lord Scott and Lord Mance all agreed with those two opinions, with Lord Neuberger and Lord Scott adding some observations of their own.

12.67 Lord Neuberger said:

> "I do not consider that it is right to invoke the Pointe Gourde principle, or any other principle developed by the courts, for the purpose of adding a wholly new assumption to the statutory assumptions which have been laid down by the legislature…. . All the more so if that assumption is effectively inconsistent with one or more of the express statutory assumptions. I do not thereby intend to suggest the Pointe Gourde principle has no part to play in this field, but its role is relatively limited. I agree with Lord Collins, when he says in para 128 that it is a principle of statutory interpretation, mainly designed and used to explain and amplify the expression 'value'. As Lord Walker implies in para 36, the principle is a factor to be borne in mind when construing the compensation legislation with a view to achieving, so far as possible, a result consistent with its aim of fair compensation. That seems to me consistent with principle and with most of the authorities, including all the decisions of this House and of the Privy Council, to which your Lordships were taken."[59]

12.68 Lord Collins observed, in relation to the *Pointe Gourde* principle:

> "In my opinion it [the *Pointe Gourde* principle] is a principle of statutory interpretation, mainly designed and used to explain and amplify the expression 'value'. … In *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 213–215 Lord Pearson reviewed the authorities and concluded, at p 214, that although the Pointe Gourde principle had been described as a 'common law principle', it could not be such a principle 'because compulsory acquisition and compensation for it are entirely creations of statute'. He went on, at pp 214–215: 'The Pointe Gourde principle in my opinion involves an interpretation of the word "value" in those statutory provisions which require the compensation for compulsory acquisition to include the value of the lands taken.' I am satisfied that this the right approach and that there is nothing in Lord Nicholls's speech in Waters which is inconsistent with this view. … The underlying basis of the decision in Waters is that the extent of the scheme to be ignored for the purposes of valuation is not limited by the express provisions of section 6 and Schedule 1. It does not go further … ."[60]

12.69 The difficulty is that while these observations clearly cast much doubt on the analysis of the *Pointe Gourde* principle in *Waters,* they do not explicitly state that that analysis is

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[59] [2009] 1 WLR 1797, at para 56.
[60] See above footnote, at para 128.

wrong. Indeed, Lord Collins' opinion, quoted above, that "the underlying basis of the decision in Waters is that the extent of the scheme to be ignored for the purposes of the valuation is not limited by the express provisions of section 6 and Schedule 1" is on one view an acceptance of the idea that the principle may be used to alter the clear provisions of the statutory code.

12.70 In his analysis of the decisions in *Waters* and *Spirerose,*[61] Barnes explains that *Spirerose* did not expressly depart from the decision in *Waters*. However, the effect of the doctrine of precedent is that that is, in fact, what has happened. This is because in *Spirerose* Lord Walker, with whom the other judges agreed, stated that Lord Nicholls' reference in *Waters* to a non-statutory *Pointe Gourde* principle was not necessary to the decision in that case. Barnes notes that some tribunals have failed to appreciate the full effect of the *Spirerose* decision. As he observes, in footnote 122 in paragraph 5.75:

> "In [*GPE (Hanover Square Ltd) v Transport for London* [2012] UKUT 126 (LC)], it was said that the effect of the *Spirerose* decision was confined to questions of the assumption of planning permissions even though Lord Walker expressed his reasoning in much wider terms."

12.71 It must be an open question whether remarks going wider than is necessary for the decision in a case are to be considered part of the *ratio decidendi* (the basis for the decision of the case), or simply as *obiter* (unrelated) observations. As Barnes observes:

> "It would be a bold person who regarded what was said in *Spirerose* as necessarily the last word on the subject."[62]

For our part, we would regard the decision in *Spirerose* as a welcome drawing back from the more extreme effects of the *Pointe Gourde* principle. But it does not appear to us to go far enough. It would, no doubt, have been possible, had the House of Lords wished to do so, to have made it clear that the principle could not, in any circumstances, operate so as to replace the terms of the various statutory provisions.

12.72 In any event, it remains open, as is clear from the *GPE (Hanover Square Ltd)* case, for tribunals to find room still to apply the principle. Further, with due acknowledgement to the elucidation of the application of the precedent rule to the cases in Barnes, we do not consider that it will be straightforward for a solicitor or chartered surveyor to give clear advice to a client on the basis of the *Spirerose* decision. The decision in that case has reinforced our view that the only sensible remedy for the confused state of the law in this area is a complete restatement.

12.73 Finally, in this connection, we note that the Law Commission, in their proposed New Code, began the relevant Rule (13) as follows:

> "All previous rules, statutory or judge-made, relating to disregard of 'the scheme' will cease to have effect."[63]

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[61] Barnes, at para 5.75.
[62] See above footnote.
[63] Law Com No 286, at p 92.

We anticipate that, whatever form our proposed new statute may take, it will include provision to that effect.

Discussion

12.74 We see no reason to call in question the principle that the price paid for land should reflect its value to the seller. Apart from any other consideration, it is what domestic law and the Convention require. That value should also include an assessment of the potentiality of the land, although that latter element, in an era of comprehensive planning, will be largely determined by Parliament; and it is to be expected that Parliament's view will be informed by wider policy considerations, including the state of the national economy.

12.75 But the current law, as set out by the House of Lords in *Waters* and *Spirerose*, is still, apparently, that tribunals must approach the matter from the perspective of a flexible amalgam of the statutory provisions and the *Pointe Gourde* principle. We do not find that a satisfactory basis for a compensation code. Accordingly, it appears to us that the whole question of statutory disregards should be considered afresh. In particular, consideration should be given as to how far it is appropriate to reduce the compensation paid to a landowner on the basis of what may be a long-standing, mostly completed, local authority (or indeed national) plan.

12.76 For example, where a development plan is being implemented in discrete phases, separate CPOs may well be sought in respect of each phase. In such a case, it might be possible to limit the "disregards" to the elements of the plan included in the relevant phase. Alternatively, it might be possible to limit the disregards by reference to the time which had elapsed since the development plan had been settled, so that valuation for a compulsory purchase more than, say, five years after the adoption of the plan, would not be affected by the plan. Further, as Lord Nicholls pointed out in *Waters,*[64] it is not self-evident that a landowner whose land has gone up in value by reason of some development plan, should lose that increase because it is being compulsorily acquired, as opposed to being purchased by agreement. Another, discrete, issue is whether, as clearly envisaged by Schedule 1 to the 1963 Act, an increase in value of the land being acquired, as a result of the scheme, should be taken into account for the purposes of assessing compensation.

12.77 We are conscious that any re-formulation of the statutory rules and disregards will not be simple. The whole field of compulsory acquisition by authorities with different powers, and different long-term policies, and overlapping responsibilities, is complex. It may be unreasonable to expect the rules governing compensation to be otherwise. But we should, in any event, strive for a greater degree of transparency than is currently the case.

12.78 The whole question of how the value of land should be assessed, and what factors should be taken into account, or disregarded, is essentially one of policy. In modern times that policy must be set out in legislation. The difficulty we face in formulating questions is

[64] See para 56: "There is an even more fundamental problem. This goes to the very fairness of the Pointe Gourde principle as currently applied. The wider the scheme, the greater the potential for inequality between those outside the area of acquisition, whose land values rise by virtue of the scheme, and landowners whose properties are acquired at a value which disregards the scheme. Conversely, the narrower the scheme, the greater the potential for an authority being called upon to pay compensation inflated by its own investment in improved infrastructure or other regeneration activities. Holding the balance between these conflicting interests is pre-eminently a subject for decision by Parliament."

that we do not have the benefit of the courts' consideration of the statutory code set out in the 1963 Act. We have a series of decisions on the development of the *Pointe Gourde* principle, which pay little or no attention to major elements of what the legislation says.

12.79 We ask the questions:

81. How should the "scheme" be defined?

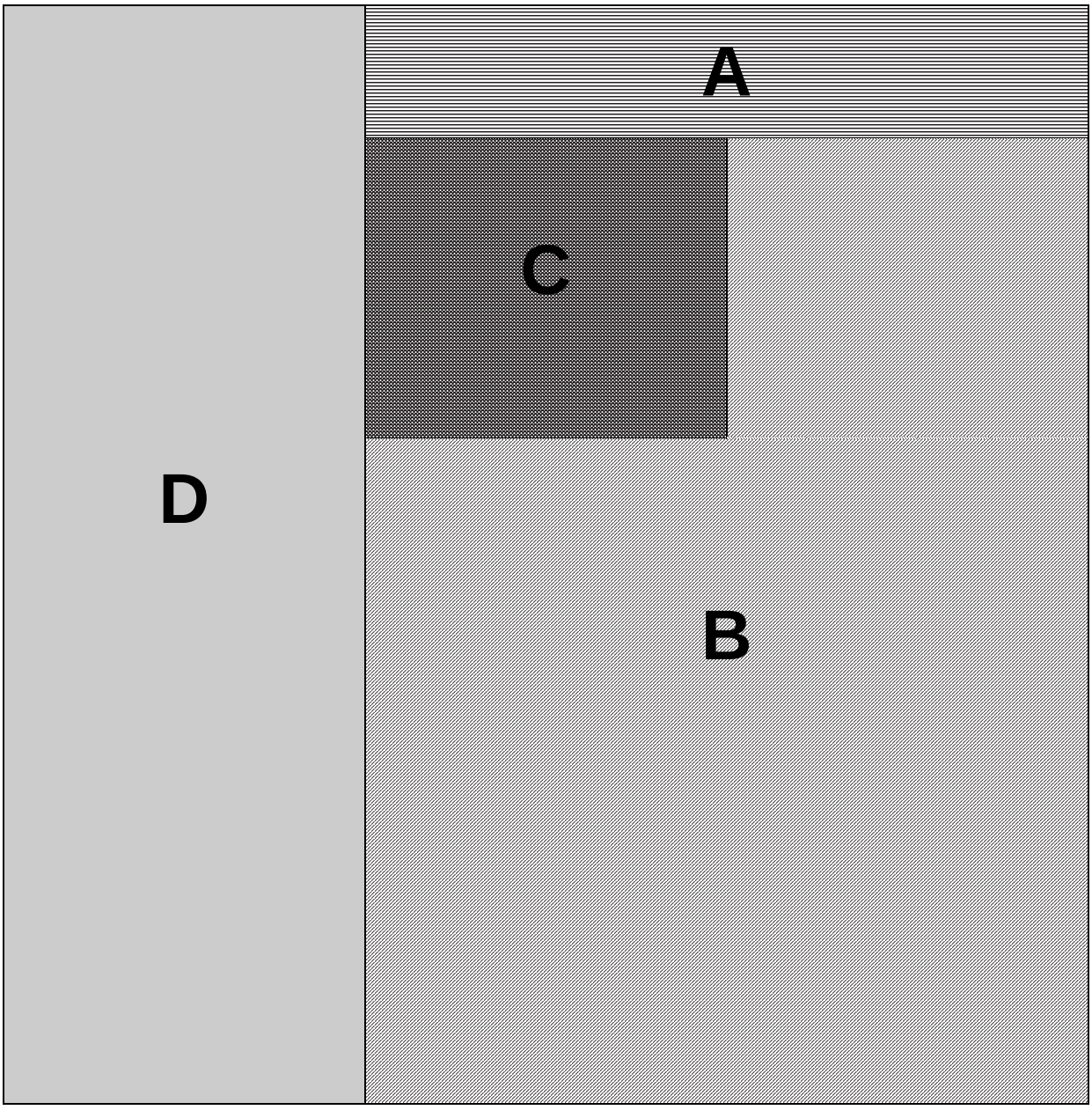
82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

84. Should any such disregard be limited by reference to the time elapsed since the adoption of the scheme or, if not, on what alternative basis should or might it be limited?

Land diagram

	Land acquired by agreement: **A**
	Land authorised to be acquired compulsorily: **B** (including **C**)
	Relevant land: **C**
	Land in different authority area: **D**



Chapter 13 Valuation of land to be acquired - establishing development value

Introduction

13.1 When calculating the market value of compulsorily acquired land (this is represented by "C" on the diagram at page 189), in terms of section 12(2) of the 1963 Act (rule 2), regard must be had to any potential uses to which the land could have been put but for the compulsory acquisition. In broad terms, prior to 1947, that would have been a question of the marketability of the land for some other purpose, such as the construction of houses on farmland, or of any particular features of the ground in question. Since 1947, as we discuss in more detail below, the use of land has been planned and controlled to a much greater extent by national and local authorities, and the potential uses to which a particular piece of land may be put, will be determined, in more or less detail, by the acquiring authority's plans and development intentions. The potential for development will accordingly depend on any planning permissions which existed at the point of compulsory acquisition, or which would have been likely to have been granted had it not been for the compulsory purchase.[1]

13.2 The determination of planning permission that might have occurred, had it not been for compulsory acquisition, is a complex area which often requires the construction of a fictional "no scheme world" and a venture into what has been called "the realm of the counterfactual".[2] As a result, the law can appear to be convoluted and difficult to apply. It is our aim to bring some clarity and consistency to this area. However, it may be that the creation of a fictional "no-scheme world" is the only practical method of establishing the development value that would have potentially attached to a particular piece of land if it were not for its compulsory acquisition.

13.3 In this Chapter we first consider sections 22 to 24 of the 1963 Act, as amended by the 1991 Act, which provide for the consideration of several statutory assumptions as to planning permission which are to be taken into account when ascertaining the value of acquired land.[3] We then consider Part V (sections 31 to 37) of the 1963 Act which provides for compensation where planning permission is granted for additional development after completion of the compulsory purchase process.

13.4 The question is whether these provisions are still fit for purpose. The 1963 Act is a consolidating statute. The provisions were originally enacted in the 1959 Act, that is, in the context of the planning legislation and planning system of the middle of the last century. Planning law has moved on since then, and there is a question as to whether the provisions currently in the 1963 Act should be retained.

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[1] The grant of planning permission is now governed by the 1997 Act.
[2] *South Lanarkshire Council v Lord Advocate* 2002 SC 88 (IH), *per* Lord President Rodger at 92.
[3] See WA Leach, "*Compulsory Purchase Valuation: The Six Assumptions of Planning Permission*," [1973] JPL 454 and 527.

2011 Act

13.5 In that context, we have taken note of the changes made in England and Wales to sections 14 to 22 of the 1961 Act, by section 232 of the 2011 Act. These provisions were equivalent to sections 22 to 30 of the 1963 Act. Sections 14 to 22 had been heavily criticised by the courts as being unsatisfactory and in need of reform.[4] The 2011 Act sought to remedy the problems arising from these provisions and clarify the law. Several members of our Advisory Group have noted that it might be desirable to adopt similar reforms in Scotland in order to achieve similar clarity. One commentator has suggested that the changes made should be replicated as soon as possible in Scotland and before a wider review of compulsory purchase law is completed.[5]

13.6 Prior to the coming into force of the Scotland Act 1998 (in July 1999), the planning and compulsory purchase systems were more or less identical north and south of the border. It was considered that there was value in having consistency between the two jurisdictions; not least because, as we have noted in Chapter 1, decisions by the courts were normally equally applicable throughout Great Britain. We also recognise the seemingly widespread support that the changes made by the 2011 Act have had.

13.7 On the other hand, as relatively little time has passed since the 2011 Act came into force, it is difficult to make a complete assessment of the efficacy of the changes in practice. Nevertheless, we will consider the various reforms made by the 2011 Act in more detail at appropriate points throughout this Chapter and invite views as to whether these changes are effective and whether they should be replicated, wholly or in part, in Scotland.

Limitations on development value

13.8 Even though actual or prospective planning permission should be taken into account when considering market value, it does not follow that it should also be assumed that this planning permission is capable of implementation.[6] It also does not follow that there would be demand for the development in question; it is not the planning permission itself which increases the value of the land, but planning permission coupled with demand.[7] The case of *McEwing*[8] concerned compulsory acquisition of land in Greenock owned by a firm of building contractors. The contractors claimed that they proposed to develop the land for the purpose of building private houses and that planning permission had been granted to them in this respect by the local planning authority. Lord President Clyde noted:

> "So far as Rule 2 is concerned, the value of the land is not restricted to its actual use at the time it is taken. Its potentialities must be taken into account, for these would obviously enter into the market price. Its suitability for building dwelling-houses upon it would be a factor in its price as between a willing buyer and a willing seller. But these potentialities must be viewed as possibilities, and not as realised in the hands of the purchaser at the date of the take-over."

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[4] *Waters v Welsh Development Agency* [2004] UKHL 19 *per* Lord Brown at para 164; *Rooff v Secretary of State for Communities and Local Government* [2011] EWCA Civ 435, *per* Carnwath LJ at para 42.
[5] Roy Martin QC, "*Planning Assumptions Reform: The Case for Scotland*", SCPA National Conference (24th October 2012).
[6] *Manchester Land Securities v Denton DC* (1970) 21 P&CR 430, at 437.
[7] *Viscount Camrose v Basingstoke Corporation* [1966] 3 All ER 161.
[8] *McEwing & Sons Ltd v Renfrewshire County Council* 1960 SC 53. See also *Sri Raja v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317.

13.9 The Lord President continued:

> "In the second place, however, the matter can in principle be carried further. To permit the claimants to secure, in addition to the market value of the land at the date of the compulsory acquisition, something additional in respect of the potential profit which they reasonably hoped to make from the land by building houses on it and selling them, is more than the statutes contemplated that they should get. It would give them more than their loss at the date when the compulsory acquisition takes effect. For this is the material date. It was never envisaged that, in addition to the existing value of the land taken, the future profits, which the proprietor might have made out of the land had it not been taken, should also be paid."[9]

13.10 His Lordship went on to consider the judgment of the Judicial Committee of the Privy Council in the Australian case of *Pastoral Finance Association, Limited v The Minister*.[10] In that case the appellants had bought a site, fronting on Darling Harbour in New South Wales, which was particularly suitable for their business of freezing meat for export. Before they had begun to build on the site, they were made aware that it was going to be "resumed" (compulsorily acquired) by the Government. In their claim for compensation, they included a figure for the savings and additional profits which they would have made if their business had been transferred to that site. The trial judge directed the jury to assess the capital sum which would represent those savings and profits, and the jury accordingly made a finding of £23,550 (with a rider that the market value of the land was £9,950). Both on appeal in the courts of New South Wales and in the written case before the Judicial Committee, the case was argued on the basis that there had been no misdirection by the judge. The question of misdirection was raised for the first time at the hearing before the Judicial Committee. The judgment of the Committee was given by Lord Moulton, who observed:

> "That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shown would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalised value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. … Prospective future profits on future prospective developments, therefore, cannot be claimed in addition to the market value of the land."[11]

Since the matter had not been raised until that hearing, however, the Committee found that they could not allow the Minister to raise the point at that stage, and they restored the trial judge's original finding.

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[9] At para 60.
[10] [1914] AC 1083.
[11] At p 1088.

13.11 This approach recognises that, in the real world, where land is developed, the existing use will be abandoned and consequential disturbance may be incurred in the realisation of the development potential. Therefore, where value is attributed to development potential, this should not include a value for loss of future profits as this would result in the claimant being compensated for more than his or her actual loss.[12] Issues of compensation for disturbance and business loss are considered in Chapter 16.

Statutory planning assumptions

13.12 Section 22(1) of the 1963 Act provides:

> "For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections 23 and 24 of this Act as are applicable to the relevant land or any part thereof shall (subject to subsection (3A) of this section) be made in ascertaining the value of the relevant interest."

13.13 The statutory assumptions which apply to the relevant land (that is, the land being compulsorily acquired) or any part of it, are to be taken into account for the purposes of assessing compensation. In England and Wales, (amended) section 14 of the 1961 Act provides that, in terms of taking account of actual or prospective planning permission, account may be taken of planning permission (or the prospect thereof)[13] for development on the relevant land **or other land**.

13.14 It seems to be realistic that planning permission which was in place at the time of the acquisition, or could reasonably have been expected to be granted at the time of the acquisition, in respect of land which is not itself compulsorily acquired but is adjacent to land which is compulsorily acquired, might have a positive effect on the value of the land which is compulsorily acquired.[14] However, to extend the planning assumptions more widely than under the current law, and to allow account to be taken of possible planning permission in relation to other land, may significantly prolong the inquiry required when assessing the question of compensation. We therefore ask the question:

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

13.15 Sections 22 to 24 of the 1963 Act provide for the following to be considered:

(1) planning permission which is in force at the date of the notice to treat;[15]

(2) assumptions not directly derived from development plans;[16] and

(3) special assumptions in respect of certain land comprised in development plans.[17]

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[12] *Horn v Sunderland Corporation* [1941] 2 KB 26.
[13] S 14(2)(b).
[14] We discuss the issue of the landowner's retained land generally in Chapter 15.
[15] S 22(2).
[16] S 23.
[17] S 24.

13.16 Accordingly, a claimant may argue that some other planning permission would have given value to the land but for the compulsory purchase. This is discussed in more detail below. We will now turn to consider each of the three categories of planning assumptions.

Planning permission which is in force at date of notice to treat

13.17 Section 22(2) provides:

> "Any planning permission which is to be assumed in accordance with any of the provisions of those sections is in addition to any planning permission which may be in force at the date of service of the notice to treat."

This will include permission granted by development order.[18] It is immaterial whether or not an existing planning permission is full or outline,[19] conditional or unconditional,[20] or whether it relates to the land in question or a larger area.

13.18 However, such restricted planning permissions (for example, a personal or time limited permission) may, in practice, not add much value to the land.[21] Where there is existing planning permission but none of the other statutory assumptions can be relied upon, the only value available to the claimant will be what a speculator would have paid; this will depend on the condition of the property.[22]

13.19 Planning permission normally runs with the land and it seems reasonable that the value of any existing planning permission should be considered. It also seems reasonable that, wherever possible, the value of the land should be determined according to factors established in the real world, before entering into a consideration of the "no-scheme world" and all the difficulties of interpretation which follow.[23] We therefore propose that:

> **86. Any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired.**

13.20 Following the reforms of the 2011 Act, and as recommended by the Law Commission,[24] section 14(2)(a) of the 1961 Act provides that:

> "account may be taken … of planning permission, whether for development on the relevant land or other land, if it is in force at the **relevant valuation date** …". (emphasis added)

13.21 The "relevant valuation date" is defined in section 5A of the 1961 Act.[25] If the land is subject to a notice to treat, the relevant valuation date is the earlier of the date when the acquiring authority enter on to and take possession of the land and the date when the

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[18] Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223), Sch 1, art 3.
[19] 1997 Act, s 59 as amended by s 21 of the Planning etc. (Scotland) Act 2006.
[20] A temporary planning permission is merely a permanent planning permission subject to conditions and is to be taken into account notwithstanding it was granted for the period pending compulsory acquisition (*McArdle v Glasgow Corporation* [1971] RVR 357). See 1961 Act, s 14(9), as amended.
[21] *J Davy Ltd v London Borough of Hammersmith* (1975) 30 P & CR 469; *Bromilow v Greater Manchester Council* (1976) 31 P & CR 398.
[22] *Hemingby Agricultural Traders Ltd v East Lindsey DC* [2010] UKUT 390 (LC).
[23] Law Com 286, para 8.24.
[24] See above footnote, rule 14.
[25] Added by Planning and Compulsory Purchase Act 2004, s 103(2).

assessment is made. If the land is subject to a GVD, the relevant valuation date is the earlier of, the vesting date, and, the date when the assessment is made.[26]

13.22 As noted above, section 22(2) of the 1963 Act provides for the consideration of any existing planning permission which is in force at the date of the service of the notice to treat. Much can change between the date of the notice to treat and the "relevant valuation date". For instance, an outstanding application for planning permission may be successful following the service of a notice to treat. We ask the question:

87. What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?

Assumptions not directly derived from development plans

13.23 Section 23 of the 1963 Act provides for three statutory assumptions which may be made regarding the grant of planning permission, and which are not directly derived from the current development plan in place with respect to the relevant land. We consider each of these in turn.

(a) Planning permission for proposals of the acquiring authority

13.24 In some cases, although the acquiring authority may have proposals in relation to the land, there may not actually be any planning permission in place at the date of the service of the notice to treat. Section 23(1) of the 1963 Act provides:

> "In a case where—
>
> (a) the relevant interest is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for development of the relevant land or part thereof, and
>
> (b) on the date of service of the notice to treat there is not in force planning permission for that development,
>
> it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, such as would permit development thereof in accordance with the proposals of the acquiring authority."

13.25 Therefore it is to be assumed that planning permission for development of the land in accordance with the acquiring authority's proposals, would be granted, provided that, on the date of the service of the notice to treat, there is no planning permission in force for that development.[27] Where the assumption under section 23(1) can be made, the question of value is another matter. It may be the case that there is little or no demand on the open market for land with the particular permission in question attached.[28]

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[26] The same date applies where there is a CAAD (see Ch 14). We discuss the relevant valuation date for the assessment of compensation, generally, in Ch 7.

[27] Although no account shall be taken of planning permission in force on the date of the service of the notice to treat which does not run with the land (s 23(2)). If there is planning permission in force at the date of the service of the notice to treat then the relevant assumption is contained in s 22(2).

[28] See *City of Aberdeen District Council v Skean Dhu plc* 1991 SLT (Lands Tr) 22 at 29.

13.26 The "relevant land" for the purposes of this assumption is the land which is being acquired from the particular landowner, which may only be a small part of the overall scheme, and does not mean that the claimant can rely on the assumption that planning permission would similarly be in place for adjacent land.[29] This concept applies relatively easily where the acquiring authority's proposals for the relevant land are related to, for instance, residential development. There will be no problem in assuming residential development in accordance with the proposals of the acquiring authority where the landowner only owns a small part of the overall scheme; a residential development can be divided into smaller sections.

13.27 However, where the proposed development is a road, for instance, this assumption is less easy to apply. The assumed permission will only apply to the part of the road which is intended to go through the claimant's land. It has been suggested that the result of this for valuation purposes is that it can be assumed that the claimant would be granted permission for a "disembodied section of road, but no more".[30] However, the assumed permission in this situation would be incapable of implementation and therefore would be of no benefit to the owner of the land, not least because rule 3 provides that the special suitability or adaptability of land for any purpose, shall not be taken into account if that purpose is a purpose to which it could only be applied in pursuance of statutory powers. It is extremely unlikely that an ordinary member of the public, who does not have statutory powers of compulsory purchase, would be granted planning permission for a road, let alone a disembodied section of road.

13.28 The value of this assumption to the landowner may also be limited by the operation of the *Pointe Gourde* principle, which is closely related to rule 3.[31] This provides that any increase in value due to the overall development scheme is to be left out of account. The valuation should be carried out assuming the availability of planning permission but disregarding the effect of the scheme. In *Myers v Milton Keynes Development Corporation*[32], Lord Denning MR elucidated this concept, referring to (unamended) section 15(1) of the 1961 Act (the English equivalent of section 23(1)):

> "It comes to this. In valuing the estate, you are to disregard the effect of the scheme, but you are to assume the availability of planning permission. This is best explained by taking an imaginary instance: a scheme is proposed for building a motorway across Dartmoor with a service station every five miles. Suppose that land is taken on which a service station is to be built as soon as possible. In assessing compensation, you are to disregard any increase due to the proposed motorway, or service stations. But if the landowner had already been granted *actual* permission for that piece of land for commercial purposes (for example, as a café), you are to have regard to it: see s.14(2). Even if he had no such permission already, you are to assume that he would have been granted planning permission for a service station; see s.15(1). And you are to value that land with that permission in the setting in which it would have been if there had been no scheme. If it would have been a good site for a service station, there would be a great increase in value. If it would have been in an inaccessible spot on the wild moor, there would be little, if any, increase in value because there would be no demand for it. A further complication arises when the proposals are not put into effect for 10 years. Planning permissions are not in

[29] See *Roberts v South Gloucestershire District Council* [2003] 1 P & CR 411; *Colneway Ltd v Environment Agency* [2004] RVR 37.
[30] See *Roberts v South Gloucestershire District Council* [2003] 1 P & CR 411 per Carnwath LJ at para 18.
[31] *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Land* [1947] AC 565. See Ch 12.
[32] [1974] 1 WLR 696.

practice granted so far ahead. They are only granted for immediate development. In the illustration you are therefore to assume that, after 10 years, planning permission would be granted for development of a service station in a setting where there had been no scheme."[33]

13.29 This illustrates that the planning assumptions in the 1961 and 1963 Acts can have complicated and artificial results.[34] The 1961 Act (prior to the reforms in 2011) and the 1963 Act, draw a distinction between the planning status of the land and its valuation. In the case of *Wilson*,[35] the Tribunal was required to assume that planning permission for residential development would have been granted. In addition, it was required to make deductions for the "dead ripe value"[36] in the real world. For this purpose, it was required to disregard, in accordance with *Point Gourde,* the enhancement of value due to the public's knowledge of the authority's involvement in the scheme, including its investment in infrastructure and the consequent acceleration of development.

13.30 For many of the reasons outlined above, the Law Commission concluded that this planning assumption amounted to a "needless and unwarranted complication".[37] We largely agree with this conclusion but note that, ultimately, section 15 of the 1961 Act, as amended, continues to provide that planning permission is to be assumed for the acquiring authority's proposals. This provision is in very similar terms to section 23(1) of the 1963 Act. We ask the questions:

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

89. If so, should this continue to be limited (a) to planning permission which might reasonably be expected to be granted to the public and, (b) by the *Pointe Gourde* principle?

(b) Schedule 11 development

13.31 Section 23(3) provides, subject to section 23(4), that it shall be assumed that, in respect of the relevant land, or any part of it, planning permission would be granted (subject to the conditions set out in Schedule 12 to the 1997 Act) for any development "not constituting new development" of a class specified in paragraph 1 of Schedule 11 to the 1997 Act and for any development of a class specified in paragraph 2 of that Schedule. The purpose of this assumption is to guarantee that compulsory purchase compensation includes compensation to cover any value attributable to the right to rebuild and alter certain buildings.[38]

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[33] At p 704.
[34] See M Clark, "Valuation aspects of land taken under a scheme" in *Compensation for Compulsory Purchase,* Journal of Planning and Environment Law Occasional Paper (London: Sweet & Maxwell, 1975).
[35] *Wilson v Liverpool Corporation* [1971] 1 All ER 628. See also *WM Leggat v East Kilbride Development Corporation,* decision of an official arbiter ref No 2/1961.
[36] The "dead ripe value" means the potential value of the land on the assumption that all necessary infrastructure is in place.
[37] Law Com 286, para 7.57. See also DETR Review, para 111.
[38] See B Denyer-Green, *Compulsory Purchase and Compensation,* (9th edn, 2009) p 249.

13.32 Paragraph 1(1) of Schedule 11 provides that "development not constituting new development" includes:

> "The carrying out of—
>
> (a) the rebuilding, as often as occasion may require, of any building which was in existence on 1st July 1948, or of any building which was in existence before that date but was destroyed or demolished after 7th January 1937, including the making good of war damage sustained by any such building;
>
> (b) the rebuilding, as often as occasion may require, of any building erected after 1st July 1948 which was in existence at a material date;
>
> (c) works for the maintenance, improvement or other alteration of any building, being works which—
>
> (i) affect only the interior of the building, or do not materially affect the external appearance of the building, and
>
> (ii) works for making good war damage,
>
> so long as the cubic content of the original building, as ascertained by external measurement, is not substantially exceeded."

13.33 In the case of *Greenweb,*[39] the equivalent provision in England and Wales (prior to amendment by the 2011 Act) produced a significant compensation windfall for the claimant. The case concerned compensation for compulsory purchase of land which had been used as public open space for a number of years. Prior to 7th January 1937, there had been a terrace of houses and a commercial building on the site. These had been destroyed during World War II. The claimant argued that planning permission should be assumed for any development under paragraph 1(1)(a) of Schedule 3 to the Town and Country Planning Act 1990 (the equivalent to Schedule 11 to the 1997 Act). The Court of Appeal upheld the decision of the Tribunal, finding that, despite the large windfall in the circumstances of the case, the statutory assumptions were mandatory. Where one of the statutory assumptions applied, there was no discretion for refusing it. Stanley Burnton LJ found:

> "In my judgment there is no ambiguity in the word 'shall,' or in the phrase 'it shall be assumed that'. The assumption is mandatory. The phrase does not and cannot mean 'it may be assumed that'. Moreover, if it could be read as 'may,' one would have to read into the section the criteria or guidance to enable the compensating authority or the tribunal to know when it is, and when it is not, to make the assumption in question. That would be to add to the statute words that are not there. It would be to legislate, not to interpret. Moreover, if the assumption is only to be made when it is supported by the facts, it ceases to be an assumption, and the express provision becomes otiose."[40]

13.34 This assumption is an anachronism which derives originally from a provision in the 1947 Planning Act, which provided that a "development charge" should not apply to development which was closely related to the existing use of the land, being "development not constituting new development". Prior to the 1991 Act, there were various additional

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[39] *Greenweb Ltd v London Borough of Wandsworth* [2009] 1 WLR 612; [2009] JPL 116 CA.
[40] At para 32.

categories of "development not constituting new development". If planning permission was refused for any development contained in this category then compensation was payable.[41] The Law Commission noted that the continuance of the equivalent provision in the 1961 Act seemed to be an "unnecessary complication".[42] Members of our Advisory Group have also advocated reform in this area in order to avoid another windfall case such as *Greenweb* arising. For these reasons, we propose that:

90. The statutory assumption of planning permission for development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

13.35 Section 23(3) also provides that, subject to section 23(4), it shall be assumed that, in respect of the relevant land or any part of it, planning permission would be granted for any development of a class specified in paragraph 2 of Schedule 11 to the 1997 Act. Paragraph 2 of Schedule 11 provides that "development not constituting new development" includes:

> "The use as two or more separate dwellinghouses of any building which at a material date was used as a single dwellinghouse."

13.36 Development of a building which was used as a single dwelling house, for use as two or more dwelling houses, is a distinct issue from development for the repair of war damage set out in paragraph 1 of Schedule 11 and considered in *Greenweb*. However, the assumption provided for by paragraph 2 of Schedule 11 is perhaps equally anachronistic and we note that both section 15(3)(a) and 15(3)(b) of the 1961 Act, which referred to the equivalent English provisions of paragraphs 1 and 2 of Schedule 11, were removed by the 2011 Act. We therefore ask the question:

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

(c) Development referred to in a CAAD

13.37 Section 23(5) provides:

> "Where a certificate [i.e. a CAAD] is issued under the provisions of Part IV of this Act, it shall be assumed that any planning permission which, according to the certificate, would have been granted in respect of the relevant land or part thereof if it were not proposed to be acquired by any authority possessing compulsory purchase powers would be so granted, but, where any conditions are, in accordance with those provisions, specified in the certificate, only subject to those conditions and, if any future time is so specified, only at that time."

13.38 This section reflects the fact that the establishment of development value is not limited to the statutory planning assumptions. A claimant may wish to argue that the value of the land would have been enhanced by some other planning permission if it were not for the compulsory purchase, particularly where the existing statutory assumptions are of little or no value. However, such a claim will inevitably be subject to considerable uncertainty and may invoke considerable argument as to valuation. The detailed provisions contained in Part IV of the 1963 Act in relation to CAADs, raise several discrete issues which are discussed in detail in Chapter 14.

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[41] 1991 Act, s 60(2) and Sch 12, para 32.
[42] Law Com 286, para 8.34.

Special assumptions in respect of certain land comprised in development plans

13.39 Section 24 of the 1963 Act provides that, in terms of assessing compensation for compulsory acquisition, certain assumptions may be made regarding planning permission for development which accords with the provisions of the current development plan in the relevant area. The "development plan" system was introduced by the 1947 Planning Act. Under this Act, local authorities are under a duty to prepare plans which establish policies for land use and development in their area. These plans must be considered by local authorities when taking decisions regarding applications for planning permission. The planning system in Scotland is currently reflected in the 1997 Act, which leaves intact fundamental principles such as the requirement that there be a development plan for all parts of the country.[43]

13.40 As with existing planning permission, as noted above, the relevant development plan will be considered as at the date of the notice to treat.[44] So far as GVDs are concerned, under paragraph 6 of Schedule 15 to the 1997 Act, a notice to treat is deemed to have been served on the date on which a GVD is made. As we have asked the question (paragraph 13.22 above) regarding the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired, it seems prudent to ask the following question:

92. In terms of special assumptions in respect of certain land comprised in development plans, what should be the relevant date for referring to the applicable development plan?

13.41 There are four statutory assumptions which can be derived from the development plan, in terms of section 24 of the 1963 Act. Where any of these assumptions applies, it is to be assumed for the purposes of assessing compensation that planning permission would be granted for the form of development specified. If section 24 does not apply then a similar result may nonetheless be achieved by virtue of a CAAD (see Chapter 14).

13.42 Section 24(6) governs all of the planning assumptions to be made within section 24, whether qualified or not.[45] Section 24(6) provides that it is to be assumed that the permission would be subject to such conditions, if any, as might reasonably have been expected to be imposed by the authority granting the permission, and if it is indicated that any such planning permission would be granted only at a future time, then the assumption will be that the planning permission will be deferred until that time. Although section 24(6) does not expressly refer to planning obligations, it is likely that, where the evidence suggests that planning permission would not have been granted without a planning obligation, it should be assumed that an appropriate agreement committing the developer to the obligation would have been agreed.[46] We consider the four assumptions below.

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[43] See R McMaster, A Prior and J Watchman, *Scottish Planning Law,* (3rd edn, 2013), paras 1.9-1.24.
[44] See 1963 Act, s 45(1).
[45] See *Menzies Motors Ltd v Stirling District Council* 1977 SC 33 per Lord Cameron at 48.
[46] See *Purfleet Farms Ltd v Secretary of State for Transport* [2002] RVR 203.

(a) Planning permission for development of a specific description as defined in current development plan

13.43 Section 24(1) provides that if the relevant land or any part of it (not being land subject to comprehensive development) **consists or forms part of a site** defined in the current development plan as the site **of proposed development of a description specified** in relation thereto in the plan, it shall be assumed that planning permission would be granted for the development of the land for that purpose.

(b) Planning permission for development where land is allocated primarily for a use specified in current development plan

13.44 Section 24(2) provides that if the relevant land or any part of it (not being land subject to comprehensive development) **consists or forms part of an area** shown in the current development plan as an area **allocated primarily for a use specified in the plan** in relation to that area (for example, residential use) then it shall be assumed that planning permission would be granted for the development of all or part of the land for that use. However, the assumed development must be development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.[47]

13.45 The case of *Thomas Newall Ltd*[48] illustrates the difference between the first planning assumption, in section 24(1) (where there is a specific description in the current development plan) and the second assumption, in section 24(2) (where the land is allocated primarily for a use specified in the current development plan). In that case, the claimant submitted that the reference land was defined in the Lancashire District Local Plan in terms of section 16(1) of the 1961 Act (equivalent to section 24(1)) as it was identified and delineated on the proposals map and in the policy (H3) as part of a site for housing. The acquiring authority submitted that sites under policy H3 were only sites where there was an *opportunity* to provide housing and that this did not preclude other uses which were, in some cases, specifically envisaged such that the reference land could not be described as a "site defined in the current development plan as the site of proposed development of a description specified" as required by the section.

13.46 The Tribunal found that section 16(1) required a more definite proposal of the use of land for a certain purpose:

> "The reference to a 'site of proposed development' in section 16(1) is to be contrasted with an 'area allocated primarily for a use' in section 16(2) and (3). The former must mean a more definite proposal for development than simply the identification of land as suitable for a particular use, especially where continuation of existing uses or redevelopment for other uses as well is not precluded. In our view the effect of policy H3 is to encourage housing development not prescribe a particular development. A Housing Opportunity Site is therefore not a "site of proposed development of a description specified in relation thereto" for the purposes of section 16(1).

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[47] S 24(2)(b). On "development for which planning permission might reasonably have been expected to be granted" see below at para 13.49.
[48] *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC).

Although paragraph 2.3.3 of the Local Plan envisages other uses may continue or be developed on the Housing Opportunity Sites, we consider that Policy H3 allocates land as a **housing** opportunity site rather than for a mix of uses. Such sites are therefore allocated primarily for a single use not a range of two or more uses and the relevant provision for the purposes of the first preliminary issue is accordingly section 16(2)."[49]

(c) Planning permission for development where land is allocated primarily for a range of two or more uses specified in current development plan

13.47 Section 24(3) provides that where the land acquired, or any part of it, **consists, or forms part of, an area** allocated in the current development plan **primarily for a range of two or more specified uses**, it is to be assumed that planning permission would be granted for the development of all or part of the land, as the case may be, for any of the range of uses. As is the case with the second assumption, such development must be development for which planning permission might reasonably have been expected to be granted.[50] The decision of the court in *Thomas Newall* (above) can equally be used to interpret this assumption and many of the same problems in the interpretation of the second planning assumption apply equally to this assumption.

(d) Planning permission for development where land is within a comprehensive development area or an action area

13.48 Section 24(4) provides that where the land acquired or any part of it **is subject to comprehensive development**, it is to be assumed that planning permission would be granted for any development within the "planned range of uses"[51] so long as it is development, in the circumstances specified in section 24(5),[52] for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof.[53] As the same two-limb test is used under this statutory assumption as both the second and third, the same problems of interpretation have arisen.

Interpretation of statutory planning assumptions derived from development plan

"Development for which planning permission might reasonably have been expected to be granted"

13.49 As noted in the preceding paragraphs, this test appears in sections 24(2), 24(3) and 24(4) and requires to be satisfied before any of the assumptions can be met. The case of *James Miller*[54] concerned the acquisition of land by the sewerage authority. The land was on an area which was designated for housing. The claimant argued at the LTS that the land

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[49] See above footnote, at para 17 and 18.
[50] S 24(3)(b).
[51] "Planned range of uses" means the range of uses which, in accordance with the particulars and proposals comprised in the current development plan in relation to the area in question, are indicated in the plan as proposes uses of land in that area (s 24(5)).
[52] The circumstances specified in s 24(5) are those that would have existed if: (i) the area in question had not been defined in the current development plan as an area of comprehensive development, and no particulars or proposals relating to any land in that area had been comprised in the plan and (ii) in a case where, on the date of the service of the notice to treat, land in that area has already been developed in the course of the development or redevelopment of the area in accordance with the plan, no land in that area had been so developed on or before that date.
[53] S 24(4)(a). See *Menzies Motors Ltd v Stirling District Council* 1977 SC 33.
[54] *James Miller and Partners Ltd v Lothian Regional Council* 1981 SLT (Lands Tr) 3.

should be valued as if no pumping station were to be built on it, and as if it was not being acquired for that purpose. The acquiring authority argued that a sewerage pumping station was required for residential development of the area and, without it, planning permission could not "reasonably have been expected to be granted." After further inquiry the LTS found that, assuming no part of the land was to be acquired for a pumping station, the station would have been likely to have been situated elsewhere and therefore it was likely that planning permission for residential development would have been granted but with various restrictions. They decided that proof should accordingly be limited to the value which the land would have had if no pumping station were to be built on it.

13.50 In contrast, in the case of *O'Donnell*[55] it was found that the assumption contained in section 24(2) did not apply because it could not be said that the planning permission "might reasonably have been expected to be granted". The evidence suggested that, although the current development plan allocated the land for industrial use, there had been changes in planning policy since the time this plan was created.

Section 24(7) – cancellation assumption

13.51 Section 24(7) provides:

> "Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers."

13.52 As noted above, the statutory assumptions contained in subsections 24(2), 24(3) and 24(5) can only be made if planning permission might reasonably have been expected to be granted for the land, or part of the land. By virtue of section 24(7), the potential for such planning permission to have been granted must be considered as if no part of the land was proposed to be compulsorily acquired. The same requirement appears in section 25(3)(a) of the 1963 Act in relation to CAADs and many of the same issues arise in terms of the interpretation of the requirement in that context.[56] This provision reflects the principle established in the *Pointe Gourde* case.[57]

13.53 Section 16(7) of the 1961 Act (the equivalent, prior to amendment by the 2011 Act, to section 24(7) of the 1963 Act,) was considered in the case of *Margate Corporation.*[58] The owners of land fronting on to a road applied for planning permission for residential development, which was refused on the ground that this would be premature until details of the road bypass scheme were finalised. There was no scheme for residential development on the development plan. The claimants claimed compensation on the basis of planning permission for 20 houses with access to the adjacent road, whereas the acquiring authority submitted that planning permission would only have been granted, in terms of section 16

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[55] *O'Donnell v Edinburgh District Council* 1980 SLT (Lands Tr) 13.
[56] See Ch 14.
[57] *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Land* [1947] AC 565. The case, the principle derived from it and the statutory requirement regarding disregarding the scheme (s 16 of the 1963 Act), are discussed in more detail in Ch 12.
[58] *Margate Corporation v Devotwill Investments Ltd* (1971) 22 P & C R 328. It should be noted that this case concerned assumptions related to highways but was decided before the enactment of s 14(5)-(8) of the 1961 Act (added by the 1991 Act, but in any case now amended by the 2011 Act). The equivalent in Scotland is s 22(5)-(7) of the 1963 Act which refers to a "public road" as opposed to a "highway".

and the requirement in section 16(7), for 9 houses with temporary access to the road and a further 11 at a later date when suitable access became available. The Lands Tribunal found in favour of the claimants. The House of Lords found that the Tribunal had erred in making the assumption that, as no part of the claimants' land could be taken for the road development, planning permission might reasonably have been expected for full immediate redevelopment.

13.54 With regard to the requirement in section 16(7) and allowing the appeal, Lord Morris of Borth-y-Gest said:

> "An assumption had to be made that the respondents' land was not going to be acquired so that a by-pass should there be constructed, but it was in no way an inevitable corollary that there would be a by-pass on some other line and in some different position. If there was not to be a by-pass on the respondents' land it by no means followed that there would inevitably be a by-pass somewhere else. There might be or there might not be. It might have been possible to have another route for a by-pass; it might have been quite impossible. It would be a question depending upon topographical and various and many other factors whether there could be a by-pass somewhere else. It would be for consideration whether any alternative by-pass was or was not possible or probable, and, further, whether its construction was or was not likely. Those matters could not rest upon any assumptions but must rather rest upon an examination of all the evidence."[59]

13.55 His Lordship went on to suggest that the decision should be remitted to the Lands Tribunal for further consideration and highlighted the large number of questions that must be considered:

> "Were there, then, some other ways? If so, what were they, and how effective would they be? Would it have been practicable to effect some road-widening? Could some traffic-regulatory adjustments have been made? Within what period of time might some improvement of road conditions have been made? Even if the problem of relieving traffic congestion proved to be baffling, what planning permission for house building might reasonably have been expected? Was there a housing shortage which presented an urgent and serious problem? If the need for homes was pressing, might permission for house-building on the basis desired by the respondents have been given, even at the cost of adding or adding temporarily to traffic congestion and traffic hazards? How considerable would the added traffic volume be? Was it reasonably to have been expected (on the basis that the respondents' land was not to be taken for a by-pass) that the Minister would have granted unqualified permission for the development as planned and at the time as planned by the respondents or was it reasonably to have been expected that there would be some, and, if so, what, different permission for development - the difference being in relation to the location of the houses and the time of their erection? All the many relevant facts and circumstances would have to be considered before answer could be given. The amount of compensation to be awarded would depend upon the value of the permission that might reasonably have been expected."

13.56 The case therefore highlighted the challenges of determining what planning permission would reasonably have been expected to have been granted in the "no scheme world". In the more modern case of *Thomas Newall Ltd*,[60] the local authority had issued a CPO over a derelict and contaminated site for the purposes of regeneration. The Tribunal

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[59] At pp 336-337.
[60] *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC).

was required to consider, among other things, whether, in terms of section 16 of the 1961 Act, planning permission might reasonably have been expected to be granted in respect of the relevant land.

13.57 The Tribunal noted that section 16(2) (planning permission for development where the land is allocated primarily for a use specified in the current development plan) applied, and that the local authority's proposals underlying the CPO should be assumed to be cancelled in accordance with section 16(7). It held that this "cancellation assumption" was to be made at the valuation date and not the date of the publication of the CPO:

> "By contrast, in the case of section 16 the cancellation assumption is to be made at the valuation date. That is well after the compulsory purchase order is made and in many cases other land may already have been acquired and some works undertaken pursuant to the order. For example, in this case the acquiring authority had already taken steps to secure removal of the gas holder and it is common ground that the physical condition of the reference land and its surroundings is to be taken as at the valuation date. In those circumstances one must ask on what basis it is to be assumed that the whole extant scheme has been cancelled when section 16(7) states only 'if no part of **the relevant land** were proposed to be acquired?'"[61] (emphasis added)

13.58 In the case of *Abbey Investments,*[62] it was also held that the cancellation assumptions should be applied on the valuation date and in *Persimmon Homes,*[63] it was held that when considering compensation, the preferred approach is to consider the prospects of planning at the valuation date on the assumption that the scheme was cancelled.

13.59 In England and Wales, section 232 of the 2011 Act substituted new sections 14, 15, 17 and 18 of the 1961 Act. Section 16 has been repealed. Section 14(2)(b) now provides for consideration of the prospect, on the assumptions set out in subsection (5), but otherwise in the circumstances known to the market at the relevant valuation date, of planning permission being granted on or after that date for development on the relevant land or other land (other than development for which planning permission is in force at the relevant valuation date and appropriate alternative development). The first assumption set out in subsection (5) is that "the scheme of development underlying the acquisition had been cancelled on the launch date".[64] The launch date, where the acquisition is authorised by a CPO, is the date of first publication of notice required under section 11 of the Acquisition of Land Act 1981[65] or (as the case may be) paragraph 2 of Schedule 1 to that Act. In other words, the underlying scheme will be deemed to have been cancelled at the time the CPO was first published. We therefore propose that:

93. The underlying "scheme" should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, at the time when the CPO is first published.

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[61] At para 28.
[62] *Abbey Investments v London Development Agency* [2010] UKUT 325 (LC).
[63] *Persimmon Homes Ltd v Secretary of State for Transport* [2009] UKUT 126 (LC).
[64] There are four "cancellation assumptions" set out in new section 14 of the 1961 Act following the 2011 Act. These apply consistency to all of the statutory planning assumptions, i.e. appropriate alternative development and other consents which are not appropriate alternative development. The cancellation assumptions, and their relevance to CAADs, are considered further in Ch 14.
[65] 1981 c. 67.

13.60 The Tribunal in *Thomas Newall Ltd* further held that the assumption relates only to the claimant's land and it does not follow that the acquiring authority's scheme or proposals generally have to be disregarded:

> "In our judgment the Pointe Gourde principle does not permit a further statutory assumption to be made, namely that in addition to the assumption that 'no part of the relevant land were proposed to be acquired' there are no proposals to acquire any land pursuant to the relevant scheme. To do so would introduce a new assumption which is not warranted by the language of section 16(7) nor by any recognised purposive principle of statutory construction as envisaged by Lord Walker in paragraph 36 of Spirerose. It would also result in applying the Pointe Gourde principle to the ascertainment of the interest to be valued rather than the value of the interest contrary to Rugby Joint Water Board case and see also *Myers v Milton Keynes Development Corp* [1974] 1 WLR 696 at p 702. It will be at the subsequent valuation stage that Pointe Gourde is potentially applicable not at this preliminary stage of determining whether the reference land is assumed to have planning permission.
>
> Further, to ignore any proposals to acquire land for the purposes of the scheme as a whole would be inconsistent with the House of Lords decision in *Margate Corporation v Devotwill Investments* [1970] 3 All ER 864. There land was affected by a road bypass scheme and the Lands Tribunal had to decide whether planning permission might reasonably have been expected to be granted under section 16(2) for housing. The House of Lords held that although the bypass could not proceed on its existing line without the relevant land, it was a question of fact whether it was appropriate to assume that a bypass on another line would be likely to be built. This decision could not have been reached if the assumption had to be made that the acquiring authority's underlying proposal had to be disregarded. The effect of the Margate case has been reversed by section 14(5)-(7) so far as road schemes are concerned but that does not affect the application of the principle in other cases."[66]

13.61 Nevertheless, the Compulsory Purchase Association noted that, prior to the 2011 Act being introduced in England and Wales, it was not clear whether the "scheme" to be disregarded for planning purposes was the entire scheme or merely the intention to acquire the relevant land.[67] New section 14(5)(a) of the 1961 Act, which states that "the scheme of development underlying the acquisition" should be assumed to be cancelled on the "launch date", makes it clear that it is in fact the extent of the whole scheme that will be "cancelled" and not simply the intention to acquire the relevant land.[68] We therefore propose that:

94. The scope of the underlying "scheme" to be deemed to be cancelled for the purposes of considering statutory planning assumptions, should be the entire scheme and not simply the intention to acquire the relevant land.

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[66] At paras 30-31.

[67] Compulsory Purchase Association, "Localism Act CPO changes," Available at: http://www.compulsorypurchaseassociation.org/files/Localism-Act-CPO-Changes-2.pdf.

[68] S 14(8) provides that "If there is a dispute as to what is to be taken to be the scheme mentioned in subsection (5) ("the underlying scheme") then, for the purposes of this section, the underlying scheme is to be identified by the Upper Tribunal as a question of fact". The same cancellation assumptions apply in relation to CAADs, on which see Ch 14.

Reform of special assumptions in respect of certain land comprised in development plans

13.62 Section 24 of the 1963 Act has been criticised as outdated and difficult to apply. The planning assumptions were introduced at a time when development plans were generally more site specific than they are now. Rowan Robinson & Farquharson-Black note that the section deals with development plans in terms of the law prior to the 1969 Act.[69] The 1969 Act established a system of two tier development planning which is now contained in the 1997 Act. Amendments by the Planning etc. (Scotland) Act 2006[70] now provide for a simplified one-tier system of local development plans which operates throughout Scotland, except for Edinburgh, Glasgow, Aberdeen and Dundee where a modified two-tier system exists, where local development plans have to be consistent with strategic development plans.[71]

13.63 In the Lands Tribunal case of *Urban Edge Group*,[72] it was argued by the acquiring authority that, because the drafting of section 16 of the 1961 Act clearly reflected the drafting of the Town and Country Planning Act 1947, it only applied to development plans made under that Act. The Tribunal rejected this argument and found that section 16(2) of the 1961 Act could apply to development plans made under the Town and Country Planning Act 1990.

13.64 Nevertheless, *Urban Edge Group* illustrated the difficulty in applying modern development plans to unamended section 16 of the 1961 Act. As is noted at paragraph 24 of the judgment:

> "Whether 'the relevant land consists of or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area' falls, self-evidently, to be determined by examining how the relevant land is shown on the proposals map and relating this to the policies and other provisions of the plan. This is, as will be seen, a much harder task than it would usually have been in relation to first generation development plans, which, in accordance with the provisions of section 5 in the 1947 Act, used to show areas allocated for housing or other uses and to define the sites of new roads etc., leaving the rest as white (unallocated) land or Green Belt. As the Tribunal (George Bartlett QC, President, and P H Clarke FRICS) stated in *Purfleet Farms Ltd v Secretary of State for the Environment. Transport and the Regions* [2002] RVR 203 at paragraph 38, second generation plans did not define sites or allocate areas of land in this way."[73]

13.65 The style of modern development plans is such that it may be difficult to satisfy the statutory test contained in section 24(1) that the land compulsorily acquired forms "part of a site defined in the current development plan as the site of proposed development of a description specified in … the plan" or, as required by section 24(2), is within an area "allocated primarily for a use specified in the plan in relation to that area". In *Urban Edge Group*, the Tribunal considered whether land compulsorily acquired was sufficiently allocated to satisfy the test in section 16(1), and decided, after consideration of policies in the Hackney Development Plan, that it was not.

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[69] At para 7-04.
[70] Asp 17.
[71] Rowan Robinson & Farquharson-Black, para 7-04–7-08.
[72] *Urban Edge Group Ltd v London Underground Ltd* [2009] UKUT 103 (LC).
[73] By George Barletta QC.

13.66 It may also be assumed that planning permission is in force for development that is "appropriate alternative development"[74] at the relevant valuation date, and appropriate alternative development for which it is certain, at the relevant valuation date, "that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted".[75]

13.67 The rule regarding "appropriate alternative development" is derived from the findings of the Law Commission which noted:

> "This rule (though apparently complex) is intended to embody, in much shorter and simpler terms, the general philosophy of the 1961 Act: that the subject land should be valued with the benefit of any permission which would have been expected in the absence of compulsory purchase. We do not understand the principle to be controversial."[76]

13.68 It seems to us that a similar simplification of the law would be beneficial in Scotland. We therefore propose that:

95. Provision along the lines of section 14 of the 1961 Act, as amended, should be included in the proposed new statute.

Compensation for subsequent planning permission

13.69 Part V of the 1963 Act deals with compensation where additional planning permission is granted after the compulsory acquisition. Section 31(1) of the Act provides:

> "Where—
>
> (a) any interest in land is compulsorily acquired or is sold to an authority possessing compulsory purchase powers and, before the end of the period of ten years beginning with the date of completion, a planning decision is made granting permission for the carrying out of additional development of any of the land; and
>
> (b) the principal amount of the compensation which was payable in respect of the compulsory acquisition or, in the case of a sale by agreement, the amount of the purchase price, was less than the amount specified in subsection (2) of this section,
>
> then, subject to the following provisions of this section, the person to whom the compensation or purchase price was payable shall be entitled, on a claim duly made by him, to compensation from the acquiring authority of an amount equal to the difference."[77]

13.70 This provision will apply in circumstances where, after the completion of the compulsory purchase process, the acquiring authority subsequently decide, for whatever reason, to use the land for development which was not originally envisaged as development for which the land was compulsorily acquired.[78] Any planning permission which the acquiring

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[74] As defined in s 14(4).
[75] See s 14(3) and s 14(4)(b). See Ch 14, paras 14.54 onwards.
[76] Law Com 286, 8.25.
[77] Added by the 1991 Act, Sch 16, para 1.
[78] Any additional planning permission which is subsequently granted not on the relevant land but on neighbouring land will be irrelevant (*McKechnie v South Lanarkshire Council* LTS/COMP/2005/05).

authority receive for such alternative "additional development",[79] may increase the value of the acquired land above the amount initially granted in compensation to the original owner.

13.71 Section 32 sets out provisions regarding the mechanics of a claim under section 31. By virtue of section 34, sections 31 and 32 are applied to any additional development which is initiated by or on behalf of the Crown, or initiated in right of the Crown interest in land. Under section 35, the provisions of this Part of the Act shall have effect subject to Schedule 3 to the Act. Schedule 3 makes provision for application of Part V of the Act to certain cases such as where the acquired land was subject to a heritable security or held in trust. Any additional compensation assessed under these provisions will be determined by reference to the rules contained in Part III of the Act.

13.72 In practice, an acquiring authority may acquire land and immediately resell it, perhaps to a developer or because they acquired the land as a result of a blight notice. By virtue of section 31, the acquiring authority remain liable for compensation regarding the land, if planning permission for additional development is granted over the land, to any successor in title within the 10 year period. The acquiring authority, in such circumstances, would be well advised to impose an obligation on the successor in title to pay any such compensation which arises.

13.73 Some of our Advisory Group have suggested that section 31 is not well known and should either be repealed or reviewed. The Law Commission considered that the equivalent English provision should be repealed as it was "anomalous". Failing that, the Commission thought that the provisions should be amended and updated:[80]

> "Compensation under the ordinary rules is intended to reflect the full market value of the land at the valuation date, with all its present and future potential, including any hope value for future development. The claimant is then free to use the money for alternative investments (any delay in payment being compensated by interest). There is no obvious reason why he should be treated as though he had retained his investment in the acquired land, until any potential value had become a certainty. No such expectation would arise on an ordinary sale in the private market, in the absence of a specific provision in the contract of sale for 'clawback' of future development value."[81]

13.74 It has been suggested that, as the additional planning permission granted in respect of the acquired land is due to the intervention of the acquiring authority, it may be incorrect as a matter of policy that the previous landowner should benefit from this.[82] Allowing for compensation for subsequent planning permission may also lead to uncertainty, which may make it more difficult for acquiring authorities to plan their budgets for projects. Section 31 may also be seen to be contrary to the market value principle contained in rule 2, whereby

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[79] S 37(1), see *Streeter's Executors v Secretary of State for Transport* [2011] UKUT 1 (LC) for a case in which the term "additional development" was considered in terms of the 1961 Act. The provisions of s 31 of the 1963 Act shall have effect in relation to any planning permission falling within column 1 as set out in s 33(1) as if a planning permission granting that permission had been made on the corresponding date in column 2. However, no additional compensation is available for a subsequent grant of planning permission which relates to land acquired under the provisions specified in s 31(3).

[80] For instance, to take account of the decision in *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 (see Ch 7).

[81] Law Com 165, para 8.72. In contrast, the DETR Review in 2000 found that there was "nothing to suggest that this provision has given rise to any particular difficulties, anomalies or unfairness". See para 118.

[82] DETR Review, para 118.

the assessment of the value of the land is based on its value in the open market;[83] it is unlikely that potential planning permission, which may be obtained up to 10 years later in respect of the land, would be anticipated in the open market.

13.75 In terms of the Crichel Down Rules,[84] a "disposing department" (i.e. the acquiring authority which is disposing of surplus land) may include "clawback" provisions in its agreement with the former landowner, where the planning position in relation to compulsorily acquired land (which has become surplus to the acquiring authority's requirements and is being offered back to the original owner), cannot reasonably be established prior to the disposal. Clawback provisions entitle the disposing department to recover additional value attributable to the returned land at a later date. Clawback provisions are used in order to ensure that the former owner of land should not, at the expense of the public purse, benefit from any uplift in the market value of the surplus land when exercising his right to repurchase. However, if the acquiring authority/disposing department is entitled to clawback additional value in respect of the land after it has disposed of its interest to the original owner, it could be argued that the individual whose land is compulsorily acquired, should equally be entitled to recover additional value in respect of that land where subsequent planning permission is awarded, even after his title has expired.[85]

13.76 If, despite the discussion above, provision is considered necessary to allow a claim similar to that contained in section 31 of the 1963 Act, there seems no particular reason why the "cut-off" period should be 10 years. In the course of its project, the Law Commission received representations that this term should be reviewed, and opinions on the correct term varied from 5 years to 25 years. In relation to Part V of the 1963 Act, we ask the questions:

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

97. If not, should the period for considering subsequent planning permission remain as 10 years?

[83] See Ch 7.
[84] These establish a, non-statutory, rule which gives former owners of compulsorily acquired land the right to repurchase the land when it becomes surplus to the requirements of the acquiring authority before the acquiring authority seeks to dispose of it on the open market. See Chapter 19.
[85] For more on the clawback provisions under the Crichel Down Rules and how they relate to section 31 of the 1963 Act, see paras 19.23-19.24.

Chapter 14 Valuation of land to be acquired – CAADs

Introduction

14.1 In this Chapter we consider Part IV of the 1963 Act (sections 25 to 30) which establishes the mechanism of CAADs. CAADs are a method of determining whether, if it were not for the compulsory acquisition, planning permission for other forms of development of the land could (or could not) be expected to be granted.

14.2 The specific issues we cover in this Chapter are the technical requirements for applying for a CAAD, the date as at which a CAAD should be determined and the extent to which the development should be deemed to be "cancelled" for the purposes of that determination. We also discuss the appeals process and, in particular, the body to which an appeal should be made. Finally, we consider whether the *Pointe Gourde* principle has, or should have, any application to the process. The timeline set out in Appendix C may be of assistance to readers.

Background

14.3 The essential purpose of the CAAD process is to secure the payment of fair compensation to landowners whose property is compulsorily expropriated.[1] In practice, the value of land is often ascertained through obtaining planning permission for new development. It is well established that compensation for compulsory purchase should reflect the value of the land on the open market in terms of a sale between a willing seller and a willing buyer. However, where land is to be compulsorily acquired, it will be difficult to establish the value of the land by applying for planning permission to test the position, as planning permission is likely to be refused on the basis that the land is needed for a public purpose.[2] Landowners whose land is subject to compulsory purchase will therefore be placed at a disadvantage compared to landowners who are able to realise the development potential of their land outwith the shadow of compulsory acquisition. The CAAD procedure provides landowners who are facing compulsory acquisition with an alternative means to establish the development value of their land.

Process of applying for a CAAD

14.4 The CAAD procedure enables the claimant to apply for determination by the planning authority of potential planning permission before negotiations regarding compensation commence. Although a positive CAAD (see paragraph 14.8) may result in a significant increase in the value of compensation which the claimant is entitled to, it should be noted that "regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part IV of this Act".[3] Section 25 of the 1963 Act provides that, where

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[1] See J Watchman, *Certificates of Appropriate Alternative Development,* SPEL 2010, 137, 12-14.
[2] DETR Review, para 109.
[3] 1963 Act, s 22(3A) (substituted by 1991 Act, Sch 17, para 7(2)).

an acquiring authority propose to use compulsory purchase powers, either the authority or the landowner may apply to the planning authority for a CAAD.[4] The acquiring authority may apply for a CAAD (a negative CAAD, see paragraph 14.9) in order to establish that the land to be acquired does not have development value, or that any such value is less than what is claimed by the landowner.[5]

14.5 Where the acquiring authority have served a notice to treat, or an agreement has been made for the sale of the land, and a reference has been made to the LTS to determine the issue of compensation, then no application for a CAAD may be made by either party after the date of reference to the LTS, except with the consent in writing of the other party or with the leave of the LTS.

14.6 This raises the question of whether there should be a specific time limit within which an application for a CAAD must be made. Generally, it is be advantageous for applications to be dealt with as expeditiously as possible. Later in this Chapter we discuss changes in planning policy which may take place, to the advantage or disadvantage of the landowner, between the making of the CPO and the final assessment of the value of the property. It would assist in general transparency if a CAAD were sought at the time of the making of the CPO. We appreciate that merely requiring an application to be made expeditiously may not produce a quick result. In paragraph 7.42 we discuss the case of *R v Northumbrian Water Ltd,* ex parte *Able*,[6] in which a CAAD was applied for almost immediately following the making of a CPO, but the result did not emerge for some considerable time. Nevertheless, we ask the question:

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

Content of CAAD application

14.7 Under section 25(3) of the 1963 Act, the application for a CAAD must contain information regarding the classes of development[7] which the applicant believes, either immediately, or at a future time,[8] would be appropriate for the land in question, if it were not for the proposed compulsory acquisition.[9] The applicant must specify the classes of development and when they would be appropriate.[10] The applicant must also specify grounds for holding that opinion[11] and provide a statement specifying the date on which a copy of the application has been, or will be, served on the other party directly concerned in

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[4] Under s 27, where the landowner is absent from the United Kingdom, or cannot reasonably be found then the valuator who is appointed under section 56 of the 1845 Act in order to assess the value of the land which is proposed to be acquired, may also apply for a CAAD.
[5] See R McMaster, A Prior and J Watchman, *Scottish Planning Law,* (3rd edn, 2013), para 10.45.
[6] (1996) 72 P & CR 95.
[7] There are 11 classes of development set out in the Town and Country Planning (Use Classes) (Scotland) Order 1997 SI 1997/3061 (as amended by SI 1998/1196 and SSI 1999 No 1). See R McMaster, A Prior and J Watchman, *Scottish Planning Law,* (3rd edn, 2013), para 4.20-4.44.
[8] See *Fox v Secretary of State for Environment* (1991) 62 P & CR 459 per Roch J at para 474 (regarding the equivalent provision in section 17(3) of the 1961 Act, prior to amendment).
[9] In considering what alternative development may have been granted, regard may be taken of not only planning permission that would have been granted over the applicant's land in particular but also the possibility of the development of the applicant's land as part of a greater area, even where the greater area is not owned by the applicant (*Sutton v Secretary of State for the Environment* [1984] JPL 648).
[10] S 25(3)(a).
[11] S 25(3)(b).

the acquisition.[12] The application for a CAAD must be in writing and must contain a map or plan which identifies the land to which the application relates.[13] However, there is no prescribed form of application for a CAAD. On a practical level, any reasonable expenses incurred by the claimant in applying for a CAAD, must be taken into account when assessing the level of compensation that the claimant is entitled to.[14]

14.8 In terms of section 25(4), where an application is made to a planning authority for a CAAD, the planning authority shall, not earlier than 21 days after the date on which a copy of the application is served on the other party,[15] issue the applicant with either a positive certificate or a negative certificate.[16] A positive certificate will be issued where, in the opinion of the planning authority:

> "planning permission would have been granted for development of one or more classes specified in the certificate (whether specified in the application or not)[17] and for any development for which the land is to be acquired, but would not have been granted for any other development."[18]

14.9 A negative certificate will be issued where, in the opinion of the planning authority:

> "planning permission would have been granted for any development for which the land is to be acquired, but would not have been granted for any other development."[19]

14.10 Section 25(4) of the 1963 Act provides that, where a positive CAAD is issued, it will identify any classes of development for which permission would have been granted (for example, residential development). The certificate does not have to provide great detail regarding the nature, cost or form of the development but, in accordance with section 25(5), where, in the opinion of the planning authority, planning permission would only have been granted subject to conditions, or at a future time (or both) then the certificate shall specify those conditions, or that future time (or both).[20] Similarly, section 17(5)(b) of the 1961 Act, as amended, provides that a CAAD must give a general indication of any condition to which planning permission for the development could reasonably have been expected to be subject.

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[12] S 25(3)(c).
[13] See Land Compensation (Scotland) Development Order 1975 (SI 1975/1287) art 3(1).
[14] S 25(9A), added by 1991 Act, s 75(3). In determining what are "reasonable expenses", the expropriated party should be given a degree of latitude (*Danzan Trust and the Dundas Estate v City of Edinburgh Council*, LTS/COMP/2005/3).
[15] But not later than two months from the date of receipt of the order or such other period as may be agreed (Land Compensation (Scotland) Development Order 1975 (SI 1975/1287) art 3(2)).
[16] The planning authority must also serve a copy of the certificate on the other party (s 25(9)).
[17] See Land Compensation (Scotland) Development Order 1975 (SI 1975/1287) art 3(3) and *London and Clydesdale Estates Ltd v Aberdeen District Council* (1979) 39 P & CR 549.
[18] S 25(4)(a). Where the planning authority is of the opinion that planning permission would have been granted in terms of subsection (4)(a) but subject to conditions or only granted at a future time, or both, then the certificate shall specify the conditions, or that future time, or both in addition to the other matters required to be contained in the certificate (s 25(5)). See timeline, Appendix C.
[19] S 25(4)(a). It is not open to the planning authority, however, in determining the application for a certificate, to certify that planning permission would not have been granted for a particular development because that development would not have been in accordance with the development plan (s 25(7)). See *Fox v Secretary of State for the Environment* (1991) 62 P & CR 459 per Roch J at 478. Although, see also *Skelmersdale Development Corporation v Secretary of State for the Environment* [1980] JPL 322.
[20] This mirrors s 37 of the 1997 Act which provides, in terms of ordinary applications for planning permission, that the planning authority may grant planning permission "either unconditionally or subject to such conditions as they think fit." This seems like a wide discretion but it is curtailed in practice by a number of rules: see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 599 and *British Airports Authority v Secretary of State for Scotland* 1979 SLT 197.

14.11 A well-prepared acquiring authority would usually be alive to the possibility of a CAAD application being made in relation to the compulsorily acquired land and, accordingly, be able to budget for this from an early point in the compulsory purchase process, or tailor their plans to avoid the possibility of increased compensation due to a potentially lucrative CAAD.

14.12 However, some local authorities may be unfamiliar with working on a purely hypothetical planning application due to the relatively small number of CAAD applications they receive. This could give rise to CAADs being issued which are unsatisfactory, leading to difficult valuation questions arising before the LTS at a later date.[21] For these reasons, it has been suggested, including by some members of our Advisory Group, that even with the benefit of a CAAD, it is often difficult to determine an accurate valuation of the property in question. Where certain classes of development are specified in a CAAD, it may be the case that a greater level of detail is required in order to properly and fairly value the land in question. Where residential development is specified in a CAAD, for instance, a more accurate valuation may require details regarding the density of development that would have been permitted. We ask the question:

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide?

Relevant date for determination of a CAAD

14.13 A matter of importance, in terms of determining whether a positive CAAD should be issued in terms of section 25(4), is what the relevant date should be for determining the facts and circumstances in relation to the land in question, as well as the relevant date for considering planning policies in respect of the land which is to be compulsorily acquired. This is important as there may be a change in planning policy following the proposal to use compulsory purchase powers, which means that the likelihood of planning permission being granted may change. Section 30(2) of the 1963 Act provides:

> "For the purposes of sections 25 and 26 of this Act, an interest in land shall be taken to be an interest proposed to be acquired by an authority possessing compulsory purchase powers in the following (but no other) circumstances, that is to say—
>
> (a) where, for the purposes of a compulsory acquisition by that authority of land consisting of or including land in which that interest subsists, a notice required to be published or served in connection with that acquisition, either by an Act or by any Standing Order of either House of Parliament relating to petitions for private bills, has been published or served in accordance with that Act or Order; or
>
> (b) where a notice requiring the purchase of that interest has been served under any enactment, and in accordance with that enactment that authority are to be deemed to have served a notice to treat in respect of that interest; or
>
> (c) where an offer in writing has been made by or on behalf of that authority to negotiate for the purchase of that interest."

[21] See *Stayley Developments Ltd v Secretary of State for the Environment Transport and the Regions* [2001] 1 EGLR 167.

14.14 In terms of the equivalent provision in England and Wales,[22] however, prior to the changes made by the 2011 Act, there was considerable case law on the "relevant date" for consideration of applicable planning policy and other factors relating to CAADs. In the case of *Jelson*,[23] Lord Denning held that, relying on section 17 of the 1961 Act (equivalent to section 25 of the 1963 Act), the planning authority must assess the CAAD application as at the date when the land was proposed to be acquired. In the case of *Fletcher Estates*,[24] it was conceded in the House of Lords that the position in the *Jelson* case should be followed. In *Fletcher Estates,* the House of Lords confirmed that the determination must be made by reference to section 22(2) of the 1961 Act (equivalent to section 30(2) of the 1963 Act) and the dates contained in it. Both physical and planning factors should be considered at the same relevant date.[25]

14.15 Lord Neuberger also considered this issue, with reference to section 17(4) of the 1961 Act, as it then was, in *Spirerose*.[26] He stated:

> "For my part, I would prefer to treat as an open question the issue whether it is right that such a certificate should be based on the situation as at the date of the notice to treat (whether deemed or actual). That was the effect of the decision in *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243, but it may be appropriate for your Lordships to reconsider the issue one day (not least because of the subsequent decision of this House in *West Midland Baptist (Trust) Association (Inc) v Birmingham Corpn* [1970] AC 874). The issue has not been considered in this House, as it was conceded in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307 that the *Jelson* case was rightly decided.
>
> However, assuming that the Jelson case was rightly decided (as it may very well have been), I cannot accept the Court of Appeal's view that it helps justify their decision in this case. As Lord Denning MR said in the *Jelson* case [1970] 1 QB 243, at p 250, there are anomalies whichever date is chosen under section 17(4)(b), and therefore anomaly, and hence unfairness, are very suspect grounds for justifying the addition of a non-statutory assumption to the valuation assessment. In any event, it is by no means clear to me that there is a particularly striking anomaly: it makes some sense to select the date of the making of the compulsory purchase order as being the relevant date for the purposes of section 17(4)(b), as that is the date on which the owner's ability to seek and obtain planning permission becomes fettered."[27]

14.16 There seems therefore to be no entirely satisfactory answer to the question of what should be the "relevant date" although Lord Neuberger saw merit in it being the date of the making of the CPO. Referring to the *Fletcher Estates* case in terms of the date to which the determination of a CAAD had to relate, the DETR Review suggested that "the implications of this aspect of the judgement warrant further review".[28] The Review also noted: "the relevant date should not be fixed at a point too far into the acquisition process if it is to inform the valuation negotiations. On the other hand, too early a date is more likely to give rise to

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[22] 1961 Act, s 22(2).
[23] See *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243; *Robert Hitchins Builders v Secretary of State for the Environment* (1979) 37 P & CR 140; *Fox v Secretary of State for the Environment* (1991) 62 P & CR.
[24] See *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307 at 319.
[25] *Fox v Secretary of State for the Environment* (1991) 62 P & CR at 472.
[26] *Transport for London (formerly London Underground Ltd) v Spirerose Ltd* [2009] UKHL 44. Discussed in greater detail at para at 12.61 onwards, above, and para 14.54 onwards, below.
[27] At para 58-59.
[28] DETR Review, para 113.

speculation about possible alternative developments". Whatever the relevant date is, it is clearly preferable that it is sufficiently defined so as to be easily identifiable by both planning authorities and the landowner.

14.17 Currently, in Scotland, by virtue of section 30(2), the date of publication of the notice of making of the CPO will usually be the relevant date for determination of a CAAD. By fixing the relevant interests in terms of the assessment for a CAAD at this date, a degree of certainty is established, and the acquiring authority (which may also be the relevant planning authority) will be prevented from altering the planning position in respect of the land in a manner which may be disadvantageous to the landowner.[29]

14.18 It is true that the date of publication of the notice of the making of the CPO (or the date of the making of the CPO as suggested by Lord Neuberger in *Spirerose*) may be a long time before the acquiring authority take entry, and before compensation is ultimately settled. It is also the case that, between these two dates, many factors can change which may impact upon the planning position of the land. (For example, there may be a change in the complexion of the local authority, with a resulting change in their attitude to development of the area in question.) If the date of publication of the notice of the making of the CPO, is the date for assessing CAADs, then it may be on the basis of circumstances which bear no relation to those existing at the time of the award. Depending upon what changes have taken place, this may work to the advantage of one of the parties.

14.19 We note that the Law Commission recommended that "appropriate alternative development" should be considered on the "valuation date",[30] i.e. the date when the acquiring authority take entry on to the land, or the date when the assessment of compensation is made. Lord Neuberger's speech in *Spirerose,* above, also hinted at this approach by making reference to the *West Midlands Baptist* case.[31] The 1961 Act, as amended, provides that section 17 certificates are to determine planning prospects as at the "relevant valuation date".[32] This addresses the problem of circumstances changing between the initial making of the CPO and the notice to treat, and the eventual determination of compensation. It may also be desirable to link the relevant date for assessment of a CAAD, to the date for "cancellation" of the scheme for the valuation of planning assumptions generally (see below). On the other hand, we see considerable merit in fixing the date as at which CAADs should be determined, and in fixing that date as early as possible in the process. It seems to us that the current provisions of section 30(2) of the 1963 Act achieve that aim. Accordingly, we propose that:

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

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[29] See *Spirerose* at para 132 per Lord Collins of Mapesbury: "there is much to be said for the submission on behalf of TfL that the date of publication of the notice of the making of the compulsory order is a rational choice by the legislature, because that is the date on which the prospect of obtaining valuable development rights is taken from the owner."

[30] Law Com 286, r 14. See also 1961 Act, s 5A.

[31] On which, see Ch 7.

[32] See s 14(4).

Deemed cancellation of scheme for determination of a CAAD

14.20 Section 23(5) of the 1963 Act provides:

> "Where a certificate is issued under the provisions of Part IV of this Act, it shall be assumed that any planning permission which, according to the certificate, would have been granted in respect of the relevant land or part thereof **if it were not proposed to be acquired by any authority possessing compulsory purchase powers**[33] would be so granted, but, where any conditions are, in accordance with those provisions, specified in the certificate, only subject to those conditions and, if any future time is so specified, only at that time." (emphasis added)

14.21 Moreover, section 25(3)(a) requires an application for a certificate to state whether there are any classes of development which would, in the applicant's opinion, be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers.

14.22 When determining an application for a CAAD, a question has arisen as to whether, in addition to disregarding the proposal by the acquiring authority to acquire the particular land, the entire underlying scheme ought also to be treated as cancelled. The case of *Grampian Regional Council*[34] concerned the purchase of land for the building of two new schools. The price was determined as if there had been a compulsory purchase. The owners of the land applied for a CAAD in terms of section 25 of the 1963 Act. A negative certificate was issued by the planning authority on the basis that, apart from the development proposed by Grampian Regional Council acting in its capacity as Education Authority, planning permission would not have been granted for any other development. An appeal by the claimants to the Secretary of State was successful.

14.23 The acquiring authority applied to have the decision of the Secretary of State quashed. In the House of Lords, they argued, relying on section 30(2) of the 1963 Act, that the Secretary of State was only required to ignore, in considering a CAAD application, the immediate event which had resulted in the applicant's interest in land becoming one which was proposed to be compulsorily acquired. In this case that was the acquiring authority's written offer to purchase. However, the Secretary of State should not have ignored the underlying plan to devote the sites in question to public education. This underlying plan, according to the acquiring authority, afforded a "complete answer to the claims for positive certificates" and so the Secretary of State had erred in finding that the land could also have been used for residential or commercial purposes on appeal.

14.24 In rejecting the acquiring authority's appeal, Lord Bridge held:

> "[T]he overriding consideration which impels me to reject the argument for the appellants is that it would, in my opinion, if accepted, defeat the essential purpose of the procedure for obtaining certificates of appropriate alternative development, as part of the overall scheme of the Act to secure the payment of fair compensation to landowners who are compulsorily expropriated, or, expressed more specifically, to ensure that, when urban land, otherwise available for some form of urban building development, is acquired for a necessary public purpose, the compensation will

[33] Words inserted by Community Land Act 1975, Sch 10, para 5(2)(5); continued by the 1980 Act, Sch 33, para 7 in relation to applications, or certificates issued in pursuance of applications, made after 12.12.1975.
[34] *Grampian Regional Council v Secretary of State for Scotland* 1984 SC (HL) 1.

> reflect its urban development value. Assuming, as I do, that every compulsory purchase of land can be justified by reference to the public purpose for which the land is required, to allow reliance on that public requirement to determine the question raised by an application under section 25 would lead to the issue of a negative certificate in every case. Counsel for the appellants, recognising that this conclusion would be fatal to his argument, sought to avoid it by contending that the applicant for a positive certificate could succeed if, but only if, he could show that, at the date of his application, there were one or more alternative sites available which could equally well or perhaps better be used to meet the public need for which his own land was proposed to be taken. I unhesitatingly reject this contention. An application for a certificate of appropriate alternative development presupposes that the land to which it relates is in fact to be acquired by an authority possessing compulsory purchase powers and a certificate issued will only be of significance if the acquisition proceeds to completion. The availability of alternative sites is very relevant at this stage when a proposed compulsory acquisition is being resisted. But once it has been decided that site A, rather than site B or site C, is to be acquired, the fact that site B or site C might have been chosen instead can have no conceivable relevance in determining the fair basis of compensation which the acquiring authority ought to pay to the owner of site A."[35]

14.25 The next case is *Fletcher Estates*[36] which concerned section 17 of the 1961 Act, as it then was. Lord Hope of Craighead said:

> "The position appears therefore to be quite straightforward upon a consideration of the ordinary meaning of the words used in the statute. The assumption which the local planning authority must make relates to the situation as at the relevant date. The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past."[37]

14.26 In Scotland, Lord Hope's dictum in *Fletcher Estates* has been applied in the case of *South Lanarkshire Council.*[38] The proposal by the acquiring authority, together with the underlying proposal, must be deemed to be cancelled at the relevant date (in this case, the date of the deemed notice to treat). At paragraph 12 the court[39] noted:

> "[I]n *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* the House of Lords gave further guidance on the approach that a planning authority must take when considering an application for a certificate under section 17 of the Land Compensation Act 1961, the equivalent of section 25 in the 1963 Act. In his speech, with which all the other members of the House concurred, Lord Hope of Craighead said (at p 319B – C) that the issue in the appeal related to the meaning and effect of the direction in section 17(4) that the local planning authority must issue their opinion regarding the grant of planning permission in respect of the land in question 'if it were not proposed to be acquired by an authority possessing compulsory purchase powers'. He added: 'It is plain that the assumption which the local planning authority is directed to make by this subsection requires it to ignore the fact that an interest in the land is proposed to be acquired by an authority possessing compulsory purchase powers as described in section 22(2). This involves disregarding the publication of

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[35] At p 31.
[36] See fn 24, above.
[37] See fn 24 above, at 322.
[38] *South Lanarkshire Council v Lord Advocate* 2002 S.C. 88 IH.
[39] Lord President Rodger of Earlsferry, Lord Prosser and Lady Cosgrove.

> the notice of the proposed compulsory purchase order, which is the circumstances referred to in section 22(2)(a) that is relevant to this case. The question is—how much the local planning authority disregard when making its assumption?' Lord Hope identifies the question in issue as relating to the implications of these particular words in section 17(4) of the English Act, and, as we have noted already, no importance to that omission, however, since the same words appear in section 25(3)(a) and must be implied into subsection (4), dealing with the local authority's decision on an application framed in terms of subsection (3)(a). That being so, we are satisfied that the reasoning in *Fletcher Estates* falls to be applied in construing the Scottish legislation. Counsel did not suggest otherwise."

14.27 In addition, as noted by Lord Hope in *Fletcher Estates,* no assumption is to be made about what may, or may not, have happened before the relevant date. The matter must be determined in the light of the circumstances existing at that date, and by the application of ordinary planning principles. Lord Hope explained the reasons for adopting such an approach:

> "It is one thing to examine these factors, on the assumption that the proposal has been cancelled on the relevant date, in the light of existing circumstances. It is quite another to look back into the past and to try to reconstruct the planning history of the area on the assumption that the proposal had never come into existence at all. The further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to be to reach a conclusion in which anybody can have confidence."[40]

14.28 The Law Commission recommended a simplified version of the CAAD procedure.[41] They also proposed, in the interests of clarity, that the cancellation assumption should apply more generally to all aspects of the planning status rules (including the "no-scheme" rule).[42]

14.29 The recommendation of the Law Commission is now reflected in section 14(5) of the 1961 Act, as amended. This sets out expressly the relevant "cancellation assumptions", which are the same for assessing a CAAD, and for the prospects of other consents which are not appropriate alternative development.[43] These are the only assumptions which can be used in terms of disregarding the scheme for the determination of planning consents. The planning potential must otherwise be assessed based on market knowledge at the relevant valuation date.[44] The applicable cancellation assumptions, under section 14(5), are:

> "(a) that the scheme of development underlying the acquisition had been cancelled on the launch date,[45]
>
> (b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,

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[40] *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307 at 323.
[41] Law Com 286, r.14A.
[42] Above at para 7.31. On the "no-scheme" rule see Ch 12.
[43] The difficulties caused by the disparities between the assumptions to be made in terms of CAAD procedure and the "no-scheme" assumption made under the *Pointe Gourde* principle were identified in *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140. See B Denyer-Green, *Compulsory Purchase and Compensation* (9th edn, 2009) p 254.
[44] This is in line with the approach adopted by the House of Lords in *Waters v Welsh Development Agency* [2004] UKHL 19.
[45] S 14(6) defines the "launch date". Generally, this will be at the time the CPO was first published.

(c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and

(d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ('the scheme highway'), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet."

14.30 There seem to us to be compelling reasons, as set out by Lord Hope in *Fletcher Estates,* why the proposal to acquire the relevant land, as well as the general underlying scheme, should be assumed to be cancelled as at the date the CPO is first published. However, a difficulty with this approach is that there may, in fact, have been little prospect of planning permission being granted at this time, which could give rise to hardship for the claimant. Nevertheless, the position in Scotland would perhaps benefit from the relative clarity introduced by the 2011 Act regarding such cancellation assumptions. We also think that a consistent approach as to the cancellation assumptions applied to CAADs, as well as other planning assumptions, would be beneficial.[46] Therefore, we propose that:

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, and no assumption should be made about what may or may not have happened before that date.

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

103. The same cancellation assumptions should apply to the consideration of all potential planning consents, including CAADs.

14.31 As well as harmonising the cancellation assumptions to apply at the same date for each of the statutory planning assumptions, including CAADs, there is an argument that the "relevant date" for consideration of a CAAD under section 25 ought to be harmonised. Again, we note the Final Report of the DETR Review which stated:

"Ministers may also wish to consider whether there might be any advantage in linking the relevant date for section 17 [for Scotland, section 25] purposes to any date which might be fixed for determining the "no scheme" position for valuation purposes."[47]

We therefore ask the question:

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

[46] We discuss this matter in Ch 13
[47] DETR Review, para 116.

Appeal against a CAAD

General

14.32 Section 26 of the 1963 Act provides that where the local planning authority have issued a certificate under section 25 of the Act, either party may appeal to the Scottish Ministers[48] against that certificate.[49] The Scottish Ministers will consider the appeal as if the application for a CAAD under section 25 had been made to them in the first instance. The Scottish Ministers have the power to either confirm the certificate, vary it or cancel it and issue a different certificate in its place.[50] Before reaching a decision, the Scottish Ministers must allow the parties an opportunity to be heard if any of them so request; this will normally be by a public inquiry.[51]

14.33 In the case of CAAD applications, parties have the right to insist on an inquiry, as is the case with an inquiry before confirmation of a CPO. The reporter has no discretion in terms of dealing with the application in a different manner, for example, through written submissions as can happen for planning appeals.[52] In Chapter 5, we discussed whether the reporter should have a discretion in compulsory purchase cases which is equivalent to their discretion in planning cases.[53] Many similar considerations apply in relation to CAAD appeals and it may be that greater use of alternative forms of procedure would be desirable. It is certainly the case that holding a hearing takes time. On the other hand, consultees may consider that the right to insist on being heard should not be removed from the CAAD appeal procedure. It is certainly, from the point of view of the landowner, an important part of the process. We therefore ask the question:

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?

Nature of appeal

14.34 The decision on a CAAD appeal will be made by the Scottish Ministers, on recommendation by the appointed reporter, on the balance of probabilities. There is no requirement to assess more accurately the possibility of any particular planning permission being granted.[54] In assessing compensation, any reasonably incurred expenses relating to a successful appeal against a CAAD, are to be taken into account.[55]

14.35 Notice of appeal must be given within one month of either, the date of the receipt of the certificate or, the expiry of the period for issuing the certificate.[56] Notice of the appeal must be in writing and a copy must be sent by the appellant to the other party, to the regional planning authority and to the acquiring authority who issued the CAAD.[57] Within one month

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[48] See Scotland Act 1998, s 53, on the transfer of functions from the Secretary of State to Scottish Ministers.
[49] The CAAD must give details regarding the manner of appeal and the time limit (Land Compensation (Scotland) Development Order 1975 (SI 1975/1287) art 3(3)). See, *London and Clydesdale Estates v Aberdeen District Council* 1980 SLT 81.
[50] S 26(2).
[51] S 26(3).
[52] Town and Country Planning (Appeals) (Scotland) Regulations 2013, reg 9(4).
[53] See paras 5.28-5.30 above.
[54] See *Porter v Secretary of State for Transport* [1996] 3 All ER 693.
[55] S 25(9A).
[56] Land Compensation (Scotland) Development Order 1975 ("the 1975 Order"), art 4(1).
[57] 1975 Order, art 4(2). See timeline, Appendix C.

of giving notice, the appellant must furnish the Scottish Ministers with a copy of the application to the planning authority, the certificate (if issued) and a statement of grounds of appeal.[58] Failure to do so will result in the appeal being treated as withdrawn.[59]

14.36 We note that the one month time limit for a CAAD appeal is different to that of an ordinary planning appeal, which is three months.[60] From discussion with our Advisory Group, we understand that this discrepancy may cause confusion for planning authorities in practice. Consistency would seem desirable; a CAAD application is simply a planning application in the hypothetical situation where no compulsory purchase occurred. On the other hand, it **is** a hypothetical situation, and one which, in everyone's interests, should be resolved quickly. We ask the question:

106. Should there be any change in the current (one month) time limit for appealing against a CAAD?

Extent of review

14.37 Section 29 of the 1963 Act provides for proceedings for challenging the validity of a decision of the Scottish Ministers on appeal under section 26 of the Act. Section 29(1) provides:

> "(1) If any person aggrieved by a decision of the Secretary of State under section 26 of this Act or the local planning authority desires to question the validity of that decision on the ground that it is not within the powers of this Act or that any of the requirements of this Act or of a development order or of the Tribunals and Inquiries Act 1971 or rules made thereunder have not been complied with in relation to it, that person or authority may, within six weeks from the date of the decision, make an application to the Court of Session, and the Court of Session—
>
> (a) may by *interim* order suspend the operation of the decision until the determination of the proceedings;
>
> (b) if satisfied that the decision is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with the said requirements, may quash the decision."

14.38 The validity of a decision on an appeal under section 26 may not be questioned in any other legal proceedings whatsoever.[61]

14.39 The operation of section 29 has been the subject of two cases in the Inner House of the Court of Session: *Scottish Borders Council ("SBC") v Scottish Ministers*[62] and *Network Rail Infrastructure Ltd v Scottish Ministers*.[63] The background of these cases is the Waverley Railway project.[64]

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[58] 1975 Order, art 4(3).
[59] 1975 Order, art 4(4).
[60] Town and Country Planning (Appeals) (Scotland) Regulations 2013, reg 3(3).
[61] S 29(2).
[62] [2012] CSIH 79 (IH (Ex Div)).
[63] [2013] CSIH 64.
[64] Through the auspices of Transport Scotland alongside Network Rail (as statutory successors to SBC under the Waverley Railway (Scotland) Act 2006), the City of Edinburgh Council, Midlothian Council and SBC.

14.40 SBC exercised powers of compulsory purchase under the 2006 Act. Positive CAADs were issued by Midlothian Council in respect of land to be compulsorily acquired. SBC appealed against these CAADs under section 26 of the 1963 Act, but failed to provide the Scottish Ministers with copies of the applications for the CAADs, and the relevant CAADs, as issued by Midlothian Council. Under article 4(4) of the Land Compensation (Scotland) Development Order 1975 ("the 1975 Order"),[65] where the appellant does not furnish the Scottish Ministers with these documents within one month of giving notice of appeal, the appeal shall be treated as withdrawn. Therefore, the Scottish Ministers notified SBC that their appeal was deemed to be withdrawn by virtue of article 4.

14.41 SBC then issued a statutory appeal in terms of section 29 of the Act. The Scottish Ministers challenged the competence of this on the basis that, as they had made no decision under section 26, but had merely treated the appeal as withdrawn in accordance with Article 4 of the 1975 Order, it was not open to SBC to proceed under section 29. The Scottish Ministers submitted that SBC should have instead proceeded by means of judicial review. The court rejected the Scottish Ministers' submissions and held that, because the decision to treat the appeal as withdrawn was a "decision" in terms of section 26, it was competent for SBC to challenge the validity of the decision by raising proceedings under section 29.

14.42 It has been suggested that this decision misinterprets section 29 of the 1963 Act.[66] Section 29 provides that a person aggrieved by a decision of the Scottish Ministers *under* section 26 may challenge the validity of the decision. In the present case, the Scottish Minister's reporter, on one view, did not make any such decision *under* section 26 (i.e. to confirm the certificate, to vary it or to cancel it and issue a different certificate in its place). Rather, the reporter, on behalf of the Scottish Ministers, made a decision *on an appeal under* section 26 by deciding that, because the appellant had failed to comply with the furnishing requirements, the appeal was deemed to be withdrawn in terms of article 4 of the 1975 Order.

14.43 It having been decided that the challenge under section 29 was competent, the substantive issue in the case was subsequently decided in *Network Rail Infrastructure Ltd v Scottish Ministers.* Network Rail (as the statutory successors to SBC) submitted that the Scottish Ministers' reporter had reached a decision which was "not reasonably open to her" by treating the appeals as withdrawn in terms of article 4 and, in particular, that she had erred in law in her interpretation of article 4(3). The court noted that "the dispute is as much concerned with the construction of the correspondence issued by the Reporter in the period leading up to the decision complained of, and whether, or to what extent, it affected the appellants' obligation to 'furnish' the specified documents in terms of article 4(3)".

14.44 Lord Justice Clerk Carloway found in favour of the Scottish Ministers. At paragraph 22, he held:

> "The terms of article 4(4) of the 1975 Order are clear and mandatory. If the appellants do not furnish certain specified documents, notably the grounds of appeal, copy applications and relative certificates specified in article 4(3), on time, the appeals are to be treated as withdrawn."

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[65] SI 1975/1287.

[66] See J Watchman, *Compulsory purchase authority wins first round in CAAD proceedings*, SPEL 2013, 155, 18-20. The author states at p 19 "In this author's opinion the issue decided in this case should be added to the list of matters to be addressed by the Scottish Law Commission in its review of the law of compulsory purchase."

14.45 He also held, at paragraph 27:

> "The court is not satisfied that the placing of material on a website, without something more, is sufficient to amount to the 'furnishing' of that material to another for the purposes of statutory interpretation. There may be circumstances in which such information may be furnished by, say, providing a hyperlink to a website, where it has been made available, or uploading the information to a particular website at the request of the intended recipient. Where a party does nothing, however, there is no act which might be construed as 'furnishing' the information to anyone. The first respondents cannot be expected to seek out the information required by article 4(3) on the basis that it may or may not be in the public domain. Aside from the uncertainty that would be created as a result, in relation to whether the appeals were being insisted upon, it would run entirely contrary to the logical and clearly expressed intention of Parliament that it is the appellants who are responsible for the furnishing of the documents under article 4(3) in order to proceed with their appeals. For all of these reasons, the appeals are refused."

14.46 This decision seems to us to be correct.[67] It seems to reflect the clearly expressed intention of Ministers, contained in the 1975 Order, that it is the responsibility of the appellant to furnish the Scottish Ministers with the relevant documents as specified in article 4(3). The court reached the conclusion that nothing in the conduct of the Scottish Ministers' reporter had invalidated this requirement on the appellant contained in article 4(3).

14.47 It seems to us that case may be confined to its particular facts and it is perhaps unlikely that it will be repeated on the same scale. In our view the requirements of the 1975 Order are reasonably clear. However, it is at least arguable that, regardless of the ultimate decision and based on a strict reading of section 29, the proceedings were invalid because, as noted above, there was no clear "decision" made under section 26 so as to engage section 29, when the Scottish Ministers' reporter notified the appellant that the appeal was deemed to be withdrawn.

14.48 This is important because it should be asked "whether public sector partners entering into litigation and incurring the required resources (including legal fees and the time of public officers on litigation-related work) is a good example of partnership working and delivering best value in the delivery of public projects".[68] It would seem desirable that the proposed new statute should set out clearly, not only the grounds upon which an appeal against a decision on a CAAD can be made, but also the options open to the authority dealing with the appeal.

To whom should an appeal be made?

14.49 A further issue in terms of appeals against a CAAD is to *whom* such an appeal should be made. As noted above, the current position, as provided for by section 26, is that either party may appeal to the Scottish Ministers. When acting in this capacity, the Scottish Ministers acting through the Reporter's Office will not be the "independent and impartial tribunal" which is required under Article 6 of the Convention when a determination is being

[67] See J Watchman, *Scottish Ministers win second round in CAAD proceedings*, SPEL, 2013, 160, 136-138.
[68] J Watchman, *Compulsory purchase authority wins first round in CAAD proceedings*, SPEL 2013, 155, 18-20 at 19.

made regarding the appellant's civil rights. This lack of independence and impartiality will be particularly marked when the acquiring authority is a government department.[69]

14.50 As we have discussed in detail in Chapter 3, decisions on planning matters, and the appeals against them, are essentially matters of policy.[70] In the (analogous) circumstances of CAADs, we consider that the current appeal process, whereby the Scottish Ministers determine the appeal, is compatible with Article 6 of the Convention. There is, as we have discussed, a statutory means of reviewing the decision of the Scottish Ministers. It is therefore not necessary, in terms of Article 6 of the Convention, that a CAAD appeal should be made directly to an "independent and impartial tribunal" such as the LTS. The question of the body to which the initial appeal should be made is, therefore, one of policy.

14.51 We recognise that, in terms of an ordinary planning appeal, the Scottish Ministers, by virtue of their democratic accountability, are best placed to assess whether an application for planning is in the public interest. A CAAD, however, may be thought to raise a different issue as it exists purely in a hypothetical world and for the purpose of determining what compensation, if any, the landowner may be entitled to. This may be considered to justify a divergence of treatment between the two situations. On the other hand, the consideration of whether a planning permission would have been granted, without any compulsory acquisition, raises the same policy issues as a "real" planning appeal.

14.52 The Law Commission recommended that an appeal against a CAAD should be dealt with by the Lands Tribunal in the first instance.[71] In making this recommendation, the Law Commission also suggested that the procedural advantages of a local inquiry before an inspector should be retained, albeit reporting to the Tribunal rather than the Secretary of State.

14.53 Since the Law Commission's report, the law in England and Wales has been amended by the 2011 Act. Under new section 18 of the 1961 Act, the person entitled to the interest in the land or the acquiring authority, may appeal the local planning authority's decision on a CAAD, to the Lands Chamber of the Upper Tribunal. The Upper Tribunal must determine the application as if it had been made directly to the Tribunal, and not to the planning authority, and may confirm the CAAD, vary it or cancel it and issue a different certificate in its place.[72] There is an appeal against a decision of the Upper Tribunal on a point of law only.[73] At the SCPA Conference in June 2014, we noted significant support for a similar reform in Scotland. For the reasons set out above, we remain unpersuaded. Nevertheless, we ask the questions:

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?

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[69] See *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 at para 2.
[70] See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.
[71] Law Com 286, Rule 14A(3).
[72] S 18(2).
[73] Tribunals, Courts and Enforcement Act 2007, s 13.

Non-statutory planning assumptions and application of *Pointe Gourde* principle

14.54 In the case of *Spirerose,*[74] the owners of a printing works which was subject to compulsory acquisition, applied for a CAAD under the 1961 Act. A CAAD was issued specifying a mixed-use development but, due to an error as regards the valuation date, the valuation had to be conducted without a certificate. Moreover, none of the statutory planning assumptions contained in the 1961 Act assisted the claimants. The claimants argued that at the valuation date, eight years later, planning permission could reasonably have been assumed for the redevelopment of the subject land. This argument relied on an application of the principle set out in the *Pointe Gourde* case.[75] The acquiring authority argued that, in the absence of the ability to rely on an actual existing planning permission, or one of assumptions contained in the 1961 Act, any prospect of planning permission being granted at the valuation date, could be reflected only in "hope value".[76]

14.55 At first instance, the Lands Tribunal decided, based on the decision in *Waters v Welsh Development Agency*[77] that the *Pointe Gourde* principle should be applied as an adjunct to the statutory planning assumptions contained in sections 14 to 16 of the 1961 Act (sections 22 to 24 of the 1963 Act).[78] The Tribunal held that the assumption of planning permission for the assessment of compensation, was not limited to permission in force at the time of the valuation date or to the statutory planning assumptions. Where it is appropriate to assume planning permission in terms of the *Pointe Gourde* principle, section 14(3) allows for this and such a claim is not limited to hope value only.

14.56 The Tribunal found that if, at the valuation date, planning permission would, on a balance of probabilities, have been granted for a particular development then, for the purposes of valuation, such planning permission should be assumed. The decision was upheld by the Court of Appeal. Carnwath LJ held:[79]

> "It is accepted that, where the statutory assumptions apply, probability of a permission is converted into full value for valuation purposes. As has been seen, the claimant was unable to take advantage of the statutory assumptions because of an anomaly in the provisions fixing the date of consideration. As far as possible, we would interpret the no-scheme rule so as to remedy the anomaly rather than extend it. Further, reflecting the same point, it is plainly desirable that there should be consistency in the assessment of compensation for compulsory acquisition of land in materially similar cases, whether or not the statutory assumptions apply."[80]

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[74] *Spirerose Ltd v Transport for London* [2009] UKHL 44. The decision also has relevance to the application of section 16 of the 1963 Act which concerns the disregard of depreciation due to the prospect of acquisition by an authority possessing compulsory purchase powers. This is also discussed in Ch 12.

[75] *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Land* [1947] AC 565. See Ch 12.

[76] Where no planning permission exists and no planning permission can be assumed then the correct approach is to consider what the position would have been had the scheme never been conceived. This is known as "hope value". The onus is on the claimant to prove that a relevant hope exists. See *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140.

[77] [2004] UKHL 19.

[78] See also *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426.

[79] *Spirerose Ltd v Transport for London* [2009] 1 P & CR 20 at para 65. See Rowan Robinson & Farquharson-Black, para 7-19.

[80] The decision of the Lands Tribunal and Court of Appeal in *Spirerose* followed earlier decisions of the Tribunal in *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 and *Thomas's Executors v Merthyr Tydfil CBC* [2003] RVR 246 to the effect that the claimant should be able to rely on such planning permission as would have been granted in the "no-scheme" world even where there are CAADs. See B Denyer-Green, *Compulsory Purchase and Compensation,* (9th edn, 2009) pp 244-246.

14.57 The Court of Appeal concluded that, on the available planning evidence, planning permission should be assumed at the valuation date. The acquiring authority appealed to the House of Lords.

14.58 Their Lordships unanimously allowed the appeal. Lord Collins of Mapesbury held:

> "I accept [Transport for London]'s fundamental point that it is not the role of the court to rewrite legislation by adding additional assumptions of planning permission. As Lord Denning MR said in *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243, 250, whichever date was taken there would be anomalies: 'So much so that I think we must go simply by the construction of the statute.' There is a difference between legitimate purposive construction and impermissible judicial legislation. The 1961 Act has dealt with the present case by providing not only for the section 17 procedure, but also by providing in section 14(3) that, even if the statutory assumptions do not apply, nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused. That enables development value to be taken into account. In my opinion for the court to depart from the normal method of valuation of land which has potential development value by adding an assumption that planning permission will be obtained by analogy with those provisions which do provide for assumptions is not a permissible exercise of statutory construction."[81]

14.59 The House of Lords therefore rejected the position of both the Lands Tribunal and Court of Appeal, which had relied upon an application of *Pointe Gourde*, in effect, to add new assumptions to the statute. The House of Lords found that the prospect of planning permission being granted could only be reflected in hope value.[82] Where there is a prospect of planning permission being granted, it may not be assumed that planning permission had been granted on or before the valuation date.[83] The approach adopted by the House of Lords is attractive in terms of its simplicity.

14.60 However, a restriction of compensation to "hope value", which is usually subject to deductions for uncertainty, in situations where evidence indicates a reasonable chance that planning permission would have been granted, may be unfair on the claimants, and may result in their being awarded less compensation than an assessment which accurately represents the value of the land at the time of the compulsory purchase. In the real world, the market and any hypothetical purchaser would have recognised the true value of the land to the purchaser at that time, including the reasonable chance of planning permission being granted.

14.61 The approach of the Lands Tribunal and the Court of Appeal, whereby a probability is treated as a certainty, is more complex than the approach of the House of Lords, but, arguably, provides less scope for unfair assessments of compensation.[84] It also largely negates the need for recourse to a CAAD. Planning issues and the question of

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[81] At para 131.
[82] Hope value is to be applied at the valuation date (*Persimmon Homes Ltd v Secretary of State for Transport* [2009] UKUT 126 (LC)).
[83] Although see *Jelson v Blaby District Council* [1977] 1 WLR 1020 and *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 which provide that if it can be shown that, but for compulsory purchase, planning permission would have been granted at an earlier date, the land may be valued as though such permission had been granted.
[84] See J Rowan Robinson, *Compensation and the probability of planning permission*, SPEL 2010, 43-44.

compensation are effectively dealt with in the same forum. The decision of the House of Lords has, however, reinforced the importance of CAADs for the value of the claim.

14.62 In England and Wales, the problem identified following the *Spirerose* case regarding the value of compensation available to the claimant, has been remedied by amendments made to the 1961 Act by the 2011 Act. Section 14(3)(b) of the 1961 Act now provides that, in terms of assessing the value of land in accordance with rule 2 in section 5 (section 12 of the 1963 Act), it may be assumed:

> "…that, in the case of any development that is appropriate alternative development to which subsection (4)(b)(ii) applies and subsection (4)(b)(i) does not apply, it is certain at the relevant valuation date that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted."

14.63 The changes made by the 2011 Act provide for greater consistency across the various statutory planning assumptions. Appropriate alternative development may be assumed where, on the assumption that the scheme was cancelled when the CPO was made, it could reasonably have been expected to be granted at a time after the valuation date. A positive CAAD will be issued under the amended section 17 of the 1961 Act where, in the local planning authority's opinion, there is development that is appropriate alternative development in relation to the acquisition.[85]

14.64 At present, under section 25 of the 1963 Act, the test for the granting of a CAAD is relatively high; the planning authority must be of the opinion that planning permission "would have been granted" for the alternative development. As noted by Rowan Robinson & Farquharson-Black, this is a higher test than that which appears in section 24 in relation to assumptions derived from development plans, where it must only be shown that the alternative planning permission "might reasonably have been expected to be granted".[86] There seems to us to be no obvious justification for such a distinction. Indeed, it may operate in practice in a manner which is unduly harsh on the claimant.[87] On the other hand, as acknowledged by the House of Lords in *Spirerose,* what may appear to commentators to be an unduly harsh distinction is, ultimately, a matter of policy. We ask the questions:

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions?

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[85] 1961 Act, s 17(1)(a).
[86] See para 13.39 onwards.
[87] Although even a negative CAAD does not prevent the assumption of "hope value" on the basis that development might be permitted in the future (see *Corrin (Trustees of Northampton Church Charities) v Northampton Borough Council* (1980) 253 EG 489).

Chapter 15 Consequential loss – retained land

Introduction

15.1 In Chapters 11 to 14 we discussed the assessment of compensation for land which has been compulsorily acquired. This Chapter and Chapter 16 comprise the second part of our consideration of compensation. They both relate to consequential financial loss sustained by the landowner. In this Chapter we consider loss caused to the value of land retained by the landowner. In Chapter 16 we consider other loss caused to the landowner in consequence of the acquisition.

Matters dealt with in this Chapter

15.2 This Chapter deals with two connected issues, against the background that the value of the retained land may be affected, either positively or negatively, by the compulsory acquisition of part of the landowner's land.[1] First, we consider the assessment of compensation for any depreciation in the value of the retained land (injurious affection[2]). The retained land may become less valuable because the acquired land was important to the overall value of the land, or because the scheme of the acquiring authority will have a negative impact on the retained land in terms of noise, visual impact or some other factor.

15.3 Second, we consider any "betterment" to the retained land and whether, and to what extent, this should be set off against compensation payable to the landowner for the compulsory acquisition of the acquired land. The acquisition and development by the acquiring authority of part of a person's land may increase the value of the retained land by, for instance, enhancing the possibility of planning permission being granted on the retained land. For example, in one case, a company owned land facing on to, and extending back from, the Strand in London.[3] The frontage on to the Strand was valuable, a fact which was reflected in the compensation awarded when the frontage was acquired compulsorily for the purpose of enabling the local authority to widen the road. The result of the acquisition of that strip of land was that the next strip of the company's land faced on to the widened Strand, and went up in value accordingly.

Matters not dealt with in this Chapter

15.4 This Chapter does not consider the situation where depreciation or betterment is caused to land by the activities of an acquiring authority with statutory powers, but where no land has been acquired from the affected landowner.[4]

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[1] See, generally, Rowan Robinson & Farquharson-Black, Ch 11.
[2] See Glossary.
[3] See *South Eastern Railway Company v London County Council* [1915] 2 Ch 252.
[4] See 1973 Act, Pt I. This is outside the scope of the project (see Ch 2 above).

Terminology

15.5 The "other land" mentioned in paragraph 15.1 is referred to in the 1845 Act, by reference to the acquired land, as "land held therewith".[5] In this Chapter we use the term "retained land".

15.6 A claim for injurious affection will arise where part of the claimant's land has been compulsorily acquired and the execution of the works by the acquiring authority, or the intended use of those works, depreciates the value of the retained land.[6]

15.7 Severance is a particular example of injurious affection. We deal with it specifically because it is specifically mentioned in the 1845 Act. Severance "signifies that what the promoters have acquired is separated from, in the sense that it can no longer be treated by the landowner as part of, the subjects which, until its purchase, he held along with it".[7] The probable, practical effect of severance will be to cause the landowner inconvenience and possible expense in the use of the separated parts of the land, and it is the likeliest cause of injurious affection to the retained land. A common example of severance is where a major road is constructed through agricultural land.

15.8 There have been suggestions that the terms "severance" and "injurious affection" are unclear and archaic and should be reconsidered.[8] Indeed, in *Edwards v Minister of Transport,* Harman LJ referred to the term "injurious affection" as "a piece of jargon having a respectable pedigree and prolific of litigation in our courts for a century or more".[9] However, as they are well-established terms and, we believe, generally understood by practitioners, we consider that it may be counterproductive to replace them at this stage.

General

15.9 The major difference between the assessment of loss in relation to the retained land, and loss in relation to the land acquired, is, or ought to be, that in the case of retained land the calculation of the loss is more straightforward. The depreciation or appreciation in the value of retained land, as a result of the acquisition, should be something which can be accurately estimated, without recourse to statutory assumptions or disregards, or the application or non-application of the *Pointe Gourde* principle.

15.10 More generally, we consider, in this Chapter and Chapter 16, whether it would be an improvement on the current position if the legislation were to provide for a single principle, to the effect that the landowner is entitled to be compensated for all loss consequential upon the compulsory purchase, with loss attributable to injurious affection being one head of the damages which could be claimed.

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[5] 1845 Act, s 48.
[6] See for instance *Re Stockport, Timperley and Altringham Railway Co* (1864) 22 LJQB 251.
[7] *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153, HL per Lord Watson at 167.
[8] In many Australian jurisdictions, for instance, the term "injurious affection" has been omitted. See Law Reform Commission of Western Australia, *Compensation for Injurious Affection,* Final Report, July 2008 (No 98), p 19.
[9] *Edwards v Minister of Transport* [1964] 2 QB 134 at 144.

Injurious affection of retained land

15.11 At common law, where the construction or use of works on neighbouring land has a detrimental impact on an individual's land, the law of nuisance will apply. In Scots law, where nuisance is established, interdict is available as of right and it is not necessary to prove *culpa* (fault).[10] In addition, an award of damages will be available where nuisance and *culpa* are proven.[11]

15.12 Where damage is caused to an individual's land as a result of injurious affection due to the action of an acquiring authority exercising powers of compulsory acquisition, the right to make a claim under the common law of nuisance will also, in theory, arise (subject to the ordinary rules of causation and remoteness). However, in most cases of compulsory purchase, recourse to the law of nuisance will be barred. It is well established that an authority which undertakes an activity that is either expressly or impliedly authorised by legislation, will be immune from an action at common law,[12] provided that it does not act outwith the confines of the statutory authorisation.[13]

15.13 Accordingly, section 48 of the 1845 Act refers to:

> "[T]he sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

Lands to which term "severance" can be applied

15.14 Section 48 of the 1845 Act provides that a claim relating to severance or injurious affection will arise where injury is done to "the lands held therewith" the land that is to be compulsorily acquired. Sections 48 and 61 also refer to "the other lands of the owner". The scope of the right to compensation for injurious affection caused by severance therefore depends on the interpretation of these terms. They have, on at least one occasion, been interpreted to mean that the retained land must be contiguous with the compulsorily acquired land.[14]

15.15 However, the majority of authorities suggest that the test should not be interpreted as one of physical proximity, but rather of effect.[15] In *Cowper Essex v Acton Local Board*[16], Lord Macnaughten held, referring to section 49 of the English 1845 Act:

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[10] Gloag and Henderson, Introduction to the Law of Scotland, 13th edition, para 28.11. See also *Duke of Buccleuch v Cowan* (1866) 4 M 475.
[11] *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SLT 214.
[12] *Caledonian Railway Co v Ogilvy* (1855) 2 Macq 229, HL at 236; *City of Glasgow Union Railway Co v Hunter* (1870 8 M (HL) 156; *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353.
[13] See *Ogston v Aberdeen District Tramways* (1896) 24 R (HL) 8 and *Edinburgh and District Water Trustees v Sommerville* (1906) 8 F (HL) 25.
[14] See *Nisbet-Hamilton v Commissioners of Northern Lighthouses* (1886) 13 R 710 per Lord Justice-Clerk Moncrieff and Lord Young. But, in fairness to their Lordships, we note that the real point of the decision was that a claim in relation to the injury to be caused, to an estate on the mainland, by the possible erection and operation of a foghorn on an island in the Firth of Forth, was "far too remote a ground of action" (per the Lord Justice Clerk at p 720).
[15] See *Caledonian Railway Co v Lockhart* (1860) 3 Macq 808.
[16] (1889) 14 App Cas 153, HL.

> "Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof as lands 'held therewith' or as 'the other lands' of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner and if the unity of ownership conduces to the advantage or protection of the property as one holding. That condition seems to be implied. Otherwise the owner could hardly sustain injury by reason of the execution of the works on the land taken."[17]

15.16 On this basis, it has been held that it is not conclusive whether the acquired land is in close proximity or physically attached to the retained land, provided that the acquired land was "held at the same time and for a common purpose, and was connected with the land which has been left".[18] In addition, it is not necessary that both the acquired land and the retained land be held under the same title, and it is unnecessary that the claimant is an owner and occupier of both the land acquired and the land retained. In *Oppenheimer v Minister of Transport,*[19] the claimant owned a house and grounds, with an option to purchase three adjoining fields, the option being registered as a charge on the fields. The Minister wished to build a new trunk road and served a notice to treat in respect of the option. The claimant sought compensation for the injurious affection caused, or to be caused, to the freehold house and grounds, on the basis that that property was "held with" the option land for the purposes of the English 1845 Act. Having decided that the claimant's interest in the land acquired was an "interest in land" within the meaning of the Act, the court decided that that land was "held with" the freehold land for the purposes of the provisions relating to injurious affection.

15.17 The approach developed in the case law regarding the definition of retained land for the purposes of assessing compensation for injurious affection caused by severance, seems to us to be sensible. The Law Commission noted:

> "[F]arm businesses may have land and buildings scattered over a wide area, the operation of which as a unit may be adversely affected by the acquisition of part. The expression 'held with', as used in the existing case-law, makes clear that the relevant test is whether the unity of ownership 'conduces to the advantage or protection' of the holding."[20]

15.18 It will always be a question of fact and degree whether the severance of a parcel of an owner's land, will cause a depreciation in the value of other land held by the same owner. We propose that:

> **112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.**

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[17] Above, at p 175.
[18] *Holt v Gas Light and Coke Co* (1872) LR 7 QB 728. See also *Holditch v Canadian Northern Ontario Railway* [1916] 1 AC 536 (Privy Council).
[19] [1942] 1 KB 242.
[20] Law Com 286, para 3.32.

Assessment of compensation

(a) Concurrent value

15.19 Compensation for injurious affection is measured by determining the amount by which the retained land has depreciated as a result of the compulsory acquisition.[21] There are two possible methods of ascertaining this loss. The first is the "concurrent" valuation approach, where compensation is determined by valuing the acquired land, and adding to this the value of the depreciation caused to the retained land. The two parts of this valuation are carried out separately. This approach may be difficult in practice where the acquired land and the retained land have a particular "marriage value" when held together, but the value of each of the two plots must be assessed separately.

15.20 For example, a parcel of land lies between two roads, with access to both of them. Its value reflects its accessibility. If a part of the land, facing on to only one of those roads, were compulsorily acquired, neither the part acquired, nor the retained part, would enjoy such good access as the whole parcel did prior to the acquisition. The likely result is that the value of the two parts, taken together after acquisition, would be less than the value of the "married" whole, before acquisition.

(b) "Before and after" value

15.21 The second method is the "before and after" valuation approach, i.e. determining the value of the whole of the claimant's land before the acquisition, and deducting the remaining value of the retained land after the acquisition. This method is simpler to apply than the concurrent valuation approach. Pursuing the example at paragraph 15.20 above, the parcel of land would be valued prior to the acquisition, and then the retained land would be valued after the acquisition. The difference would be the loss to the landowner.

15.22 In the case of *Abbey Homesteads,*[22] farmland was acquired for the construction of the Witney Bypass. The claimant argued that the totality of the land should be valued and apportioned to its various parts because the land only had value in terms of development potential as a whole. But the Lands Tribunal (Mr Wellings QC), having reviewed the authorities, concluded that compensation for the acquired land must be assessed separately from compensation for severance or injurious affection, and not on the before and after basis. Separate assessments of compensation must be made for the acquired land and the retained land, and severance compensation is available only in respect of the retained land.[23]

(c) Discussion

15.23 The concurrent valuation approach may result in claimants receiving less compensation than the whole loss suffered as the depreciation in value to the acquired land as a result of the loss of "marriage value" is not taken into consideration.

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[21] See *Executors of J R Bullock, deceased v Minister of Transport* [1969] RVR 442; *Ramac Holdings v Kent County Council* [2014] UKUT 109 (LC) (UT (Lands)) at para 81.

[22] *Abbey Homesteads Group Ltd v Secretary of State for Transport* [1982] RVR 171. See also *ADP & E Farmers v Department of Transport* (1988) 28 RVR 58.

[23] S 61 of the 1845 Act makes clear that the claimant will be entitled to damage sustained "by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land". The section is intended to confer a right to compensation only in respect of the land retained.

15.24 Nevertheless, *Abbey Homesteads* suggests that the value of the acquired land, and the depreciation in value of the retained land, should be assessed separately.[24] And, as noted by Barnes,[25] the separate valuation of the acquired land, and the retained land, is consistent with the current law. In practice, however, we understand that the before and after approach may be adopted in some cases.[26] The before and after method of valuation probably best reflects the true loss of the claimant and his entitlement to compensation.[27] It avoids the problem encountered in the concurrent valuation approach regarding the calculation of the loss of marriage value in the acquired land and the retained land.

15.25 The Law Commission encountered "wide support" for the proposal to provide specifically for the before and after approach. They proposed that the use of this valuation method should be a matter for agreement between the parties, or determination by the Lands Tribunal.[28] We also note that this method of valuation is in favour in Australia.[29] We take the view, subject to those of consultees, that if the "before and after" method produces a more accurate assessment of the loss sustained by the landowner, then that method should be adopted. We therefore propose that:

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.

Application of Pointe Gourde *principle*

15.26 It is unclear whether the *Pointe Gourde* principle applies to the assessment of the value of retained land. As a matter of logic, it should not. In *English Property*[30] it was held by the Court of Appeal that the rule has no application to retained land. A parcel of land was subject to development with the exception of a strip. The claimant argued, based on the *Pointe Gourde* principle that, in the no-scheme world, the marriage value of the two pieces of land held together would be valued at £170,000, and that this figure should be apportioned between the acquired land and the retained land. The claim was accepted in respect to the acquired land but not in respect to the retained land. The *Pointe Gourde* principle did not apply because the authority had no scheme to acquire the retained land in the first place. Morritt LJ observed:

> "It is contended that, though section 9 of the Land Compensation Act 1961 applies only to the land retained, the Pointe Gourde Principle applies to the land acquired and the land retained alike and would have required the same assumptions. I do not agree. The scheme for the purposes of the Pointe Gourde Principle was the compulsory acquisition of the Blue Land. There was no such scheme for the acquisition of the Green Land or the Orange Land. Thus the Pointe Gourde Principle does not require the valuation of the retained land, including the Green Land and the

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[24] See also *South Eastern Railway v London County Council* [1915] 2 Ch 252 and *Hoveringham Gravels v Chiltern DC* [1978] 35 P & CR 295.
[25] Barnes, para 9.46. The learned author refers, at para 9.57, to a judgment of Lord Hoffman in *Penny Bay Investment Co Ltd v Director of Lands* (2010) 13 HKFCFAR 287 at para 43: "The value of a property means the price which it would have fetched on a sale in the open market between a willing seller and a willing purchaser on the relevant date. That obviously cannot be affected by what happened afterwards."
[26] Law Com 165, para 5.15; B Denyer-Green, *Compulsory Purchase and Compensation,* (9th edn, 2009) p 295.
[27] An illustrative example of the two methods of valuation is provided in B Denyer-Green, *Compulsory Purchase and Compensation,* (9th edn, 2009) p 296.
[28] Law Com 286, para 3.30.
[29] Law Reform Commission of Australia, *Lands Acquisition and Compensation*, (Report No 14, 1980), para 240.
[30] *English Property Corporation v Royal Borough of Kingston Upon Thames* (1999) 77 P & CR 1.

> Orange Land, on an assumption that its physical condition was different from what it actually was as at the date of the notice to treat. As section 9 of the Land Compensation Act 1961 applies only to the valuation of the land taken, that provision does not require such a valuation either. In my view the consequence is clear: there is nothing to displace the normal rule that the land retained, like the land acquired, is to be valued as at the date of entry in its actual physical condition as at the date of the notice to treat."[31]

15.27 In contrast, in *Melwood Units v Commissioner for Main Roads,*[32] the *Pointe Gourde* principle was applied in assessing the value of the acquired land and the depreciation caused to the retained land. The claimant proposed to develop land for a retail development. In the "no-scheme" world, planning permission would have been granted over 37 acres of land. However, due to the scheme of the acquiring authority, which was to build an expressway through the centre of the land, planning permission was only obtained for 25 acres north of the proposed expressway. The Privy Council found that the five acres acquired for the expressway and the seven acres south of the expressway, were no longer capable of retail development. It held that the value of the whole of the site following severance had to be compared with the value it would have had in the no-scheme world.

15.28 But, while the headnote to the case mentions that the *Pointe Gourde* principle was applied, and the matter is dealt with on that basis in the court's opinion, it is difficult to see why that should have been thought necessary. The retained land in that case had suffered demonstrable damage by reason of severance. If there had been no severance, it would have been valued, like the other land, as suitable for retail development.

15.29 In the case of *Clark,*[33] the claimant owned a farm which was adjacent to a sewage works. As part of their scheme of modernisation of the sewage works, the acquiring authority acquired part of the claimant's land. In the "no-scheme" world there would have been smaller works for the modernisation of the sewage works on the acquiring authority's own land, which would not have involved the severance of the claimant's land. The Lands Tribunal applied the no-scheme rule in determining the claim for injurious affection to the claimant's retained land; the damage to the retained land was the difference between the value of the retained land in the no-scheme world and in the with-scheme world. On the facts there was no injurious affection. Nevertheless, the application of the *Pointe Gourde* principle in this case and in *Melwood* are clearly inconsistent with the decision in *English Property.*

15.30 A claim for injurious affection is based on the contention that the acquiring authority's scheme has resulted in injury to the retained land. The overriding aim of the *Pointe Gourde* principle[34] is to eliminate increases or decreases in the value of the acquired land, caused by the scheme underlying the compulsory acquisition. It would certainly be possible to extrapolate so that the *Pointe Gourde* principle should apply also to the valuation of retained land. But, as we have noted above, it does not seem necessary to do so when an application of the provisions of the 1845 Act will achieve the same result.

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[31] (1998) 77 P & CR 1 at 10-11.
[32] *Melwood Units v Commissioner for Main Roads* [1979] AC 426 PC.
[33] *Clark v Wareham and Purbeck District Council* (1972) 25 P & CR 423.
[34] *Pointe Gourde* is described in detail in Ch 12 above.

15.31 The major difficulty with attempting to apply the *Pointe Gourde* principle to retained land is that it runs the risk of confusing two entirely separate processes. The assessment of the value of the acquired land is carried out in accordance with the rules set out by Parliament, taking account of statutory disregards, potential planning permission, etc. The statute also provides for the landowner to be compensated for any additional loss suffered as a result of the compulsory acquisition of his property. A claim for such loss can be properly and accurately assessed using the principles to which we have referred.

15.32 As the Law Commission pointed out, a claim for severance or injurious affection "does not require any hypothetical assumptions; it is a question of causation".[35] In our view, it would not be appropriate to apply the *Pointe Gourde* principle to the question of assessment of the value of retained land. It seems reasonable that, wherever possible, the value of the land should be determined according to factors established in the real world before entering into a consideration of the hypothetical "no-scheme world" and all the difficulties of interpretation which follow.[36] It should also be noted that there appears to be nothing on the face of section 13 of the 1963 Act (which provides for the disregard of actual or prospective development in certain cases) to suggest that it should be applied to the assessment of compensation for injurious affection to the retained land. We therefore intend, in the proposed new statute, to set out the principle of compensation for injurious affection to the retained land without reference to extraneous principles developed by the courts.

Date on which compensation is to be assessed

15.33 Valuation of the retained land should, in principle, be carried out as at the date of severance, that is, the date on which the acquiring authority take entry to the acquired land, in order to ascertain the depreciation in market value. Such valuation should certainly take into account any potential planning permission which would have been available in relation to the retained land, had it not been for the compulsory acquisition. (That was the point in the *Melwood Units* case, above.)

15.34 But a question has been raised as to whether events following the date of severance, may be taken into account in assessing depreciation, where these events provide a more accurate indication of the damage caused to the retained land. Between the time of the valuation of the retained land and the eventual determination of compensation, events may occur which turn speculation regarding possible damage caused to the retained land, into fact.

15.35 It may be said that the consideration of events which affect the value of the retained land after the date of severance, allows for a fairer assessment of the claimant's loss: changes in circumstances after the valuation date will not affect the claimant's interest over acquired land, as he no longer has an interest in the land. In the case of retained land, the relevant property remains in possession of the claimant, and subsequent events may affect the value of his interest in it. But any change in the value of the land may work against, rather than for, the landowner. It will certainly make the acquiring authority's position more difficult, not least because it will introduce an unwelcome uncertainty into the budgeting calculations. And it will tend to hold up the whole process. We see little advantage in

[35] Law Com 286, para 7.46.
[36] See Ch 13.

allowing claims for injurious affection to the retained land to be raised and considered after the date of the severance.

15.36 We also note that, if deferral of a claim for injurious affection were allowed, it would tend to frustrate the operation of the "before and after" method of valuation. The Law Commission recognised this problem, and noted that the "before and after" method should accordingly be a matter for agreement between the parties or for decision by the Tribunal.[37]

15.37 On balance, our preliminary view is that the correct principle is that the injurious affection to the retained land should be assessed as at the date of severance. Deferral is as likely to work to the disadvantage as to the advantage of the landowner. On the whole matter, we propose that:

114. Claims for injurious affection should be assessed as at the date of severance.

Loss to claimant

15.38 In making the assessment of compensation under this head, it is legitimate to consider the potential future use of the acquired land,[38] and depreciation in the development value of the retained land[39] or loss caused to the retained land due to deferment of the development value.[40] However, the statutory planning assumptions set out in sections 22 to 24 of the 1963 Act,[41] will not apply to the assessment of compensation of retained land. These apply only to the "relevant land," a reference which extends only to land which has been acquired. The CAAD procedure[42] is also only applicable to acquired land and not retained land, but "although the certificate has no relevance or usefulness save in respect of the land acquired, the material which gave rise to its being issued or its contents being agreed can be referred to on the wider issue".[43] A CAAD may therefore be persuasive, although not binding, in terms of the development potential of retained land.

15.39 Since the coming into force of the 1973 Act, where the acquiring authority carries out works which are partly on the land acquired from the landowner and partly elsewhere, compensation for injurious affection is to be assessed by referring to the whole works and not just the part situated on the land acquired from the claimant.[44] Prior to this, compensation for injurious affection could only be based on depreciation attributable to the use of the land which was compulsorily acquired from the claimant.[45]

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[37] Law Com 286, paras 3.29-3.30.
[38] *Rockingham Sisters of Charity v R* [1922] 2 AC 315; *Ripley v Great Northern Railway Co* (1875) 10 Ch App 435.
[39] *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 35 P & CR 295.
[40] *Waterworth v Bolton Metropolitan Borough Council* (1978) 37 P & CR 104.
[41] See para 13.12 and following para.
[42] Discussed in Ch 14.
[43] *Abbey Homesteads Group Ltd v Secretary of State for Transport* [1982] RVR 171.
[44] 1973 Act, s 41.
[45] *City of Glasgow Union Railway Co v Hunter* (1870) 8 M 156 HL; *Edwards v Minister of Transport* [1964] 2 QB 134. But, for a (slight) weakening of that principle, see *Rockingham Sisters of Charity v R* (above) *per* Lord Parmoor at p 329: "Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard."

15.40 As noted above, compensation for injurious affection is measured by determining the amount by which the retained land has depreciated as a result of the compulsory acquisition. This will not include, for example, personal inconvenience to the landowner, as this will usually not depreciate the value of the retained land.[46] Moreover, compensation for injurious affection will not cover loss of profitability of the retained land or the costs incurred by the claimant in terms of remedying the detriment caused to the land by the compulsory acquisition.

15.41 In *Cooke v Secretary of State for the Environment,*[47] Cooke owned a farm which was severed due to a road improvement scheme. This had various detrimental effects on the land, for example, the farmhouse was left without direct access to the farm. Under the head of injurious affection, he claimed the costs of various alterations made necessary to the farm as a result of the acquisition, including a new access road. The total value of the claim was £19,373. The Lands Tribunal held that compensation for severance and injurious affection was to be calculated solely on the basis of depreciation in value to the retained land. It therefore awarded £3,376 for the value of the land taken, and £3,048 for severance and injurious affection to the retained land. The case demonstrates that the depreciation in market value may be less than the full cost to the claimant of the injurious affection.[48] It is for consideration whether costs not reflected in the depreciation of the capital value of the retained land should, nevertheless, be recoverable as out-of-pocket expenses necessarily incurred by the landowner. We deal with that matter in Chapter 16.

15.42 The acquisition by an acquiring authority of part of a landowner's property, may conceivably cause significant problems and loss of profitability for a business carried out on the retained land. Temporary problems may occur due to dust and noise from construction of the acquiring authority's works during the construction period. Permanent losses may be caused by obstruction of access or other forms of deterrent to customers. As severance of land can often reduce profitability to business carried out on the retained land, it may be desirable to allow the LTS greater flexibility, by allowing it to provide greater compensation in such cases. We discuss this further in Chapter 18. We also note that the DETR Review recommended:

> "The inclusion in a claim for severance/injurious affection of any damage caused to the claimant's business carried out on the retained land if that results from the same factors as those which have cause the injurious affection to the value of his land so long as that does not result in any duplication in compensation."[49]

15.43 Such "duplication in compensation" may occur because, as Rowan Robinson & Farquharson-Black identify, the damage caused to the retained land, as a result of the severance, may be recoverable by the claimant in terms of a disturbance claim.[50] A claimant should be able to claim for the damage caused either as injurious affection or as disturbance, but not both. Following the DETR Review, the UK Government expressed the opinion that a claim for this kind of loss is more appropriately dealt with as an element of the

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[46] *Caledonian Railway Co v Ogilvy* (1855) 2 Macq 229 HL.
[47] (1973) 27 P & CR 234.
[48] See also *Frederick Powell & Son Ltd v Devon County Council* [1979] RVR 127 and *McLaren's Discretionary Trustee v Secretary of State for Scotland* 1987 SLT (Lands Tr) 25.
[49] DETR Review, para 129.
[50] Rowan Robinson & Farquharson-Black, para 11-14, referring to *McLaren's Discretionary Trustee v Secretary of State for Scotland* 1987 SLT (Lands Tr) 25.

compensation paid for disturbance.[51] The Law Commission was similarly of the view that such a claim should be dealt with as part of disturbance, and that the Lands Tribunal should be afforded relative flexibility to deal with loss not covered in the loss of market value to land.[52]

15.44 Where loss, such as loss of profitability to a business on retained land, is fairly attributable to the compulsory acquisition of land by the acquiring authority, it seems reasonable that the claimant should be able to recover this loss, even though it goes beyond loss caused to the market value of the retained land. Limitation of a claim for injurious affection, to depreciation in the value of the retained land, provides a simple test which should be easy to apply and is consistent with the method of valuation applied to the acquired land. Other consequential losses should be dealt with separately. We discuss them in Chapter 16.[53] We propose that:

115. Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.

Accommodation works

15.45 Accommodation works are works which are carried out by the acquiring authority by agreement between the acquiring authority and the claimant, in order to mitigate the damage caused to retained land, and therefore reduce the amount of compensation which is payable to the claimant. Examples might include building a bridge over a road to re-connect severed land, erecting a fence between the acquired land and the retained land, or installation of double glazing in buildings on the retained land in order to reduce noise.

15.46 The acquiring authority may also undertake not to use the land for certain purposes, provided that this undertaking is not inconsistent with the purpose for which the land is acquired.[54] In addition, steps taken under the provisions of Part II of the 1973 Act with respect to the mitigation of the effect of works, should also be taken into account when assessing compensation.[55] However, an acquiring authority cannot be compelled by law to undertake accommodation works, and a claimant cannot be compelled to accept such works,[56] even though he is under a general duty to mitigate his loss.[57]

15.47 We understand that, in practice, the provision of accommodation works is generally advantageous for claimants. For instance, they may obtain stock-proof fencing, which is of better quality than the fencing they might erect themselves. As the aim of accommodation works is to reduce the compensation payable to the claimant, their use also has clear advantages for the acquiring authority.

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[51] DTLR Report, para 3.39.
[52] Law Com 286, paras 3.20–3.24.
[53] See *Harvey v Crawley Development Corporation* [1957] 1 QB 485 per Romer LJ at 494.
[54] *Ayr Harbour Trustees v Oswald* (1883) LR 8 App Cas 623.
[55] Ss 18 and 18A.
[56] See *R v South Holland Drainage Committee Men* (1838) 8 A & E 429.
[57] Discussed in Chapter 16. See, generally, *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846.

15.48 It has been argued that the acquiring authority should be compelled to design, and bound to implement, a scheme of accommodation works where severance or injurious affection occurs.[58] However, this may be problematic:

> "There is too much scope for legitimate argument as to the works necessary to offset the effects of a particular public work. Some owners will desire simultaneously to remodel their premises, with scope for argument as to the apportionment of costs. Others will oppose any construction work on their property at all. The better course is simply to empower the constructing authority to carry out such works as may be agreed with the affected owner to mitigate the adverse effects of the public work."[59]

15.49 Unless consultation provides compelling reasons to the contrary, it seems that the present discretionary position is satisfactory. We certainly see the benefits of accommodation works: a policy of mitigation can operate effectively in order to save compensation payments for the acquiring authority and simultaneously reduce the negative impact on the claimant's retained land, which may enable the claimant to continue operating on the retained land after the compulsory acquisition. However, providing for the mandatory provision of accommodation works may lead to problems such as those identified above. We propose that:

> **116. The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.**

Set-off of betterment

General

15.50 In a case where the compulsory acquisition of part of a person's land results in betterment of the value of that person's retained land, the increase in value must, in certain circumstances, be set-off against (i.e. deducted from) the compensation payable in respect of the land taken. This general rule was initially established by the 1959 Act. Before this, it was generally accepted that, in the absence of statutory authority to the contrary,[60] set-off of betterment was not competent.

15.51 The relevant provisions of the 1959 Act were consolidated by sections 14 and 15 of the 1963 Act. Despite the general provision for the set-off of betterment in the 1963 Act, there remain specific provisions in certain Acts[61] dealing with the issue, and section 14 will not apply where there is specific provision in a "corresponding enactment".[62]

15.52 Section 14 of the 1963 Act provides:

> "(1) Subject to section 15 of this Act, where, on the date of service of the notice to treat, the person entitled to the relevant interest is also entitled in the same capacity to an interest in other land contiguous or adjacent to the relevant land, there shall be

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[58] Country Land and Business Association, *Fair Play: CLA vision for reform of the Compulsory Purchase System,* (2012), para 2.3.4.
[59] Law Reform Commission of Australia, *Lands Acquisition and Compensation*, (Report No 14, 1980), para 332.
[60] See, e.g. Act for the Rebuilding of London 1667; General Turnpike Act for Scotland 1831; Light Railways Act 1896; Roads (Scotland) Act 1970. See too the report of the Uthwatt Committee: *Final Report of the Expert Committee on Compensation and Betterment,* 1942, Cmnd 6386.
[61] See, e.g. Roads (Scotland) Act 1984, s 110; Housing (Scotland) Act 1987, s 10 and Sch 1.
[62] 1963 Act, s 15(5).

deducted from the amount of the compensation which would be payable apart from this section the amount (if any) of such an increase in the value of the interest in that other land as is mentioned in subsection (2) of this section.

(2) The said increase is such as, in the circumstances described in any of the paragraphs in the first column of Part I of Schedule 1 to this Act, is attributable to the carrying out, or the prospect, of so much of the relevant development as would not have been likely to be carried out if the conditions mentioned in paragraphs (a) and (b) of section 13(1) of this Act had been satisfied; and the relevant development for the purposes of this subsection is, in relation to the circumstances described in any of the said paragraphs, that mentioned in relation thereto in the second column of Part I of the said Schedule 1, but modified, as respects the prospect of any development, by the omission of the words "other than the relevant land", wherever they occur."

15.53 Accordingly, section 14 applies where, on the date of the service of the notice to treat, the person who is subject to compulsory purchase also owns, in the same capacity,[63] land which is "contiguous or adjacent"[64] to the land which is being compulsorily acquired. Any increase in value to the retained land must have arisen in the circumstances set out in section 14(2). In terms of section 14(2), the first step is to ascertain whether the land to be compulsorily acquired, falls within any of the cases listed in the first column of Part 1 of Schedule 1 to the Act. The second step is to establish any development defined in the second column of Part 1 of Schedule 1, either already completed or proposed, the carrying out of which would not have been likely if the conditions mentioned in paragraphs (a) and (b) of section 13(1) of the Act had been satisfied. Those circumstances are:

"(a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land; and

(b) (where the circumstances are those described in one or more of paragraphs 2 to 4A in the said first column of Part I) the area or areas referred to in that paragraph or those paragraphs had not been defined or designated as therein mentioned or (in a case falling within paragraph 4) if the scheme therein mentioned had not come into operation."

15.54 It is for the acquiring authority to establish that betterment has occurred and that the value of the land would not have increased, but for the scheme.[65] Any increase in the value of the retained land, as a result of development identified in the second step, will then be deducted from the value of the compensation payable to the claimant in respect of the acquired land.

15.55 If the acquiring authority subsequently acquires land which, at the previous acquisition, had been retained by the landowner, and betterment of that retained land as a result of the previous acquisition had already been taken into account and set off against the compensation paid to the landowner in terms of the previous acquisition under section 14, then section 15 will apply so that the increased value shall not be disregarded, as would usually be the case according to section 13. This avoids betterment being set off twice

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[63] See 1963 Act, s 45(5).
[64] See para 15.57 below.
[65] See *James Miller and Partners Ltd v Lothian Regional Council (No 2)* 1984 SLT (Lands Tr) 2. See also *Merseyside Police Authority v Liverpool City Council* [2011] UKUT 108 (LC).

against compensation. Equally, by virtue of section 15, any depreciated value which has been subject to a payment for injurious affection at a previous acquisition, shall not be disregarded in terms of section 13. Additionally, where retained land which has previously been the subject of injurious affection is subsequently acquired, either in whole or in part, then section 15 provides that the decrease in value due to the scheme is not to be disregarded when assessing compensation in terms of section 13.

15.56 In Chapter 10 we outlined the general principle that the overriding goal of compensation legislation should be to compensate the dispossessed owner for the loss suffered as a result of the compulsory purchase, and for that loss only. The claimant is entitled to be paid "neither less nor more than his loss".[66] It seems, therefore, that the general policy regarding the set-off of betterment, may represent a reasonable balancing of the private interests of the landowner and the general public interest. On the other hand, the individual landowner who happens to own land contiguous or adjacent to that which is being acquired, suffers by comparison with other landowners in the neighbourhood whose land is not acquired. We discuss that issue at paragraphs 15.60 to 15.70, below.

Defining retained land

15.57 In practice, we are aware that there may be difficulties in determining whether or not the retained land is "contiguous or adjacent" to the land which is compulsorily acquired. "Contiguous" has been interpreted as meaning "touching".[67] However, the word "adjacent" is not a word of precise and uniform meaning, and the degree of proximity denoted is a question of circumstances.[68] It has been recommended that "there needs to be a clear definition of 'adjacent' for the purposes of assessing betterment".[69] One option might be to remove the requirement that the land be "contiguous or adjacent" altogether. According to the Law Commission:

> "Most also agreed with our proposal that the definition of 'retained land', whether for the purpose of assessing adverse effects or enhancement, should not include any requirement that the land be adjacent or contiguous."[70]

15.58 The Law Reform Commission of Western Australia ("LRCWA") expressed the view in 2008 that "adjoining land", in terms of the equivalent provision to section 14 of the 1963 Act[71], should extend to land owned by the claimant, and separated from the taken land only by other land owned by the claimant.[72] The LRCWA summarised the competing policy considerations as to what the extent of "adjoining" land should be:

> "On the one hand, arguably, a person should be compensated only for the overall loss caused by a taking for a public purpose so that set off should apply in respect of other land whether or not adjoining or severed from the taken land. On the other hand, all other land owners in the vicinity of the relevant public work may enjoy the

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[66] *Horn v Sunderland Corporation* [1941] 2 KB 26. See paras 11.18-11.19.
[67] *Spillers Ltd v Cardiff (Borough) Assessment Committee and Pritchard (Cardiff Revenue Officer*) [1931] 2 KB 21.
[68] *Wellington Corporation v Lower Hutt Corporation* [1904] AC 773.
[69] DETR review, para 124.
[70] Law Com 286, para 3.32.
[71] Land Administration Act 1997, section 241(7).
[72] Law Reform Commission of Western Australia, *Compensation for Injurious Affection,* Final Report, July 2008 (No 98), Chapter 4 and Recommendation 13.

enhancement it brings, so that a person who happens to have suffered a taking elsewhere should not be singled out from his neighbours."

15.59 We agree that when it comes to assessing whether there has been betterment and the set-off of betterment, it is important that the land to which such a rule applies is capable of being clearly demarcated. We ask the question:

117. Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?

Problems with current rule

(a) General

15.60 Notably, where the individual concerned owns land which is contiguous with, or adjacent to, compulsorily acquired land, but does not own the land which has been compulsorily acquired (i.e. the land is not split by the scheme of the acquiring authority into acquired and retained land) then any benefit to that land as a result of the compulsory acquisition of the contiguous or adjacent land, will not be set-off against the compensation payment due to them i.e. the benefit (or loss) lies where it falls. As Rowan Robinson & Farquharson-Black note, this distinction between those landowners who have some of their land taken, and those who do not, is inconsistent:

> "Why should two landowners, both of whom own land which has benefitted from a scheme of public works, be treated differently solely because of the coincidence that one of them has had part of his land acquired for the scheme?"[73]

15.61 A landowner who retains some land but also has some land acquired, may receive little or no compensation as a result of the set-off principle. Where the benefit attaching to the retained land is in excess of the compensation payable in respect of the acquired land, the compensation awarded will be nil and it is not possible for the acquiring authority to recoup the excess.[74] Further, the "betterment" which the landowner notionally receives may not be realisable in monetary terms. On the other hand, other landowners in the area may see a significant benefit in terms of an increase in value to their land without having been deprived of the ownership of any land.

15.62 In relation to this problem the DETR Review proposed, referring to section 7 of the 1961 Act (equivalent to section 14 of the 1963 Act), that betterment should only be set-off against compensation for injury caused to the retained land (i.e. compensation for injurious affection or severance) and should not affect other heads of compensation payable to the landowner.[75] Following this review, the UK Government noted that, although responses to this proposal were "mixed," such an approach would "most closely accord with the spirit of equivalence".[76]

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[73] Para 11-06. See also Uthwatt Committee: *Final Report of the Expert Committee on Compensation and Betterment,* 1942, Cmnd 6386, para 285 and Country Land and Business Association, *Fair Play: CLA vision for reform of the Compulsory Purchase System,* (2012), para 2.3.9.
[74] See *Cotswold Trailer Parks Ltd v Secretary of State for the Environment* (1974) 27 P & CR 219. See also *Brell v Penrith City Council* (1965) 11 LGRA 156 (Australia).
[75] DETR Review, para 123.
[76] DTLR Report, para 3.40.

(b) Comparative practice

15.63 We note debate regarding set-off for betterment in Australia at both Commonwealth and state level.[77] In 1980 the Australian Law Reform Commission proposed an alternative means of remedying the inequality between landowners who have no land acquired and those which have some land acquired (although this proposal does not seem to have been ultimately implemented.)[78]

> "There will normally be persons who reap benefit from whom no land is taken. That benefit may exceed the benefit enjoyed by the owner from whom some land has been taken. If the public purse is to be replenished, why not also from them? The solution is to provide legislation for recoupment of the betterment, or a proportion of it, from those owners who have benefited, whether or not they have lost land. … There would seem to be no reason why the Commonwealth Parliament should not include in legislation a general provision for the assessment, and payment over a period, of a contribution related to the benefit taken by particular parcels of land from a public work. The legislation would probably be characterised as a taxing provision but this would accord no special difficulty."[79]

15.64 In Western Australia, the LRCWA recommended that the relevant provision[80] should be amended to provide that enhancement (i.e. betterment) is set off against reduction in value of adjoining land caused by either severance or injurious affection.[81] It suggested that there was no "persuasive rationale" for confining the "set-off" provisions to compensation for injurious affection and not extending this to compensation for severance.

15.65 The LRCWA also considered a suggestion by the Law Society of Western Australia that enhancement (i.e. betterment) to a person's retained land should be set-off against compensation payable to that person, only to the extent that the enhancement is "over and above" the enhancement enjoyed by others in the vicinity. We see the appeal of such a policy in that it would remedy the inequality between different types of owners. However, such an approach would require a more detailed examination of other properties in the vicinity, which would lead to more complex legislation.

(c) A possible way forward

15.66 The present system strikes a balance between some aspects of the private and public interests: that is, between the interests of the landowner and the acquiring authority. Even between those parties, however, it is liable to cause a perception of unfairness, because the effect is that the landowner may receive little or nothing for the property acquired, without being able to realise the value of the notional betterment. There will be few cases where the benefit from the retained land is so marked as in the *South Eastern Railway* case (above) where, in addition to receiving the value of property on the Strand, the

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[77] In most of the Australian jurisdictions betterment (or "enhancement") may be set off against all compensation due to the landowner, including injurious affection and severance to the retained land. See, for instance, Land Acquisition and Compensation Act 1986 s 41(1)(e) (Victoria) and Land Acquisition Act 1993, s 27(1)(d) (Tasmania). See also Acquisition of Land Act 1981, s 62(1)(f) (New Zealand).

[78] See Land Acquisition Act 1989, s 55(2)(iv) (Australia).

[79] Law Reform Commission of Australia, *Lands Acquisition and Compensation*, (Report No 14, 1980), para 335.

[80] S 241(7) of the Land Administration Act 1997.

[81] Law Reform Commission of Western Australia, *Compensation for Injurious Affection,* Final Report, July 2008 (No 98), Chapter 4 and Recommendation 11. Although see Land Administration Amendment Act 2009 (Western Australia).

company's property to the rear increased in value because it, too, became property on the Strand.

15.67 This perception of unfairness will be exacerbated if other landowners in the same area benefit from betterment without having lost any land of their own. The windfall benefit caused by the development will accrue only to those landowners who have not lost land. However, it would appear that any system which seeks to solve that latter problem, such as those suggested in Australia, will be complicated and very difficult to administer.

15.68 We do not see any easy solution to this perception of unfairness which would satisfy all the parties. It seems, however, that the person most aggrieved will be the dispossessed landowner who, as we have noted, loses land without financial compensation, and without (necessarily) being able to realise the notional gain to the value of the retained land.

15.69 On the whole matter, we wonder whether it would be more appropriate to simplify the process, and address the perception of unfairness, by ignoring betterment altogether. We do not imagine that, when an acquiring authority are contemplating a compulsory acquisition, they can accurately take account of how much any betterment of retained land will decrease their total obligation by way of compensation. On the other hand, we appreciate that, in some cases, betterment will enable such an authority to acquire land without paying out any money for it at all. Seen from the perspective of the acquiring authority, betterment is beneficial, since it will decrease the compensation they will have to pay.

15.70 Ultimately, the treatment of betterment is one of policy. It is for Parliament to balance the competing interests, and to take a view on where "fairness" lies. If the provisions as to betterment were repealed without being re-enacted, what would remain would be a liability on the acquiring authority to pay for any injurious affection, without being able to set against that any betterment to the retained land. But such course would certainly commend itself to the individual citizen dispossessed of his or her land. We therefore propose that:

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

Chapter 16 Consequential loss - disturbance

Introduction

16.1 This is the second part of our consideration of the subject of consequential loss. Apart from the specific reference to loss to the retained land by injurious affection including severance (discussed in Chapter 15), compulsory purchase will almost invariably cause the claimant to suffer a series of additional consequential losses, unrelated to the depreciated value of the retained land. These can include, for instance, the costs of moving house, increased operating costs due to the removal of a business to alternative premises,[1] or loss of the goodwill of a business.[2]

16.2 These additional compensable losses are currently covered by section 12(6) of the 1963 Act (rule 6). The rule provides:

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

16.3 Compensation under this provision is commonly referred to as compensation for "disturbance". The payment of compensation for disturbance may be essential in order to ensure that the principle of equivalence is satisfied, i.e. that the claimant is put in the same financial position as he or she would have been in had it not been for the compulsory purchase. Rule 6 has two limbs. The first limb, disturbance, requires occupation of, and an interest in, the land.[3]

16.4 Compensation for any other matters, under the second limb, includes losses which are not derived from the loss of the land but are, nevertheless, caused by the compulsory purchase. This would include the situation where a claimant has an interest in the land, has suffered loss due to its compulsory acquisition, but did not actually occupy the land.[4] It may also cover personal loss sustained as a result of having to leave the premises which are compulsorily acquired.[5]

16.5 In the first part of this Chapter we examine the relationship between rule 6 and rule 2 (market value), and between rule 6 and section 48 of the 1845 Act. In this context, we consider two issues. The first is whether there would be merit in separating the rights conferred in rule 6 from those conferred directly by rule 2 and section 48. The second is the issue of the internal consistency between market value and disturbance compensation.

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[1] *Sloan v Edinburgh District Council* 1988 SLT (Lands Tr) 25.
[2] *Prestwick Hotels Ltd v Glasgow Corporation* 1975 SC 105.
[3] It should not be confused with a "disturbance payment" under sections 34 and 35 of the 1973 Act which applies where parties such as tenants are displaced from the land due to compulsory purchase On disturbance payments, see Chapter 17.
[4] *Wrexham Maelor Borough Council v MacDougall* (1995) 69 P & CR 109. Such a claim will not be limited to costs and expenses but will be subject to the principles of causation, remoteness and mitigation of loss, on which see below**.**
[5] *Lee v Minister for Transport* [1966] 1 QB 111.

16.6 In the second part of the Chapter, we look at how rule 6 currently operates in practice, and the various issues which arise from this. Finally, we discuss "disturbance payments" within the meaning of the 1973 Act, which are separate from disturbance within the meaning of rule 6.

Rule 6, rule 2 and section 48 of 1845 Act

Development of rule 6

16.7 We begin with the relationship between rule 6, rule 2 and section 48 of the 1845 Act. Although the 1963 Act contains the current expression of the right to disturbance compensation, the right is originally derived from judicial decisions under the 1845 Act. The 1845 Act does not contain an express provision relating to disturbance. However, section 48 provides that there are two heads of compensation: the market value of the land taken and compensation for injurious affection or severance. The right to disturbance compensation was, accordingly, read into the first part of section 48 of the 1845 Act by judges.[6]

16.8 The Scott Committee were anxious that the irregularities in the operation of the system should be remedied,[7] and specifically recommended that this right to disturbance compensation should remain.[8] Rule 6 is the result. There was then a question as to whether the 1919 Act had created a new statutory right to compensation for disturbance, or whether rule 6 was simply a recognition of an existing right. This was settled in two cases.

16.9 The first was *Venables v Department of Agriculture for Scotland.*[9] In that case two questions were raised: the first was the one mentioned above, that is, whether rule 6 conferred a right to compensation for disturbance, or simply recognised a pre-existing right. The second was whether, in any event, the right was limited to persons carrying on a business in the property to be acquired.

16.10 As regards the first question, the Inner House first considered the nature of the right conferred by rule 6. Lord Justice Clerk Alness observed:

> "I first consider the relevant provisions of the Act of 1919. Section 2 is of importance. Rule (2) of that section sets up a standard of compensation which differs from that previously in vogue, viz., that the value of land shall be taken to be the amount which the land, if sold in the open market by a willing seller, might be expected to realise. Rule (6) provides: 'The provisions of Rule (2) shall not affect the assessment of compensation for disturbance, or any other matter not directly based on the value of land.' Rule (6) confers no new right, but it manifestly purports to save existing rights. It assumes that there are rights to be saved, and that these are other than those which relate to the bare value of land. The rights saved include those which relate to compensation for disturbance."[10]

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[6] *Horn v Sunderland Corporation* [1941] 2 KB 26.
[7] See paras 11.10-11.16.
[8] Scott Committee Report, p 8: "[W]e think it desirable that it should be definitely provided that the standard of the value to be paid to the owner is to be the market value as between a willing seller and a willing buyer; though, as we make clear below, the owner should, of course, in addition, receive fair compensation for consequential injury."
[9] 1932 S.C. 573.
[10] At p 579.

16.11 His Lordship went on to consider the provisions of the 1845 Act and came to the conclusion that that Act plainly contemplated the payment of compensation for damage sustained by the evicted person, in addition to compensation for the value of the lands.

16.12 His judgment on that aspect of the matter concluded:

> "The sound principle would seem to be that the person dispossessed should get compensation for all loss occasioned to him by reason of his dispossession. The Act of 1845 recognises that; the text-books recognise it; judicial authority recognises it; and the Act of 1919 continues to the evicted owner all claims formerly open to him, including that claim."[11]

16.13 Accordingly, in terms of the statutory analysis of the provisions, it appears that rule 2 reiterates the effect of the first arm of section 48, and rule 6 makes it clear that the existing interpretation of the former provision, as including a right to compensation for disturbance, remains in place.

16.14 The Court of Session's decision in *Venables* was quoted with approval in the second case, *Horn v Sunderland Corporation.*[12] Sunderland Corporation obtained a CPO in respect of a farm, and also in respect of sand, gravel and limestone lying in and under the land. The farm was used for the breeding of horses.

16.15 Scott LJ held, in terms of the 1845 English Act, that disturbance compensation could be "discerned" within the market value of the land:

> "If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1) for the value to him of the land, and (2) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1), that is, in the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover."[13]

16.16 In so "discerning" the right to disturbance compensation as part of the value of the land, Scott LJ gave effect to the principle of equivalence which underpins the law of compensation.[14]

Issues arising in relation to claims under rule 6

(a) Relevance of expropriated owner's use of land to compensation

16.17 In *Venables,* (discussed at paragraphs 16.9 to 16.12, above) there was a question as to whether the tenant of a deer forest was entitled to compensation, under rule 6, for losses said by him to have been incurred when he was required to move from the estate. The basis for the opposition to the claim was that disturbance, under rule 6, should be limited to disturbance in relation to business. The court rejected that argument. Lord Justice Clerk

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[11] At p 581.
[12] [1941] 2 KB 26.
[13] *Horn v Sunderland Corporation* [1941] 2 KB 26 at 41.
[14] See para 11.19.

(Alness) stated: “I cannot see any equity in submitting a man to pecuniary loss when he is evicted from his home, but in compensating him when he is evicted from his shop.”[15]

16.18 The right of a homeowner to be compensated for losses incurred as a result of eviction from his home, equivalent to that of a business person to be compensated for eviction from his business, seems entirely consistent with what we would see as the proper principle - that a landowner carrying on a legitimate activity is entitled to compensation for any losses caused as a result of the compulsory acquisition.

(b) Taxation consequences of common derivation of rules 2 and 6

16.19 As a consequence of the common derivation of rules 2 and 6 from section 48 of the 1845 Act, irrespective of the basis upon which they are assessed, payments made under rules 2 and 6 constitute a single payment from the acquiring authority to the landowner. Thus, in *Commissioners of Inland Revenue v Glasgow and South-Western Railway Company,*[16] the jury had awarded the owners of a purchased property three sums, first, for the value of the land taken, second, for the value of buildings, machinery etc. and third, for compensation for loss of business (£9,499, 8s. 3d.), the total coming to £52,658, 6s. 7d.

16.20 The Court of Session had held that the compensation for loss of business formerly carried on at the premises compulsorily acquired, should not be included in the purchase price for the purposes of computing stamp-duty. The House of Lords rejected this. Lord Chancellor Halsbury, after analysing section 48 in the same way as we have done, above, pointed out:

> “The thing which the railway company had to pay, and the thing which the owners of the land had to transfer by this compulsory process was, on the one hand, £52,658, 6s. 7d., including this £9,499, 8s. 3d., and on the other hand, the lands and premises which were the subject-matter of the transaction. Under those circumstances, my Lords, it seems to me to be beyond all doubt that that which is to be paid as stamp-duty is the *ad valorem*[17] stamp upon the transaction itself which conveyed from the one to the other that which, by the process of this Act of Parliament, is ascertained to be the value, and that is, under the express language of the 48th section, the value of the land. If it is the value of the land, it cannot be doubted that the *ad valorem* stamp must be upon that value.”[18]

16.21 Similarly, in *McArdle v Glasgow Corporation*,[19] where there was a question as to whether an assumption of permanent planning permission should apply, not only in relation to the computation of market value for the purposes of rule 2, but also in relation to the computation of compensation for disturbance, under rule 6, it was held that disturbance was an element of the total value of the relevant interest and no distinction could be made between the value of the land and the claim for disturbance.[20]

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[15] At pp 580-581.
[16] (1887) 14 R (HL) 33.
[17] Based on the value of the land.
[18] At p 34.
[19] 1972 SC 41.
[20] Above at pp 47-48: ”[T]he fact is that nowhere in this series of statutory provisions since 1845 is a disturbance claim treated as something separate and distinct from the rest of the claim. It is an element in the total computation of the compensation. The distinction which the acquiring authority seek to make between a

(c) Date of assessment of claims

16.22 The common derivation may also cause practical difficulties in relation to the date of assessment of claims. Depending on the circumstances of the particular acquisition, the market value of the property may be fixed before it becomes possible to assess the total compensation payable for disturbance. In the case of *Munton v Greater London Council,*[21] Lord Denning, referring to the equivalent provision in the 1961 Act, pointed out that the assessment of compensation for disturbance is a separate assessment from the assessment of the market value of the land in terms of rule 2:

> "Starting with the Acquisition of Land Act 1919, and repeated in the Land Compensation Act 1961, Parliament itself has made a division between the two. In section 5(6) of the Act it says: 'The provisions of rule (2)' —that is, about the value of the land—'shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.' Since those Acts, the practice always has been for the compensation for disturbance to be assessed separately from the value of the land. That is as it should be. The value of the land can be assessed while the owner is still in occupation. The compensation for disturbance cannot be properly assessed until he goes out. It is only then that he can tell how much it has cost him to move, such as to get extra premises or to move his furniture. The practice is warranted by two cases in this court: *Harvey v. Crawley Development Corporation* and *Lee v. Minister of Transport*."[22]

16.23 Nevertheless, regardless of where the authority for disturbance compensation is derived from and how that compensation is to be calculated, the effect seems to be the same: the disturbance compensation will be added to other applicable compensation in order to form the total sum of compensation payable to the claimant in respect of the value of the land taken.

(d) Consistency of claim for disturbance

16.24 A further difficulty with the current rules as to compensation for disturbance is the courts' current insistence that the assessment of the market value of the land should be conducted on a basis consistent with that upon which the compensation for disturbance is calculated. For reasons we now consider, this seems illogical.

16.25 In *Horn,*[23] compensation was claimed under rule 2 on the basis that the land was "a building estate ripe for immediate development and should be valued as such and not as a farm". The claimant also claimed disturbance under rule 6, in respect of the costs to him of setting up business in another farm. The claim was rejected by the arbitrator, who, having valued the land as building land, said:

> "The said sum of 22,700l. does not include any sum as compensation for the disturbance of the claimant's business by reason of his dispossession of the land. I find that the sum so assessed could not be realized by a willing seller in the open

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disturbance claim and a claim for the value of the land is thus a false distinction. They are both elements in the value of the relevant interest within the meaning of that phrase in this series of Acts of Parliament."

[21] *Munton v Newham London Borough Council* (1976) 32 P & CR 269.

[22] At p 272.

[23] See paras 16.14-16.16 above.

market unless vacant possession were given to the purchaser for the purpose of building development".[24]

16.26 Mr Horn appealed against the disallowance of the claim for disturbance. The court found, by a majority, that the arbitrator was correct to find that, if compensation was being claimed on the basis that the land was building land, it was not open to the landowner to claim, in addition, for disturbance to his business as a farmer. As Lord Greene MR put the matter:

> "The truth of the matter is that, as in cases under the Lands Clauses Acts alone, so in cases where the Act of 1919 applies, the sum to be ascertained is in essence one sum, namely, the proper price or compensation payable in all the circumstances of the case. If those circumstances are such as to make it impossible for the owner to claim that he has suffered damage through disturbance for which he ought to be compensated, then he is not entitled to have the price or compensation for his land increased by an addition for disturbance even if he has in fact been disturbed. It is a mistake to construe rules 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation."[25]

16.27 In Horn, therefore, the majority held that, while the claimant was entitled to compensation as a result of the development value of his farmland, he was not also entitled to compensation for the disturbance caused to his existing agricultural business as, if it were not for the compulsory acquisition, he would have had to abandon his agricultural business to realise the development value of the land.[26] Goddard LJ pointed out, however, that if the owner sells his land for agricultural values, he will also abandon his agricultural business. In that case, according to the decision of the majority, the claimant would be entitled to both the agricultural value and the compensation for disturbance. This has led one commentator to conclude that "the majority decision in *Horn* is both unworkable and contrary to the statutory provisions."[27]

16.28 Goddard LJ stated:

> "It was said that the respondent was occupying his land as a farm; that he has been awarded compensation on the basis that the farm was a building estate and he could only realize that value by giving possession for building; and that, therefore, he must be treated as though he has disturbed himself. But would not this equally be the case were he to have been awarded compensation based on agricultural value? He could only realize that by giving possession. Mr. Beyfus admitted that, had the agricultural value been awarded, the respondent would have been entitled to compensation for disturbance, but I am unable to see wherein the difference lies. The value of the land is what it will fetch. The arbitrator has to find its value apart from any question of disturbance, and the value is the same whether the purchaser is a builder or a philanthropist who desires to present the site to the town for a public park or a local authority. Parliament might have provided that the value was to be what a willing purchaser would give if he intended to put the land to the same use as

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[24] See fn 13, at p 28.
[25] See fn 13, at pp 34-5.
[26] See too *Corton Caravans and Chalets Ltd v Anglican Water Services Ltd* [2003] RVR 59 and *Prestwick Hotels Ltd v Glasgow Corporation* 1975 SC 105.
[27] B Denyer-Green, *Compulsory Purchase and Compensation,* (9th edn, 2009) p 324.

the vendor was putting it at the time of the notice to treat, but that is not what the rule says, and I see no warrant for reading it in that way."[28]

It is our view that, as a matter of the interpretation of the legislation and as a matter of logic, the view of Goddard LJ is to be preferred to the majority in this case.

16.29 Section 48, and rule 2, proceed upon the basis of a hypothetical "willing seller". As Scott LJ points out, in the passage quoted above, a hypothetically willing seller would not be able to recover, from the buyer, any incidental expenses, such as the conveyancing and valuation fees in relation to the purchase of a new house, or the costs of re-establishing a business in another place. The conferral of a right to compensation for these expenses is a recognition that the usefulness of the hypothesis comes to an end after the property has been valued. In relation to compulsory purchase, there are two separate questions which require to be answered in computing the total compensation to be paid to the landowner. The first is how much the property would fetch on the open market, as between a willing seller and a willing buyer.[29] The second is what additional expense has been or will be actually caused to the seller as a result of the forced sale. We discuss below how that second question should be answered.

16.30 For present purposes, we agree with Lord Goddard that there is no basis for the view taken by the majority in *Horn,* that the two questions must be answered on a consistent basis. We therefore propose that:

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(e) Conclusion

16.31 It will be clear from the above that there are difficulties with the application of the current rules as to compensation for disturbance. It is artificial to incorporate such payments into the general compensation for the land, having regard, in particular, to the requirement that such payment is on the (commercial) basis of a sale by a hypothetically willing seller. Further, the fact that the compensation for disturbance is treated as part of the purchase price of the land, and is therefore liable to stamp duty on the "sale", seems illogical.

16.32 These difficulties could be obviated in the proposed new statute by provision to create a separate right to compensation for disturbance. Such provision would include rules developed at common law such as causation and remoteness, which we discuss in greater detail below. Additionally, ideally, it would allow for the flexibility inherent in the established common law position.[30] We note the view that, although there are a number of changes which practitioners might want to see to the law of disturbance, "to encapsulate the principle of the law in anything other than a very general statutory provision would be to risk prejudicing the underlying principle of equivalence."[31] We envisage that such a general provision would be included in the proposed new statute.

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[28] See fn 13, at 53.
[29] Discussed in Ch 11 above.
[30] DETR Review, para 138.
[31] J Rowan Robinson and E Young, "Disturbance compensation: flexibility and the principle of equivalence," JPL 1986, Sep, 656-665 at 665.

16.33 A useful example of such a provision is section 66 of the New Zealand Public Works Act 1981, as amended, which provides a right to disturbance payments and sets out a (non-exhaustive) list of circumstances in which the claimant will be entitled to such payments.

16.34 We welcome consultees' views on whether a restatement of the law in this area should be pursued and, in light of the discussion which follows, what such a restatement might contain. In the meantime, we propose that:

120. There should be an express statutory provision for disturbance compensation.

Rule 6 in practice

Common law rules limiting disturbance claims

16.35 Three conditions must be satisfied in order for a claim for disturbance compensation to be successful. These were definitively stated by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Iron Works Ltd ("Shun Fung")*:[32]

(i) There must be a causal connection between the acquisition and the loss in question (causation);

(ii) The loss must not be too remote (remoteness);

(iii) The loss or expenditure must not have been incurred unreasonably i.e. the claimant must mitigate his loss (mitigation).

The three rules are closely linked and the differences between them may, in some cases, be theoretical. Moreover, we are conscious, in the discussion which follows, of a certain degree of overlap. Nevertheless, Lord Nicholls considered that these three rules represented "useful guidelines" by which a claim for disturbance can be assessed. We consider each rule in turn.

(a) Causation

(i) Basic concept

16.36 According to Lord Nicholls in *Shun Fung,* "a prerequisite to an award of compensation is that there must be a causal connection between the resumption[33] or acquisition and the loss in question."[34] Where some other factor caused the claimant's loss, then the loss should not form part of the claim of compensation for compulsory purchase.[35] The claimant must establish, through the use of evidence, that he or she has suffered loss

[32] [1995] 2 AC 111 at 126.
[33] "Resumption" was the equivalent in Hong Kong to compulsory purchase.
[34] [1995] 2 AC 111 at 126.
[35] For instance, where a business is acquired in a difficult economic climate, the acquiring authority may attempt to argue that the test of causation is not met because a dip in profits or turnover is not due to the impending compulsory acquisition but is due to general economic conditions.

as a result of the disturbance.[36] Provided that the claimant is able to satisfy this evidential onus, a disturbance claim can take many forms.

16.37 Over the years, there has been a significant volume of case law concerning disturbance claims and a variety of claims have been considered.[37] With this in mind, some members of our Advisory Group have advocated a statutory codification of the causation rule. However, deciding on a form of words which will encompass the test is challenging. As Lord Nicholls noted in *Shun Fung*:

> "The tools used by lawyers are concepts of chains of causation and intervening events and the like. Reasonably foreseeable, not unlikely, probable, natural are among the descriptions which are or have been used in particular contexts. Even the much maligned epithet 'direct' may still have its uses as a limiting factor in some situations."[38]

16.38 The Law Commission suggested that the term "fairly attributable", as adopted by Lord Nicholls[39] sufficiently encompassed the ordinary principles of causation and avoided over-complicating the issue.[40] One comparative provision is section 55(2)(c) of the Lands Acquisition Act 1989 (Australia) which allows for claims which are the "direct, natural and reasonable consequence of" the compulsory acquisition. The precise form of wording would ultimately be for parliamentary counsel to determine at a later stage but, at this stage, we ask the question:

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

(ii) Pre-acquisition losses – "shadow" period

16.39 In England and Wales, it was established by the Lands Tribunal in *M. Bloom (Kosher) v Tower Hamlets London Borough Council*[41] that disturbance compensation was only recoverable for losses incurred after the date of the notice to treat.[42] In *Shun Fung* (above), Lord Nicholls went on to discuss this issue. He noted:

> "This claim raises the question whether a loss occurring *before* resumption can be regarded, for compensation purposes, as a loss *caused* by the resumption. At first sight the question seems to admit of only one answer. Cause must precede effect. That is a truism. A loss which precedes resumption cannot be caused by it. Hence, it is said with seemingly ineluctable logic, a pre-resumption loss cannot be the subject of compensation."[43]

16.40 However, His Lordship found that this "seemingly ineluctable logic" produced an unsatisfactory result:

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[36] See *Thomas Newall Ltd v Lancaster City Council* [2013] EWCA Civ 802 where a disturbance claim for loss of time by a family company was rejected. Although there was evidence that directors of the company had spent time on the compulsory purchase, there was no evidence that a loss had been incurred as a result.
[37] A full analysis of the case law and common heads of disturbance compensation is provided in Rowan Robinson & Farquharson-Black, para 10-08 – 10-14.
[38] [1995] 2 AC 111 at 126.
[39] [1995] 2 AC 111 at 125.
[40] Law Com 286, para 4.20.
[41] [1995] 2 AC 111
[42] (1978) 35 P & CR 423.
[43] See fn 41, at 135.

> "The difficulty with this approach is that it leads to practical results from which one instinctively recoils. Pursued to its logical conclusion it would mean that the businessman who moves out the week before resumption cannot recover his removal expenses; he should have waited until after resumption. It would also run counter to the reasoning underlying the *Pointe Gourde* principle: A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which the resumption forms an integral part.[44] That principle applies also in reverse. A loss in value attributable to the scheme is not to enure to the detriment of a claimant: see *Melwood Units Pty. Ltd. v. Commissioner of Main* Roads [1979] A.C. 426. The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen.[45]
>
> But if business losses arising in the period post-inception of the scheme and pre-resumption are to be left out of account, a claimant will not receive compensation for those losses although they are attributable to the scheme. If the threat of resumption drives away customers who need long term assurance of supply, on resumption no compensation would be payable for this loss of profits. Future losses of profits would be recoverable, but not the losses already incurred. This would be so even in respect of losses arising after the Governor had made a formal order for the resumption of the land. Any losses arising before the date on which the land was resumed and title reverted to the Crown would be outside the pale so far as compensation is concerned."[46]

16.41 Accordingly, there may be cases in which pre-acquisition losses should be awarded as part of disturbance claims.[47] The causation test should not be understood in a purely temporal sense: "in consequence of" the acquisition does not necessarily mean "after" the acquisition but "because of it".[48] However, losses incurred in the "shadow" of the compulsory purchase still require to satisfy the tests of causation, remoteness and mitigation; it may prove more difficult to satisfy these requirements for pre-acquisition losses.[49]

16.42 A question arises as to when the cut-off date should be for the recovery of pre-acquisition losses. In *Aberdeen City District Council v Sim*,[50] for instance, a claim for solicitors' fees was allowed under the head of disturbance where they were incurred in connection with the purchase of another house in anticipation of the claimant's current house being compulsorily acquired. These fees were incurred after the CPO had been confirmed but before a notice to treat had been served. However, reasonable losses may be incurred even before there is a confirmed CPO. *Shun Fung* suggests that losses incurred from the time of the announcement of the CPO could be included in a claim:

> "…there is no sensible stopping place short of recognising that losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after

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[44] *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] AC 565.
[45] See Ch 12 for discussion.
[46] [1995] 2 AC 111 at 135–136.
[47] See *Smith v Strathclyde Regional Council* (1980) 42 P & CR 397 and *Optical Express (Southern) Ltd v Birmingham City Council* [2005] RVR 230 (LT) in which it was held that pre-acquisition losses may include a reduction in profits which is attributable to the scheme.
[48] N Macleod, "Compensation for disturbance on Compulsory Acquisition," [1989] JPL 891 at para 4.3.
[49] *Optical Express (Southern) Ltd v Birmingham City Council* [2005] RVR 230 (LT).
[50] *Aberdeen City District Council v Sim* 1983 SLT 250.

resumption. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses."[51]

16.43 The date from which disturbance payments are recoverable should, ideally, strike a reasonable balance between the landowner who is threatened by compulsory purchase and the acquiring authority who should only be liable for reasonable expenses which are required to satisfy the principle of equivalence. If the date of confirmation of the CPO is to be taken as the date from which pre-acquisition losses are recoverable, this might exclude reasonable losses incurred before that date and might force the claimant to delay taking reasonable steps which may mitigate loss. However, if the "starting date" were to be set before the confirmation of the CPO then the requirement on the claimant to mitigate loss would operate in order to discourage unreasonable claims.[52] The Law Commission proposed that the date of publication of notice of the making of the CPO[53] should be the earliest date from which disturbance compensation should be recoverable and also recommended that provision should be made for even earlier losses in exceptional cases.[54]

16.44 It seems uncontroversial that claimants should be able to recover losses incurred which are directly attributable to the compulsory purchase. In the interests of clarity it may be desirable that the date from which the relevant costs and losses should be recoverable is specified in statute. Our initial position is that this should be the date when the claimant is first aware of the compulsory purchase. We therefore propose that:

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(iii) Recovery of losses where acquisition does not go ahead

16.45 Presently, the ability to recover pre-acquisition losses does not appear to cover costs incurred by a landowner in respect of a compulsory acquisition which does not ultimately go ahead. We understand that in modern practice there will often be significant early investigation of the land and the potential works. In such circumstances, it is reasonable for landowners to seek professional advice and incur costs which would, if the acquisition were to go ahead, form part of a compensation claim. The landowner is, therefore, taking a gamble, and risks being left out of pocket if the compulsory purchase does not proceed. It would seem equitable that such loss should also be recoverable. We propose that:

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(iv) Loss of development potential

16.46 In the case of *Pattle*,[55] the Lands Tribunal considered whether the claimants were entitled to claim disturbance compensation for a hypothetical loss of rents. The claimants

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[51] At 137.
[52] DTLR Report, para 3.6–3.8
[53] See 1947 Act, Sch 1, para 3.
[54] Law Com 286, para 4.40–4.41.
[55] *Pattle v Secretary of State* [2009] UKUT 141.

had obtained outline planning permission for the redevelopment of the land, but were unable to develop it due to a CPO made by the Secretary of State. The land was compulsorily acquired and the claimants claimed disturbance compensation for lost rents that would have been available from the redevelopment of the site. The Secretary of State argued that the loss had been caused by the blighting effect of his order rather than the prospective acquisition. The Tribunal noted, based on *Shun Fung,* that disturbance compensation could cover loss due to the prospective acquisition of land and found in favour of the claimants. The claimants were entitled to pursue a claim for pre-acquisition losses, calculated on the assumption that, in the absence of the CPO, they would have implemented an extant planning permission which would have produced higher rents.

16.47 An attempt by claimants to apply the decision in *Pattle* failed in *Acrofame*.[56] This suggests that there will be a high factual burden to be satisfied before a *Pattle*-type claim will be successful. It will be difficult to establish what might have happened in the "no scheme world" in this sort of situation.[57] We ask the question:

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(b) Remoteness

(i) Basic concept

16.48 In *Harvey v Crawley Development Corporation*, it was held:

> "It seems to me that the authorities to which our attention was drawn do establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided, first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner."[58]

16.49 The two elements of this test, that the claim is not too remote, and that it is the natural and reasonable consequence of the dispossession, have effectively merged.[59] The assessment of this test is, to some extent, a question of law, but it is largely a question of fact.[60]

16.50 The LTS has held that disturbance compensation is restricted to loss caused to the occupier on dispossession.[61] As a result, an investment owner who is not in possession may find it difficult to recover her or his full loss as it will be deemed to be too remote. The government recognised this inequity and the 1963 Act was amended in order to provide that, where a person who is not in occupation incurs incidental charges or expenses in acquiring an interest in other land, these charges and expenses are to be taken into account as if that

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[56] *Acrofame Properties v London Development Agency* [2012] UKUT 107 (LC).
[57] See Ch 12 above.
[58] *Harvey v Crawley Development Corporation* [1957] 1 QB 485 per Romer LJ at para 494.
[59] *J Bibby and Sons Ltd v Merseyside County Council* (1980) 39 P & CR 53 per Eveleigh LJ at 64.
[60] See fn above, at 61.
[61] *McLaren's Discretionary Trustee v Secretary of State for Scotland* 1987 SLT (Lands Tr) 25.

person had been in occupation of the land.[62] However, the ability of investment owners to recover disturbance losses is limited.[63] It has been suggested that the law does not currently cover all of the losses which an investment owner may reasonably incur. An investment owner may suffer significant loss where, for example, he leases residential property on a temporary basis and intends to return at the completion of the lease. We accordingly ask the question:

125. Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation?

(ii) Piercing corporate veil

16.51 For various commercial reasons, the ownership or interest in property, and the possession of it, may be divided between two or more companies within the same corporate group. However, the rule that disturbance compensation is restricted to loss caused to the occupier in possession may mean that the company which is most adversely affected by the compulsory purchase will be unable to recover disturbance compensation as its loss will be deemed to be too remote. However, in some circumstances the court or tribunal may be willing to "pierce" or "lift" the corporate veil, to reveal the reality behind the "mere façade"[64] of the corporate structure.

16.52 In the case of *DHN Food Distributors v Tower Hamlets LBC*,[65] disturbance compensation was claimed by a group of three limited companies which carried out a wholesale grocery business. The claimant, DHN, was the parent company which operated on the premises which were compulsory acquired. The premises were owned by a wholly owned subsidiary of DHN. The subsidiary had the same directors as DHN and its only asset was the premises in question. The third company involved was another wholly owned subsidiary of DHN, which owned the vehicles used in DHN's grocery business and carried on no other operations. The compulsory purchase resulted in the extinguishment of the business since no alternative premises were available.[66] The court held that, since DHN was in a position of complete control over its subsidiaries, it was proper to pierce the corporate veil and treat the group as a single economic entity. DHN was, therefore, entitled to compensation. Lord Denning in the Court of Appeal held:

> "This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one."[67]

16.53 However, the corporate veil will be lifted only in very exceptional circumstances. As Danckwerts LJ held in *Tunstall v Steigmann:*

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[62] 1963 Act, s 17A, added by the 1991 Act, s 79 and Sch 17, para 6.
[63] See *Ryde International plc v London Regional Transport (No 2)* [2004] EWCA Civ 232.
[64] *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, per Lord Keith of Kinkel at p 95.
[65] [1976] 1 WLR 852.
[66] On extinguishment see 16.79 and following.
[67] *DHN Food Distributors v Tower Hamlets LBC* [1976] 1 WLR 852 at 860.

> "if persons choose to conduct their operations through the medium of a limited company with the advantages in respect of responsibility for debts thereby conferred, they cannot really complain if they have to face some disadvantages also."[68]

16.54 In the case of *Woolfson,*[69] the principle, that the corporate veil should only be lifted exceptionally and that separate legal personas should generally be upheld, was reinforced by the House of Lords. Mr Woolfson and his wife were the sole shareholders of M & L Campbell Ltd. This company traded at five shop locations. Three of these were owned by Mr Woolfson and two were owned by Solfred Holding Ltd (a company in which Mr Woolfson and his wife were also the sole shareholders). Mr Woolfson argued that he, M & L Campbell Ltd and Solfred Holding Ltd should be treated as a single entity, embodied in himself. This followed the court's refusal to allow Mrs Woolfson and Solfred Holding Ltd to enter as additional claimants in the proceedings. Lord Keith of Kinkel rejected the claimant's reliance on the decision in *DHN*:

> "I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere façade concealing the true facts…. But however that may be, I consider the DHN Food case to be clearly distinguishable on its facts from the present case. There the company that owned the land was the wholly owned subsidiary of the company that carried on the business. The latter was in complete control of the situation as respects anything which might affect its business, and there was no one but itself having any kind of interest or right as respects the assets of the subsidiary. Here, on the other hand, the company that carried on the business, Campbell, has no sort of control whatever over the owners of the land, Solfred and Woolfson. Woolfson holds two-thirds only of the shares in Solfred and Solfred has no interest in Campbell. Woolfson cannot be treated as beneficially entitled to the whole share-holding in Campbell, since it is not found that the one share in Campbell held by his wife is held as his nominee. In my opinion there is no basis consonant with principle upon which on the facts of this case the corporate veil can be pierced to the effect of holding Woolfson to be the true owner of Campbell's business or of the assets of Solfred."[70]

16.55 In the case of *Bishopsgate Parking,*[71] the long leasehold interests in three multi-story car parks in Cardiff held by a company (B), were compulsorily acquired. Each car park was held on an occupational underlease by NCP Ltd. B was the wholly owned subsidiary of Powerfocal Limited (P), which had no legal interest in the land but sought to recover disturbance compensation in relation to its own losses. P relied on the decision in *DHN.* The Upper Tribunal noted that doubt had been placed on the decision of Lord Denning in *DHN* by judgements including that of Lord Keith of Kinkel in *Woolfson*, although it found that it was nevertheless bound by *DHN.*[72] In relation to *DHN* and the issue of "piercing the veil" the court concluded that, as company P was not in occupation of the compulsorily acquired land, it was not entitled to disturbance compensation:

> "*DHN* thus constitutes authority that, where one company in a group owns the land acquired and another company is in lawful occupation of the land for the purposes of the business of the group, the corporate veil may be pierced so as to give the second

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[68] [1962] 2 QB 593, per Danckwerts LJ at 607.
[69] *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90.
[70] Above at 95 per Lord Keith of Kinkel.
[71] *Bishopsgate Parking (No 2) Ltd v Welsh Ministers* 2012 UKUT 22 (LC).
[72] 2012 UKUT 22 (LC) at 121.

company an entitlement to compensation for disturbance. There is nothing in the decision that would suggest that a group company that is not in occupation of the land may be entitled to compensation under rule 6."[73]

16.56 The case law as a whole suggests that it will generally only be appropriate to pierce the veil where a corporate structure is a mere façade which conceals the true facts. Moreover, it will not be sufficient merely to show that the claimant company was in complete control of the subsidiary company or companies; there must also be evidence, by reference to detailed accounting arrangements between the companies, for example, that the company in ownership or occupation has, in fact, suffered loss.[74]

16.57 However, since 1973, displaced occupiers who do not have compensable interests will be entitled to "disturbance payments".[75] This may mean that, even where the veil is not pierced, a company which is in possession but which is not actually the owner of land due to its group corporate structuring, will receive reasonable compensation. Nevertheless, it may be useful to provide a statutory basis for the consideration of the issue of piercing the veil (even if it may be difficult to accommodate all possible scenarios). We ask the question:

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?

(iii) Impecuniosity

16.58 The impecuniosity rule in delict, which is traceable to the 1933 House of Lords case, *Liesbosch*,[76] provided that losses are not recoverable in damages if they are attributable to the claimants' poor financial circumstances (i.e. their impecuniosity) rather than directly to the delict:

"The appellant's actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort [i.e. delict]; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts."[77]

16.59 Within the context of compensation for compulsory purchase, the decision in *Liesbosch* was applied by the LTS in *Bryce v Motherwell District Council*.[78] Mr Bryce's council house was compulsorily acquired. In his new house, he installed various features including carpets but was unable to afford the cost of installing a telephone. He was only able to afford to install a telephone two years later and at an increased cost. The acquiring authority refused to pay for the increased costs relating to the installation of the telephone. The LTS held that the acquiring authority was not liable for the increased costs of installing the telephone as these derived from the claimant's impecuniosity and not from the compulsory acquisition.

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[73] Above at 124.
[74] *Ramac Holdings v Kent County Council* [2014] UKUT 109 (LC) (UT (Lands)) at para 142.
[75] 1973 Act, ss 34-35. See paras 16.100 – 16.104 for further discussion.
[76] *Liesbosch Dredger v SS Edison* [1933] AC 449.
[77] Per Lord Wright at 458.
[78] *Bryce v Motherwell District Council* [1980] RVR 282.

16.60 A particular problem arises where claimants are forced to take out additional borrowings in the year prior to the compulsory purchase as a result of difficult trading conditions due to the adverse effect on the area of the acquiring authority's scheme.[79] The bank charges associated with these additional borrowings may be resisted by acquiring authorities in terms of disturbance compensation as being too remote from the compulsory purchase.[80] The loss as a result of these additional borrowings, is treated as being due to the claimants' impecuniosity – in other words, they would not have needed to borrow, had it not been for their already existing poor financial circumstances.

16.61 The case of *Emslie*[81] concerned the compulsory acquisition of a lease of a shop. Agreement was not reached on the level of compensation and a reference was made to the LTS and then to the Inner House of the Court of Session. The claimants argued that the notice to quit served on them by the landlord under a redevelopment clause in the lease, was invalid. They claimed, *inter alia*, for bank charges on additional borrowings necessitated by poor trading conditions resulting from blight caused by the acquiring authority's scheme. The LTS found in favour of the acquiring authority which, relying on *Liesbosch* and *Bryce*, argued that the claim in respect of interest on additional borrowings was too remote to be considered a direct and natural consequence of the compulsory acquisition, and was a result of the claimants' own impecuniosity. They also argued that the loss was unrecoverable as it was not a loss arising from dispossession. The point was not pursued in the Court of Session. It might nevertheless reasonably be argued that the bank charges did directly arise from the acquiring authority's scheme.

16.62 It has been suggested that the current concept of disturbance compensation does not in fact achieve equivalence and that the courts, in their interpretation of the remoteness test, have been too restrictive in the types of case in which they have awarded disturbance compensation.[82] Under the law of damages, it is well established that the person at fault in a personal injury case is required to "take his victim as he finds him".[83] The existence of the impecuniosity rule in compensation claims means that such an approach is not possible in terms of disturbance compensation. However, as Rowan Robinson and Young note:

> "The principle of equivalence or *restitutio in integrum* underlying the law of compensation is, of course, similar to the principle underlying the law of damages[84] and in their approach to the kinds of loss which can properly be claimed under the head of disturbance courts have found it helpful to adopt tests analogous to those applied in actions for damages."[85]

16.63 The application of the remoteness test to the financial circumstances of the claimant arguably does not accord well with the principle of equivalence.[86] The rule has been

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[79] See Jeremy Rowan Robinson, "Compensation for Compulsory Purchase: a Better Deal for Claimants," in Proceedings of the National Symposium "Compulsory Purchase: An Appropriate Power for the 21st Century?," DETR, August 1999 at p 46.
[80] Murning Review, para 3.39.
[81] *Emslie & Simpson Ltd v City of Aberdeen District Council,* 1995 SLT 355.
[82] J Rowan Robinson and E Young, "Disturbance compensation: flexibility and the principle of equivalence," JPL 1986, Sep, p 656-665 at p 658.
[83] *Lagden v O'Connor* [2004] 1 A.C. 1067 per Lord Hope of Craighead at 1088.
[84] See, for example, the similarities in the speech of Lord Blackburn in *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25; 7 R (HL) 1 (damages) and in the judgment of Scott LJ in *Horn* (compensation).
[85] J Rowan Robinson and E Young, "Disturbance compensation: flexibility and the principle of equivalence," JPL 1986, Sep, 656-665 at 657.
[86] See E Young, "Remoteness, Impecuniosity and Disturbance," [1981] JPL 707.

criticised as "unnecessarily harsh"[87] and there have been calls for its abolition.[88] The Law Commission proposed that circumstances personal to the claimant should be considered in assessing disturbance – this would seem to include the claimant's impecuniosity, which we discuss below.[89]

16.64 One case in which the impecuniosity rule appears not to have been applied is *Sloan v City of Edinburgh District Council*.[90] The claimant's flat was compulsorily acquired and, upon becoming aware of the impending compulsory purchase, the claimant purchased a replacement house. There was delay in reaching agreement as to the compensation payable in relation to the flat and, as a result, the claimant was forced to pay interest concurrently for three years on two mortgages. The LTS held that the prolonged interest payments and double rates were due to the scheme of acquisition and were therefore recoverable. The LTS emphasised the judgement of Lord Kinnear in the case of *Main*:

> "It is a well-settled rule in the construction of the Lands Clauses Act [1845] that when lands have been taken in the exercise of powers of compulsory purchase, the owner or occupier, as the case may be, is entitled not only to the market value of his interest but to full compensation for *all* the loss which he may sustain by being deprived of his land…. The sound principle would seem to be that the person dispossessed should get compensation for *all* loss occasioned to him by reason of his dispossession."[91]

16.65 The Tribunal found that claimant had not "acted unreasonably" or "broken the chain of causation" between the scheme and the extra expenditure that they incurred. There was no consideration by the Tribunal of the possibility that the interest payments could be regarded as the result of the claimant's impecuniosity but, by not applying this rule, the decision would seem to be in greater accordance with the principle of equivalence than decisions such as *Emslie*.[92]

16.66 Within the context of damages, more recent case law suggests that the courts are now more willing to deviate from a strict application of the impecuniosity rule. In *Lagden v O'Connor,*[93] the claimant, Mr Lagden, was involved in a road traffic accident for which Ms O'Connor was held negligent. He required a replacement vehicle during the time in which his car was being repaired. Due to his financial circumstances, he was only able to find a replacement through a credit hire company. The question was whether he was entitled to the full costs involved in going through the credit hire company or whether he was only entitled to the lesser spot hire rate of hiring.

16.67 The House of Lords overruled the decision in *Liesbosch* and held that Mr Lagden was entitled to the full costs of hiring a replacement vehicle through the credit hire company's services. It was reasonably foreseeable that some motorists would be unable to pay hire charges on an up-front basis, and it would be unfair in law to attribute the choice to use credit hire arrangements to the victim rather than the negligence of the wrongdoer.

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[87] DETR Review, para 156.
[88] Murning Review, para 3.40.
[89] Law Com 286, para 4.27–4.30
[90] *Sloan v City of Edinburgh District Council* 1988 SLT (Lands Tr) 25.
[91] *Lanarkshire and Dunbartonshire Railway Co v Main* (1895) 22 R 912 at 919 per Lord Kinnear.
[92] See, N Hutchison and J Rowan Robinson, "The principle of equivalence and the limits of disturbance compensation," JPL 1994, Apr, 320-326 at 325.
[93] *Lagden v O'Connor* [2003] UKHL 64.

16.68 The impecuniosity rule was, thereby, effectively replaced by a test of reasonable foreseeability. The effect of this is that the negligent party will be liable for all losses which it is reasonably foreseeable may arise from his act or omission. In compulsory purchase cases, it would seem to be reasonably foreseeable that a claimant may be forced to incur costs, such as interest on additional borrowings, as a result of the scheme of compulsory acquisition and, therefore, by analogy, such losses should perhaps be recoverable following the compulsory acquisition.

16.69 Consultees may consider that it would be inappropriate to make specific statutory provision for the recovery of losses which allegedly derive from the claimant's impecuniosity as the variety of circumstances may mean that each case would be required to be assessed on its individual merits. Equivalence requires some degree of flexibility. Non-statutory guidance may be more appropriate. As was noted by Lord President Hope in *Emslie,* "the precise limits of a claim for disturbance have never been defined in the statutes." We ask the question:

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law?

(c) Mitigation of loss

(i) Basic concept

16.70 In *Shun Fung*,[94] Lord Nicholls explained the third condition which the claimant must satisfy in order to successfully claim disturbance compensation:

> "The law expects those who claim recompense to behave reasonably. If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure. Expressed in other words, losses or expenditure incurred unreasonably cannot sensibly be said to be caused by, or be the consequence of, or be due to the resumption."[95]

16.71 The duty to mitigate loss in terms of disturbance compensation is an extension of the well-established principle of the law of damages. However, the rule operates differently in the context of disturbance compensation. When claiming disturbance compensation, the burden to mitigate loss will be greater than under the law of damages:

> "The measure of loss on compulsory purchase has been equated to that in delict or tort where the duty to mitigate damage also arises. Compulsory purchase cases however differ from delict in that pending loss, prior to the acquisition, can often be seen from afar; so anticipatory action to mitigate loss becomes more feasible."[96]

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[94] See fn 32.
[95] See fn 32, at 126.
[96] *Smith v Strathclyde Regional Council* 1982 SLT (Lands Tr) 2 at 7.

16.72 The onus of proof is on the acquiring authority to illustrate that the claimant has failed to reasonably mitigate loss.[97] A claimant may fail to mitigate loss who, being aware of the impending compulsory purchase, does not take reasonable steps to relocate a business[98] or who relocates to alternative premises which, due to their substantially greater distance from the company's principal client base, result in a significant drop in profits.[99] The claimant may also be expected to mitigate loss by, wherever possible, channelling time and resources which have been "freed-up" by the compulsory acquisition of land into other profitable activities.[100] However, the claimant will not be expected to take unreasonable commercial risks in relocating a business where, for instance, the increased profits at the new location would not cover the significantly increased rents.[101]

(ii) Personal circumstances

16.73 The duty to mitigate loss is an objective one. In the case of *Bailey*,[102] the claimant's poor health was deemed by Lord Denning to be an "extraneous and independent matter which must be put on one side". The claimant was, therefore, under a duty to re-establish the business in order to mitigate losses despite poor health.

16.74 However, the law currently provides for the consideration of some personal characteristics of the claimant, but only to a very limited extent. Section 43 of the 1973 Act provides that disturbance compensation will be assessed on the basis of total extinguishment of the business where a person carrying on a trade or business on land[103] is required, in consequence of the compulsory acquisition, to give up possession of the land and, on the date of dispossession, that person has reached the age of 60. It has been suggested that for these purposes the age of 60 is a rather arbitrary threshold.[104] Nevertheless, in our view any reform of the law to allow for further consideration of personal circumstances should be in addition to the current provision in section 43 of the 1973 Act.

16.75 It seems somewhat unusual, and potentially unfair, that other personal circumstances of the claimant are not to be considered. It is established, under the law of delict, that the person at fault is required to "take his victim as he finds him" and suffer the greater liability if the victim should turn out to have a "thin-skull".[105] This could be extended to the circumstances of compulsory acquisition; the acquiring authority should perhaps be required to take the landowner as it finds him or her. This might include factors such as age and health. In addition, it may be relevant that the landowner had been intending to retire. In such a case, the compulsory acquisition might prevent the sale of the business as a going concern.[106]

16.76 The law in Australia allows for the consideration of circumstances "peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence

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[97] *Lindon Print Ltd v West Midlands County Council* [1987] 2 EGLR 200.
[98] *Park Automobile Ltd v Strathclyde Regional Council* 1984 SLT (Lands Tr) 14; *Welford v EDF Energy Networks (LPN) Plc* [2006] RVR 245. On relocation see para 16.79 and following, below.
[99] *Scotia Plastic Binding Ltd v London Development Agency* [2010] UKUT 98 (LC).
[100] *Faraday v Carmarthenshire County Council* [2004] RVR 236.
[101] *Knott Mill Carpets Ltd v Stretford Borough Council* (1973) 26 P & CR 129.
[102] *Bailey v Derby Corporation* [1965] 1 All ER 443. See too *Bryce v Motherwell District Council* [1980] RVR 282.
[103] The annual value of which does not exceed a prescribed amount (see 1997 Act, s 100(3)(a)).
[104] N Macleod, "Compensation for disturbance on Compulsory Acquisition," [1989] JPL 891 at para 6.20.
[105] *Lagden v O'Connor* [2004] 1 AC 1067 per Lord Hope of Craighead at 1088.
[106] See Law Reform Commission of Australia, *Lands Acquisition and Compensation* (Report No 14, 1980), para 245.

of" the compulsory acquisition.[107] In relation to the impecuniosity rule (see above), the Law Commission recommended that the rules should expressly provide that the personal circumstances of the claimant are a relevant factor when considering consequential loss (i.e. disturbance).[108]

16.77 The Law Commission found general support for the proposal to consider personal circumstances but expressed concern that the term "personal circumstances" would require clear definition in order to avoid undesirable uncertainty. We agree that any statutory clarification of the law in this area should make it clear that the claimant is not to receive compensation for loss due to personal circumstances but compensation for the effect of the compulsory purchase on a person in those particular circumstances. We do not suggest that any provision allowing for the consideration of personal circumstances would operate so as to provide an additional means of compensation for those in negative equity. In any case, loss as a result of negative equity is likely to be regarded as loss "based on the value of the land" and, accordingly, would not fall under rule 6, or any provision replacing it.[109] We ask the question:

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

(iii) Date on which duty to mitigate losses arises

16.78 The case of *Lindon Print*[110] suggested that there is no duty to mitigate loss prior to the service of the notice to treat. In that case, the claimants were required to give up possession within eight weeks of the confirmed CPO. The Tribunal found that this was insufficient time to find suitable alternative premises. It also found that there was no duty to mitigate before the confirmation of the CPO and it was irrelevant that the claimants had had knowledge of the impending CPO for several years. However, in *Shun Fung,* as noted above, it was held that pre-acquisition losses may be recoverable provided that they are not too remote or could have been mitigated.[111] It seems reasonable that if claimants are able to recover pre-acquisition losses from a point before the CPO is confirmed, they should be under a corresponding duty to mitigate loss from this point. We propose that:

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

Relocation and extinguishment

(a) General

16.79 Where the property which is being compulsorily acquired is used for business purposes there are two possible bases for compensation. Where the claimant is able to relocate the business, disturbance compensation will be on the basis of the costs of this relocation. However, in some cases it may be impractical or impossible to relocate the

[107] Lands Acquisition Act 1989 s 55(2)(c) (Australia).
[108] Law Com 286, 4.27–4.30.
[109] The issue of how to deal with homeowners in negative equity is considered in para 11.35–11.42.
[110] *Lindon Print Ltd v West Midlands County Council* [1987] 2 EGLR 200.
[111] [1995] 2 AC 111 at 137.

business. It may be the case that no suitable alternative premises are available[112] or that relocation is impossible because the business depends on the goodwill which it has developed in a particular local community. In such a case, compensation will require to be assessed on the basis of the complete extinguishment of the business. The distinction between these two types of compensation is important for both parties as the amount of compensation payable may vary significantly depending on which is adopted.

16.80 In *Shun Fung*, Lord Nicholls provided guidance as to when disturbance compensation will be assessed on the basis of relocation:

> "Three principal questions arise on relocation claims. (1) Can the business be relocated, or has it effectually been extinguished? Most businesses are capable of being relocated, but exceptionally this may not be practicable: for example, another suitable site may not exist. If the business is not capable of being relocated, then perforce compensation will have to be assessed on the extinguishment basis. (2) Does the claimant intend to relocate? The claimant must have reached a firm decision to relocate his business, and he must be reasonably assured that he will be able to do so. (3) Would a reasonable businessman relocate the business?"[113]

16.81 It is only when these three questions are answered affirmatively, and the causation and remoteness tests are satisfied, that relocation costs will be recoverable in terms of disturbance compensation. Whether a business has, in fact, been relocated or has simply been extinguished, will often be a matter of degree, to be determined on the facts of each individual case. For instance, where a business is dispossessed, and the management of that business re-open a similar business at a distant locality from the original business or a significant period after the closure of the original business, it is unlikely that this will be interpreted as "relocation".[114]

(b) Compensable losses

16.82 Where disturbance compensation is assessed on the basis of relocation, claims may be made under a number of heads. The claimant will be entitled to claim the costs relating to the acquisition of replacement premises, including the costs of searching for new premises.[115] The costs of adapting the new premises, removal costs, goodwill, temporary loss of profits, personal time and lost rents may also be recoverable.[116]

16.83 However, the claimant will not be able to recover expenditure that is due to the compulsory purchase but in respect of which he receives value for money. This means that, even though the costs related to finding new premises and other heads will likely be recoverable, the purchase price of the new premises will not usually be recoverable:

> "The reason for that is that there is a presumption in law—albeit a rebuttable presumption—that the purchase price paid for the new premises is something for which the claimant has received value for money. If he has made a good bargain and acquired premises that have a value in excess of what he has paid for them, that

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[112] See, e.g. *Barlow v Hackney Corporation* (1954) 5 P & CR 129 in which no alternative premises were available.
[113] [1995] 2 AC 111 at 128.
[114] Above.
[115] *D Newton & Son v Lincoln City Council* [1985] 2 EGLR 202.
[116] See G Roots *et al*, *The Law of Compulsory Purchase,* (2nd edn, 2011), para E [2044] – E [2060].

> is not something for which the acquiring authority is entitled to any credit. If the claimant has made a bad bargain and has paid a great deal more for the new premises to which he is moving than they are really worth, that is not something for which the acquiring authority can properly be charged."[117]

16.84 Moreover, if new premises are adapted, the cost of these adaptations may be recoverable unless the adaptations increase the value of the new premises by more than the cost of undertaking the adaptations, in which case the claimant will have received value for money, and made no loss which is capable of being recovered.[118] We would envisage that any re-statement of the law in this area would include reference to the "value for money" principle.

16.85 Where the business cannot be relocated, a claimant who has acted reasonably may be able to claim compensation for the extinguishment of the business. In one case, the Lands Tribunal declined to award compensation on the basis of extinguishment where the claimant was deemed to have unreasonably refused alternative accommodation offered by the acquiring authority.[119] Where extinguishment compensation is awarded, it will be assessed on the value of the business as a going concern.

16.86 There may be some cases in which a business can be treated as comprising two or more separate components. As a result of the compulsory acquisition, it may be possible to relocate only part of the business while another part must be extinguished.[120] This might be the case where, for instance, a business in a rural area undertakes agricultural activities alongside other general commercial activities. In order to cover such circumstances, the proposed new statute should perhaps expressly allow for a claim which incorporates both the relocation and extinguishment aspects of disturbance compensation.

16.87 In the vast majority of cases, and in particular where a business is well established and has built a significant degree of goodwill, extinguishment will result in greater loss than relocation, and the claimant will, therefore, be entitled to greater compensation. However, in some cases, the costs of relocation may outweigh the established value of the business. In *Shun Fung* the Crown contended that because relocation costs exceeded the value of the business, there should be no recovery of these costs. The Privy Council disagreed with this contention:

> "The conclusion to be drawn, in a case where the cost of moving the business to another site would exceed the present value of the business, is that this is not of itself an absolute bar to the assessment of compensation on the relocation basis. It all depends on how a reasonable businessman, using his own money, would behave in the circumstances. In such a case, however, the tribunal or court will need to scrutinise the relocation claim with care, to see whether a reasonable businessman having adequate funds of his own might incur the expenditure. This is particularly so when, as in the case of the claimant company, compensation assessed on a relocation basis would greatly exceed the amount of compensation payable on an extinguishment basis. The greater the disparity, the more closely the claim should be examined, because the less likely would it be that a reasonable businessman would behave in this way. Compensation is not intended to provide a means whereby a

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[117] *Service Welding Ltd v Tyne and Wear County Council* (1979) 38 P & CR 352 at 357.
[118] See *Bresgall & Sons v Hackney LBC* (1976) 32 P & CR 442.
[119] *Pettingale v Stockport Corporation* (1961) 12 P & CR 384.
[120] See, for instance, *Tamplins Brewery Ltd v County Borough of Brighton* (1971) 22 P & CR 746.

dispossessed owner can finance a business venture which, were he using his own money, he would not countenance."[121]

16.88 The Law Commission proposed that the statutory codification of the *Shun Fung* rules should make clear that relocation compensation is not precluded even where this costs more than the value of the business. These sorts of cases are likely to be rare but, in the interests of the completeness, they should probably be provided for. We propose that:

130. It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.

(c) Possible changes to current law

16.89 It has been suggested by some members of our Advisory Group that the principles in relation to relocation and extinguishment bases of disturbance compensation should be stated in some form in statute. The DETR Review suggested that a "new statute should be drafted to enable the law established by *Shun Fung* to continue".[122]

16.90 However, a straightforward restatement may be insufficient - it may be beneficial to consider the possibility for adaptation or modernisation of the rules established in *Shun Fung.* For instance, the Law Commission, in its consultation paper, suggested that the "reasonable businessman" test (the third of the questions asked by Lord Nicholls in *Shun Fung* regarding relocation of the business) was perhaps too restrictive, and a more general reasonableness test without reference to a specific commercial test could perhaps be adopted.[123]

16.91 Indeed, in *Shun Fung*, Lord Nicholls considered that there should be a "moderate degree of latitude"[124] in relation to family businesses. A general "reasonableness" test may allow for greater flexibility in such cases. There may be significant potential for disagreement as to what a reasonable businessman would have done when faced with the prospect of compulsory purchase. In a difficult economic climate, the question of what is reasonable becomes even more difficult – the reasonable businessman may see the compulsory purchase as a golden opportunity to surrender the business rather than continue to struggle to keep it alive.

16.92 Compensation on the basis of relocation will usually be in the best interests of both parties: the claimant will be able to continue his business and the acquiring authority is likely to be liable for less compensation. A general assumption that compensation should be paid on a relocation basis would, therefore, usually be of benefit to both parties. The evidential onus would then be on the party which sought to argue that compensation should be on the basis of total extinguishment of the business.[125] We ask the question:

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?

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[121] [1995] 2 AC 111 at 127.
[122] DETR Review, para 142.
[123] Law Com 165, para 4.31.
[124] [1995] 2 AC 111 at 127.
[125] Law Com 286, para 4.37 and Rule 5(2).

Valuation date for compensation for disturbance

(a) General

16.93 We have considered the valuation date of compulsorily acquired land above.[126] We referred to the *West Midland Baptist*[127] case, which held that, in terms of notice to treat procedure, compulsorily acquired land should be valued at the date when the acquiring authority takes possession, or on the date when compensation is agreed between the parties or determined by the tribunal.

16.94 The valuation date for disturbance compensation presents another question which must be considered. Assessment of disturbance compensation at the same time as assessment of the value of the land in notice to treat procedure, as identified in *West Midland Baptist*, is likely to be consistent with the principle of equivalence.

16.95 However, the situation where GVD procedure is used is more complex. Following from the *West Midland Baptist* case, where GVD procedure is used it has been held that the valuation date for the compulsorily acquired land should be the date of vesting.[128] As we have discussed in Chapter 7, at the end of the period specified in the GVD (which is a minimum of 28 days) the title to the land will vest in the acquiring authority.[129] Therefore, the date of vesting and transfer of title (and therefore the date of valuation of the land) will often precede the dispossession of the landowner and, consequently, the disturbance of the landowner. It may often be very difficult to fully assess disturbance compensation before the dispossession (and therefore the disturbance) has taken place.[130] Accordingly, it may be unfair on the claimant, and contrary to the principle of equivalence, to assess disturbance compensation along with compensation for the value of the land as at the vesting date where GVD procedure is used.[131]

16.96 The nature of relocation of a business means that it may be particularly difficult to establish the full amount of disturbance compensation a claimant should be entitled to, until a significant time has elapsed since the compulsory purchase. From discussion with the Chief Valuer for Scotland, we are aware that it is often very difficult to assess disturbance payments until the scheme is in completed, especially when relocation of a business is involved.

(b) Comparative practice

16.97 We note the equivalent provision for business loss in New Zealand, section 68 of the Public Works Act 1981. This provides for the recovery of:

> "business loss resulting from the relocation of the business made necessary by the taking or acquisition which loss, unless the owner and the Minister or local authority

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[126] See Chapter 7
[127] *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874.
[128] *Renfrew's Trustees v Glasgow Corporation* 1972 SLT (Lands Tr) 21.
[129] 1997 Act, Sch 15, para 1.
[130] See *Munton v Newham London Borough Council* (1976) 32 P & CR 269 at 272 per Lord Denning MR: "The compensation for disturbance cannot properly be assessed until he [the owner] goes out. It is only then that he can tell how much it has cost him to move, such as to get extra premises or to move his furniture."
[131] See *Park Automobile Co v Strathclyde Regional Council* 1984 SLT (Lands Tr) 14 and the discussion in J Rowan Robinson and E Young, "Disturbance compensation: flexibility and the principle of equivalence," JPL 1986, Sep, 656-665 at 661.

otherwise agree, shall not be determined until the business has moved and (if the circumstances so require) until sufficient time has elapsed since the relocation of the business to enable the extent of the loss to be quantified."

16.98 A similar provision in Scotland may allow for a fairer assessment of the claimant's disturbance. We welcome further views on whether this would cause practical difficulties and whether a provision, similar to that in force in New Zealand, should be introduced in Scotland.

16.99 We ask the questions:

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

Disturbance payments under 1973 Act

16.100 A person who lawfully occupies land, but does not have a compensable interest in it, has no right to claim disturbance under section 12(6) of the 1963 Act (rule 6). Nevertheless, an occupier, usually a tenant, may suffer significant losses as a result of the displacement. As a result, section 38 of the 1963 Act provided for the payment of disturbance compensation at the discretion of the acquiring authority.

16.101 The discretionary nature of this power led to criticism as to its uneven application.[132] In 1973, therefore, provision was made for "disturbance payments" as of right in sections 34 and 35 of the 1973 Act. These disturbance payments will often be vital for tenants who are displaced from the land where the acquiring authority has acquired the landlord's interest and allowed the tenant's right to expire. However, the discretionary power contained in section 38 still remains. We see no particular reason why this should be the case, following the enactment of the mandatory powers in the 1973 Act. We propose that:

134. Section 38 of the 1963 Act should be repealed and not re-enacted.

16.102 Section 34 of the 1973 Act provides that, where a person is displaced from any land in consequence of the compulsory acquisition of land or various other specified statutory actions, he is to be entitled to a disturbance payment.[133] To qualify for this disturbance payment, the person must be in lawful possession of the land from which he is displaced[134] at the appropriate time.[135] Where a person is not entitled to a disturbance payment under

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[132] JUSTICE, *Compensation for Compulsory Acquisition and Remedies for Planning Restrictions together with a Supplemental Report,* 1973, para 113 (cited in Rowan Robinson & Farquharson-Black at para 12-07).
[133] For interpretation of the words "displaced from land in consequence of" the compulsory acquisition see *Sim v Aberdeen District Council* 1983 SLT 250.
[134] S 34(2). In *Smith and Waverley Tailoring Co v Edinburgh District Council (No 2)* 1977 SLT (Lands Tr) 29 the LTS held that "lawful possession" can include the situation where a person has no legal title to land but is in possession of it due to the consent of the proprietor.
[135] S 34(3).

section 34, the acquiring authority may nonetheless make a discretionary payment.[136] A disturbance payment will carry interest from the time of displacement until payment.[137] No disturbance payment is payable in relation to agricultural land.[138]

16.103 Section 35 provides that a disturbance payment is to include the reasonable removal expenses incurred as a result of the displacement. These should be calculated on the basis of those expenses which are incurred as a direct and natural consequence of the removing, as well as expenses caused by the removal itself.[139] Where a person was carrying out a trade or business on the land, a disturbance payment will also include any loss in trade or business as a result of having to leave the land. The general rules regarding remoteness and mitigation of loss of trade or business[140] in terms of a disturbance claim under section 12(6) of the 1963 Act, also apply to disturbance payments.[141]

16.104 Any dispute as to the amount of a disturbance payment is to be determined by the LTS.[142] Scots Law has been interpreted differently to the law in England and Wales in this regard. In *Gozra*,[143] the English Court of Appeal held that, notwithstanding the statutory authorisation for the Lands Tribunal to determine disputes regarding disturbance payments only, the Tribunal had jurisdiction to determine a dispute in relation to the quantum of a discretionary disturbance payment. In contrast, the LTS found in *Mackie*[144] that, where a person was entitled, as of right, to receive a disturbance payment, a dispute as to the amount could be referred to the LTS, but, in the case of a discretionary payment, the only remedy open would be one of judicial review. There was no scope for a more purposive interpretation of the legislation. In relation to disturbance payments we ask the questions:

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

[136] S 34(4).
[137] S 34 (5).
[138] S 34(6).
[139] See *Glasgow Corporation v Anderson* 1976 SLT 225.
[140] See, e.g. *Solartrack plc v London Development Agency* [2012] UKUT 158 (LC).
[141] Although the two types of disturbance claims are not necessarily "in all respects identical when it comes to assessing quantum." (*Evans v Glasgow District Council* 1978 SLT (Lands Tr) 5 at 7).
[142] S 35(4).
[143] *Gozra v Hackney Borough Council* (1988) 57 P & CR 211, CA.
[144] *City of Glasgow District Council v Mackie* [1992] 20 EG 114.

Chapter 17 Non-financial loss

Introduction

17.1 In preceding Chapters we have discussed compensation for the market value of the land and compensation for consequential loss. In this Chapter we turn to the third head of compensation which is payable where land has been compulsorily acquired – compensation for non-financial loss. Such compensation, which is not compatible with rule 1 (section 12(1) of the 1963 Act), is provided for in the form of supplementary payments, made under the 1973 Act. These are known as home loss payments and farm loss payments.

17.2 In this Chapter we discuss these supplementary payments in detail and ask whether the current provisions should be reformed. We also consider whether home loss payments and farm loss payments could be consolidated into one single payment reflecting non-financial loss to the claimant. This may serve to reduce the administrative burden on acquiring authorities and speed up the compensation process, although consultees may be of the view that the distinctions between different types of loss necessitate distinct loss payments.

General issues

A premium for compulsory purchase

17.3 Under the current law, compensation for compulsory purchase does not include a payment explicitly stated to be in recognition of the compulsory nature of the acquisition. In fact, rule 1 reflects the principle, which is a matter of policy, that so far as the land itself is concerned, the owner is entitled to no extra compensation because the acquisition is compulsory. As noted in the SME, rule 1 "prohibits the payment of solatium".[1]

17.4 Rowan Robinson & Farquharson-Black discuss whether it would be expedient to pay some premium over the actual value of the property.[2] Prior to 1919, it was commonplace for 10 per cent to be added to the assessed value of the acquired land in order to compensate for the fact that the acquisition was compulsory. This might have been a reflection of the fact that the majority of projects undertaken at that time were initiated by railway companies, acting for the profits of their shareholders.

17.5 Be that as it may, following World War I, when the Scott Committee issued its second report,[3] the national focus shifted, from developments promoted by private interests, towards the public interest and involvement in redevelopment. Compulsory purchase powers were increasingly used for this purpose. Hence, rule 1 provides that no allowance is to be made on account of the acquisition being compulsory. Rowan Robinson & Farquharson-Black ask whether, in modern times, rule 1 has reached the end of its useful life. Some other members

[1] SME, para 154.
[2] At paras 4.06-4.18.
[3] Cd 9229 1918.

of our Advisory Group have suggested that it has. Moreover, in 2001, the Murning Review found that "there are varying views on the basis of property compensation. Whilst a few consider the existing basis to be fair, the majority advocate payment of a premium to take account of the compulsory nature of the acquisition".[4] RICSS have also advocated the adoption of such a premium in order to recognise the compulsory nature of the purchase.[5] They suggest that this would encourage the claimant to agree to compensation more quickly, and any extra costs to the acquiring authority would be outweighed by the alleviation of dissatisfaction amongst claimants. These views were echoed at the SCPA Conference in Edinburgh in June 2014.[6]

17.6 There are particular types of cases in which the payment of a premium may appear to be justified. For instance, in recent years there have been more cases where an acquiring authority take land and immediately transfer ownership of it to a private individual or company.[7] The individual or company may be able to gain significant profit from the acquired land and there may only be some peripheral public interest benefit. An example would be the compulsory acquisition of land for the purposes of the relocation of Arsenal FC's stadium in North London.[8] On the other hand, it could be argued that all planning permission is, by definition, granted in the public interest and it would be invidious to discriminate between those which involve a wealthy developer and those which do not. This may particularly be the case in a time of financial stringency, when much development would not happen if private finance could not be employed.

17.7 It is our view that it would not be feasible, even if it were desirable, to give a premium to landowners according to whether or not the acquisition was privately funded. We suspect that a fixed percentage premium would almost certainly be immediately discounted by those involved, so that the perceived benefits in terms of reducing dissatisfaction would be transitory. Further, difficult questions would arise as to how it was to be applied to the value of the land. It would also add appreciably to the costs of the acquiring authority.

Rule 1 has already been superseded

17.8 In any case, as we have noted at the beginning of this Chapter, the 1973 Act provides for the making of supplementary compensation payments to private individuals whose land is compulsorily acquired. It is difficult to reconcile the statutory provisions under which those payments are made, with rule 1. To some extent, these payments already act as a premium above the standard payment of compensation (in terms of market value and disturbance) and were specifically designed to cover loss which is not recoverable under the six rules. The payments were apparently introduced on the basis that compensation under the six rules alone might be insufficient to satisfy the principle of equivalence.[9]

17.9 In that regard, and however the payments were presented when they were first introduced, it appears to us that they, or any replacement of them, could plausibly be

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[4] Murning Review, para 5.8.
[5] In a memorandum sent to this Commission in 2012.
[6] But not at the equivalent conference held in 2012, when a snap show of hands showed a clear majority against a simple percentage premium!
[7] See para 20.5 below.
[8] *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18 (Admin). See generally, S Crow, *Compulsory purchase for economic development: an international perspective*, JPL 2007, Aug, 1102-1115.
[9] See *Development and Compensation – Putting People First,* (White Paper), Cmnd 5124 (1972). The principle of equivalence is elucidated in *Horn v Sunderland Corporation* [1941] 2 KB 26, CA.

justified as a recognition by the state that a private individual, whose rights under Article 8 of the Convention are being interfered with, is entitled to some recompense on that ground.

Supplementary compensation payments under 1973 Act

General

17.10 The 1973 Act makes provision for home loss and farm loss payments. Unlike compensation under the six rules, these supplementary loss payments are not directly referable to any financial loss caused by the compulsory purchase and are more in the nature of solatium (i.e. compensation for pain and suffering). As compensation for pain and suffering is, by its very nature, "not susceptible of measurement in money",[10] any method of computation is likely to be contentious.

Home loss payments

17.11 When a home is compulsorily acquired, the value of the home to the owner or occupier may go beyond strict market value. Sections 27 to 30 of the 1973 Act provide that additional payments, known as home loss payments, can be paid where a private individual's home is compulsorily acquired. This payment is intended to reflect personal inconvenience and distress caused to the individual as a result of the loss of the home.[11]

17.12 Although the home loss payment is intended to cover the personal loss to the homeowner, it is calculated by reference to length of residence. Section 27(2) provides that a person is entitled to a home loss payment where, throughout the period of one year ending with the date of displacement, he has been in occupation of the dwelling, or a substantial part of it, as his only or main residence and he has been in such occupation by virtue of an interest or right to which section 27 applies. These interests are set out in section 27(4).[12] A person who gives up the right to occupy the property before the date on which the acquiring authority is authorised to acquire the interest, will not be treated as "displaced" from the dwelling as a result of the compulsory acquisition, and will not be entitled to a home loss payment.[13] Where a landlord's interest is acquired by agreement, a tenant will be entitled to a home loss payment as if that interest had been compulsorily acquired, provided that he or she has not given up occupation by the time of the agreement between the landlord and the acquiring authority.[14]

17.13 Failure to satisfy the length of residence requirement may not be fatal to a claim for a home loss payment. An occupier may aggregate his or her period of occupation with that of any predecessors.[15] Where the claimant has occupied different rooms in the same building, section 27(2) has effect as if these rooms constituted the same dwelling.[16]

17.14 The one year requirement of residence to qualify for a home loss payment may be too short to prevent opportunistic buyers from purchasing property which is likely to be

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[10] See *Wright v British Railways Board* [1983] 2 AC 773 per Lord Diplock at 777.
[11] See *Development and Compensation – Putting People First,* (White Paper), Cmnd 5124 (1972).
[12] As substituted by the 1991 Act, Sch 17, para 20(3).
[13] S 27(3).
[14] S 27(6).
[15] S 29(3) as substituted by the 1991 Act, s 71(4).
[16] S 29(5).

compulsorily acquired, in order to take advantage of the potential compensation, including home loss payments. The current period of validity of a confirmed CPO is three years.[17] Home loss payments could be restricted to persons who acquired their "home" before the impending compulsory purchase of that home became publicly known. This would require the current one year period to be extended to at least three years. We ask the question:

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

17.15 A claim for a home loss payment must be made in writing and accompanied by particulars which enable the acquiring authority to determine the value of the payment to which the landowner is entitled.[18] Section 29(2) establishes when the home loss payment must be paid. The acquiring authority may, at any time, and in some circumstances must, make an advance payment on account of the home loss payment.[19] Where compulsory purchase powers could have been used, but an agreement was reached between the acquiring authority and the homeowner, the acquiring authority may also agree to make a payment to the homeowner equivalent to a home loss payment.[20] Section 30 applies the home loss payment provisions to the situation where compulsory acquisition causes a person resident in a caravan park to be displaced.

17.16 We think that it is not controversial that a person whose home is compulsorily acquired should be entitled to a payment to reflect the emotional upset and inconvenience this will almost certainly cause. However, the method of valuation of such payments is a matter which requires careful consideration due to the difficulties of quantifying such loss. A system whereby a home loss payment is assessed on the basis of the circumstances in each individual case, would potentially give rise to significant complexity and, therefore, it is generally accepted that some standardised approach is necessary.

17.17 Over the years there has been variation between payments based on a percentage of the value of the home and flat-rate payments. The current law is set out in section 28(1) of the 1973 Act (as substituted by section 71(3) of the 1991 Act) and provides that the amount of a home loss payment for an "owner's interest"[21] is equal to 10 per cent of the market value of the interest subject to a maximum limit of £15,000 and a minimum of £1,500.[22] A flat rate of £1,500 applies in any other case.[23]

17.18 The Scottish Ministers have the power to alter the maximum and minimum thresholds for home loss payments at any time,[24] although, to date, they have chosen not to do this since the reforms made by the 1991 Act. The setting of maxima and minima for home loss payments is, ultimately, a policy matter for Ministers to determine.[25] One advantage of maxima and minima is that they obviate the need for assessment on the basis of each individual case. An assessment of each case on its merits would be likely to involve the

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[17] 1845 Act, s 116 and 1947 Act, Sch 2, para 1(a). See Ch 7 above.
[18] S 29(1).
[19] See ss 29(2A), 29(2B) and 29(2C). On advance payments see paras 18.28 – 18.36 below.
[20] S 29(7).
[21] See s 28(7).
[22] S 28(1).
[23] S 28(2).
[24] S 28(5).
[25] DETR Review, para 91-94.

production of evidence and pleadings which might, in fact, cost more than any home loss payment eventually awarded.

17.19 It would also be possible for primary legislation to provide a mechanism which allowed, or required, regular reviews of the relevant thresholds in order adequately to reflect the changing price of property, or the rate of inflation.[26]

17.20 An alternative to continuing with the percentage model, subject to any provision for periodic review, might be to move towards a flat rate home loss payment model.[27] We see the attractions in either a flat rate or a rate based on a percentage of the market value of the land.

Comparative practice

17.21 We note that a flat rate approach is adopted in Australia, for instance. Where there is acquisition of a dwelling, a person is entitled to $10,000 as a flat rate payment.[28] Such an approach is, arguably, more equitable than the percentage of market value approach, in that disruption for home loss applies to all homeowners regardless of the value of the home. A flat rate payment would also allow the acquiring authority at an early stage to calculate the value of compensation that they will have to pay the landowner.

We ask the questions:

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained?

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima or for an automatic increase (or reduction) to reflect inflation?

140. As an alternative, should a system, either of a flat rate payment, or of a payment individually assessed in each case, be introduced?

Farm loss payments

17.22 The compulsory acquisition of agricultural land presents particular challenges for an owner of that land who is carrying on an agricultural business on the land. Unlike other types of business which may be relatively easily relocated to alternative premises,[29] an agricultural business may have a particular dependence on a specific area of land. Owner-occupiers of agricultural land are likely to face losses in profit if they are forced to move their farming operation to unfamiliar land or to land where the environmental conditions may perhaps be less conducive to farming. In consequence of the peculiar difficulties that an agricultural landowner may encounter as a result of compulsory purchase, special "farm loss payments" are provided for in the 1973 Act in order to meet this loss.[30]

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[26] See Lands Acquisition Act 1989, s 126 (Australia).
[27] A flat rate payment was made prior to 1991.
[28] Lands Acquisition Act 1989, s 61(2) (Australia).
[29] See above, paras 16.79 onwards, on the relocation and extinguishment bases of disturbance loss for businesses.
[30] See *Development and Compensation – Putting People First,* (White Paper), Cmnd 5124 (1972).

17.23 Under section 31 of the 1973 Act, where an owner-occupier[31] of an agricultural unit[32] is displaced[33] from the land in consequence of the compulsory acquisition of his interest in the whole or a sufficient part[34] of that land and not more than three years after the date of displacement he begins to farm another agricultural unit[35] elsewhere in Great Britain, he is entitled to receive a farm loss payment from the acquiring authority.

17.24 The amount of farm loss payment is calculated in accordance with sections 32 to 33 of the 1973 Act. The amount of a farm loss payment is to be equal to the average annual profit derived from the use for agricultural purposes of the agricultural land comprised in the land acquired. That profit is computed by reference to the profits for the three years ending with the date of displacement or, if the person concerned has been in occupation for a shorter period, that period.[36]

17.25 In calculating the average annual profits, there is to be deducted a sum equal to the rent that might reasonably be expected to be payable in respect of the agricultural land, if it were let for agricultural purposes to a tenant. This deduction is to be made whether or not the land is, in fact, let and, if it is let, the deduction is to be made to the exclusion of the rent actually payable.[37] Moreover, in calculating the average annual profits, there shall be left out of account profits from any activity if a sum in respect of loss of profits from that activity would fall to be included in the disturbance compensation, for the acquisition of the interest in the land acquired.[38] Where the value of the agricultural land which is acquired exceeds the value of the new agricultural unit, the amount of the farm loss payments is to be appropriately reduced.[39]

17.26 Where the farm loss payment, together with compensation based on the value of the land on its existing use (plus disturbance), exceed the compensation assessed on the basis of the open market value of the land, the payment is limited to the difference.[40] Any dispute as to the amount of a farm loss payment is to be referred to the LTS.[41] The person entitled to the farm loss payment must lodge the claim in writing within a year of the date that he begins to farm the new unit.[42]

17.27 The current law of farm loss payments is therefore quite complex and landowners must satisfy onerous statutory requirements in order to qualify. The requirement that the whole of the farm, or at least 0.5 hectares, be acquired and the requirement that the claimant must begin farming a new agricultural unit, in which he must have had no interest prior to the authorisation of the compulsory purchase, within three years of the acquisition, may mean that many farmers are ineligible for the payment.

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[31] Or a lessee where his interest is as a lessee for a year or from year to year or a greater interest. Or a crofter or a landholder (s 31(2)). “Crofter” and “landholder” are defined in s 80(1).
[32] 1997 Act, s 122(1).
[33] See s 31(3).
[34] Not less than 0.5 hectares or such area as the Scottish Ministers may by order specify (s 31(2)).
[35] See s 31(1)(b).
[36] S 32(1). See too ss 32(2) and 32(3).
[37] S 32(4).
[38] S 32(5).
[39] See s 32(6) and 32(7).
[40] See s 32(8).
[41] S 32(9).
[42] S 33(1).

17.28 We welcome views on the operation of farm loss payments in practice and whether the current statutory requirements are too onerous. We ask the question:

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?

Comparative practice

17.29 In England and Wales, a new range of payments was introduced by the Planning and Compulsory Purchase Act 2004.[43] We do not examine them in detail here. It is sufficient to note that, however they are calculated, they appear to provide for higher payments than the current Scottish legislation, but with a similar power to the Secretary of State to alter the percentages involved.

Single payment

17.30 At the beginning of this Chapter we mentioned the views of those who consider that it would be desirable to pay landowners some kind of premium to recognise the fact that their land is being compulsorily acquired. That is contrary to the principles set out in (most of) the legislation, and by the courts, but on that aspect of the matter it may be that the pass has been sold. Certainly rule 1 is out of kilter with later provision.

17.31 In any event, any such provision is a matter of policy. And, as we have already pointed out, such payments could well be seen as some recompense for the interference with the landowner's rights under Article 8 of the Convention. We do not consider that the Convention requires any such payments to be made, but there is no reason why Parliament should not go further than simple implementation of the UK's obligations under the Convention.

17.32 It would, however, be sensible, in the interests of having an easily understood system, to avoid creating a plethora of different kinds of additional payments. As set out in the 1973 Act, home loss payments and farm loss payments are calculated on different bases. It may well be that that is justified by the differing conditions of homes and farms.

17.33 Nevertheless, we would be minded to recommend a single payment for home loss and a single payment for agricultural loss, with whatever features attract support from consultees. That would, in our view, contribute to the transparency and clarity which we hope will be a feature of the new organisation of compensation which we envisage. We propose that:

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

[43] 2004 c. 5.

PART 4: RESOLUTION OF DISPUTES; CRICHEL DOWN RULES; MISCELLANEOUS MATTERS

Chapter 18 Process for determining compensation

Introduction

18.1 The vast majority of cases involving questions of disputed compensation for compulsory purchase are settled by agreement by parties without a reference to a tribunal.[1] Usually, a surveyor instructed by the claimant and a district valuer on behalf of the acquiring authority,[2] enter into discussions and agree an appropriate figure. The LTS decides the remaining cases where disputed compensation cannot be resolved by agreement. Information supplied by the LTS shows that it issues no more than one or two disputed compulsory purchase compensation decisions each year.

Background to setting up LTS

18.2 The 1845 Act provided for various methods of determining compensation disputes, including by arbitration if agreed by the parties,[3] by the sheriff for disputes not exceeding £50[4] and by a jury for claims above £50.[5] With a view to reducing payments which were perceived to be too generous to claimants, the 1919 Act provided for disputed claims to be determined by official arbiters with valuation expertise.[6]

18.3 However, over the following years planning changes led to legal complexity and there were sometimes issues in relation to transparency and consistency in the valuation process. Therefore the 1949 Act was enacted to introduce legal expertise into the decision process, alongside the valuation expertise, and to overcome these issues. The 1949 Act was brought into force in 1950 in relation to the Lands Tribunal for England and Wales, but not at that time in relation to the LTS, due to the low number of Scottish instances. The LTS was established with effect from 1 March 1971[7] following the enactment of the Conveyancing and Feudal Reform (Scotland) Act 1970[8] which required the appointment of a body to deal with certain land obligations.[9]

18.4 As a result of the establishment of the LTS, many of the provisions contained in the 1845 Act regarding the settlement of disputes by reference to arbitration and juries, are redundant. We would be surprised if there are any modern cases which use the 1845 Act in

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[1] Although we have no figures for Scotland, a report in 1997 by the City University, commissioned by the Department of the Environment, found that less than 1% of cases were referred to, and only 0.4% were determined by, the Lands Tribunal.
[2] The district valuer is from DVS, the property arm of the Valuation Office Agency, an executive agency of HM Revenue & Customs.
[3] 1845 Act, s 20. Ss 24-35 contain the procedural provisions relating to arbitration under the Act.
[4] See above, s 21. S 22 describes the method of settling disputes before the sheriff.
[5] See above, s 36. Ss 37-49 contain the procedural provisions relating to determination of compensation by jury under the Act.
[6] 1919 Act, s 2.
[7] By the Lands Tribunal Act 1949 (Appointed Day) (Scotland) Order 1971 (SI 1971/215).
[8] 1970 c. 35.
[9] See Andrew Todd and Robbie Wishart, *The Lands Tribunal for Scotland: Law and Practice* (2012) paras 1-23 to 1-29 for a useful summary on the position since 1 March 1971.

this regard. For this reason, we intend that these provisions will be repealed, by our proposed new statute. Accordingly, we propose that:

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

18.5 In relation to making a claim for disputed compensation, the current rules are the Lands Tribunal for Scotland Rules 2003[10] ("the 2003 Rules") and the Lands Tribunal for Scotland (Amendment) (Fees) Rules 1996[11] ("the 1996 Fees Rules").

Constitution and procedure of LTS[12]

18.6 The LTS is constituted under the 1949 Act and is subject to the Tribunals and Inquiries Act 1992.[13] Paragraph 18.10, below, sets out changes to be made by the Tribunals (Scotland) Act 2014.[14] The LTS currently consists of a legally qualified President and another legally qualified member, along with two further members who are surveyors experienced in valuation matters, who all bring their particular expertise to cases before the Tribunal. It operates in a similar way to a civil court.[15] For cases involving legal issues, the LTS usually sits with two members, one legal and the other a surveyor, although simple cases can be decided by one member, and very complex cases can involve additional members. In a case where several notices to treat have been served, the acquiring authority can require that the disputed claims of the persons entitled to the relevant interests shall, where practicable, be consolidated and determined by the same member/s of the Tribunal, with the value of each interest being separately assessed.[16]

18.7 The LTS must sit in public[17] and deliver a reasoned opinion.[18] Although LTS hearings usually take place in the LTS office in Edinburgh, it has confirmed that it is possible for hearings to take place elsewhere. We understand that this rarely happens in practice, unlike planning inquiries which usually take place where the relevant land is located. The LTS publishes formal judgments,[19] which can help to produce clarity on issues of legal uncertainty. Although neither previous valuation decisions,[20] nor previous legal decisions,[21] are binding precedents for future cases, the body of case law produced by the LTS is regarded as very persuasive and can assist parties, and their advisors, in dealing with future

[10] SSI 2003/452, in particular Parts II and V, and Form 1 of Sch 2.
[11] SI 1996/519.
[12] The website for the LTS can be accessed at http://www.lands-tribunal-scotland.org.uk/.
[13] 1992 c. 53.
[14] 2014 asp 10.
[15] However, see Andrew Todd and Robbie Wishart, *The Lands Tribunal for Scotland: Law and Practice* (2012) para 1-39, for confirmation that disputes about ownership or boundaries are dealt with within the existing court system, and not by the LTS.
[16] 1963 Act, s 10.
[17] See above, s 9(2). However under rule 26 of the 2003 Rules, it can dispose of a case without a hearing, with the consent of all interested parties.
[18] Tribunals and Inquiries Act 1992, s 10(1) and Sch 1.
[19] All listed on the LTS website – see link at fn 12 above.
[20] Elliott, QC, "*Lands Tribunal Jurisdiction and Procedure"* 1977.
[21] *West Midlands Baptist (Trust) Association Inc. v Birmingham City Council* [1968] 1 All ER 205, Salmon LJ at 213.

disputes. A decision of the LTS may be appealed to the Court of Session within 42 days of it being intimated, on a point of law only.[22]

18.8 The LTS has considerable flexibility in the procedure it can use to deal with cases[23] and its jurisdiction can be exercised by any one or more of its members.[24] Therefore, it can deal with straightforward cases quickly and simply. Legal aid is available for proceedings before the LTS.[25] Counsel's fees are recoverable if specific sanction is granted by the LTS.[26]

18.9 Although the majority of cases are resolved without a reference to the LTS, it is believed, by the LTS and some members of our Advisory Group, that this is so because parties are aware that their case is "in the shadow of the Tribunal". The uncertain outcome of tribunal proceedings makes parties more willing to seek to compromise. This tendency is not unique to proceedings before the LTS. It is common for cases to be settled "at the door of the court" across a wide range of areas of dispute. It is generally considered that settling is a desirable outcome, even if a case is compromised in some way, as it avoids the parties incurring the expense of a contested hearing, particularly if settlement is achieved before they incur the expense of a contested hearing. Disputes which do reach the LTS rarely relate only to issues about quantum (i.e. quantifying the amount that a particular interest is worth) but usually also involve a disagreement about the basis upon which compensation should be assessed.

Future change under the Tribunals (Scotland) Act 2014[27]

18.10 Under the Tribunals (Scotland) Act 2014, which is not yet fully in force,[28] the LTS will become the Lands Chamber in the First-tier Tribunal for Scotland, on a date yet to be specified.

Perceived problems with LTS

General

18.11 Some criticisms of the LTS were raised in the Murning Review. RICSS has referred to concern amongst both their members and claimants that the process to obtain compensation takes too long and that it is expensive and should be more accessible. Some of the recommendations in the Murning Review may have been superseded by subsequent changes (for example, by the 2003 Rules, which contain provisions to allow the LTS flexibility in how it deals with cases). However some criticisms were repeated at the conference of the SCPA in June 2014 ("the 2014 conference"). We now look at each criticism in turn.

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[22] Tribunals and Inquiries Act 1992, s 11(7)(a)–(d) and Sch I, and the Rules of the Court of Session 2004, Chapter 41.
[23] 2003 Rules, rule 14 allows the LTS to choose how best to regulate its procedure, unless there is provision or a direction to the contrary.
[24] 1949 Act, s 3(1).
[25] Legal Aid (Scotland) Act 1986, ss 13-15 and Pt I of Sch 2.
[26] 1963 Act, s 11(4) and the 2003 Rules, rule 28, para 4.
[27] See fn 14.
[28] Tribunals (Scotland) Act 2014 (Commencement No 1) Order 2014 brought s 4 of the 2014 Act into force on 14 July 2014, to the extent necessary to allow the appointment of a President.

Accessibility

18.12 The Murning Review commented on the need for the LTS to review procedures to improve accessibility.[29] RICSS has suggested that accessibility and mechanisms for dealing with cases should be streamlined. Participants at the 2014 conference referred to inaccessibility dissuading claimants, and that proceedings could be intimidating. LTS cases are often presented by a legal representative or surveyor, and separate expert witnesses are called, which may make cases seem inaccessible to a layman. However, in cases without complex legal issues, the 2003 Rules allow flexibility[30] and the LTS does not object to a surveyor both presenting the case and giving evidence. The LTS website[31] provides information for parties, including a detailed Guidance Note for Hearings.[32]

18.13 We accept that any legal process will potentially appear inaccessible to a layman, and that a continuing perception of inaccessibility may contribute to the small number of cases.[33] But, as appears from its website,[34] the LTS is happy for parties to represent themselves:

> "Although the Tribunal works in much the same way as an ordinary civil court, our aim is to be as accessible and user friendly as possible. … It makes sense to get advice in order to check that your case — or defence to a case — is well founded. But once you are satisfied that you have a sound case you can often take it through yourself. … Many cases can be dealt with more simply if parties are able to agree that a full hearing is not needed. In other words, although there are some cases which are best presented with the assistance of lawyers and expert witnesses, there are others which are capable of being resolved more simply. You should not be reluctant to ask for the advice of Tribunal clerks about this."

18.14 We would have expected that a combination of the willingness of the LTS to dispense with formality, and the professional counsel of trained advisors where necessary, would operate to dispel any initial impression on the part of a client that the LTS is "inaccessible". Therefore, it would be helpful if consultees could explain what the difficulty is.

Proceedings are too formal

18.15 It is difficult to find direct evidence of parties having been deterred by formality.[35] The LTS has a wide discretion under the 2003 Rules in relation to how cases are conducted.[36] It can hold case management meetings, which can lead to an agreed approach or early settlement. Informal proceedings can be selected for suitable cases, which, if both parties agree, can proceed without a hearing and on the basis of written pleadings, sometimes with a site visit. Some further changes in LTS practice may be possible, such as using technology to avoid full, formal hearings where everyone requires to be physically present in

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[29] The Murning Review, para 6.11 (v).
[30] 2003 rules, rule 26.
[31] See fn 14.
[32] http://www.lands-tribunal-scotland.org.uk/using/guidance-note-for-hearings.
[33] Guy Roots QC, "*Compensation for Compulsory Purchase: Modernising Compensation*" (2009), Proceedings of the National symposium "Compulsory Purchase: An Appropriate Power for the 21st Century?" 35. At p 40 it is stated, "The Tribunal is more accessible than it is often perceived to be."
[34] See fn 14.
[35] The Murning Review, para 5.5 refers to some respondents suggesting the creation of a "local informal forum" in place of the LTS, and, in para 5.41, a suggestion is made to make the LTS more informal and ready to travel to the locality of a dispute.
[36] 2003 Rules, rule 26.

one venue. However, these changes would not require amending legislation, so are not discussed further.

Proceedings take too long

18.16 RICSS say that it is the experience of both their members and claimants that the whole CPO process takes too long, and that many surveyors find the mechanisms employed by the LTS to be cumbersome, adding to the slowness in the system. The Murning Review suggested that procedures should be reviewed with a view to reducing timescales.[37] Some changes to procedures were made in the 2003 Rules. Participants at the 2014 conference referred, in general terms, to cases taking too long. However, we have no specific evidence of this. The LTS takes the view that complex cases necessarily take time but that some straightforward cases can be concluded within six months. It suggests that many cases proceed with little delay, with only very complex cases (usually involving CAADs or planning assumptions) taking longer.

Proceedings are too expensive

18.17 RICSS have stated that in many cases the process at the LTS becomes extremely expensive and therefore is a barrier to making an application. Indeed, at the 2014 conference, concerns were expressed about costs being a huge barrier and, in some cases, amounting to six-figure sums. In terms of the expense of raising and conducting a LTS action, the level of fees, set out in the 1996 Fees Order, seems to compare favourably with the fees for other civil court cases in the Court of Session and sheriff court.[38] The maximum hearing fee is capped at £5,000. It has been suggested by some in our Advisory Group that alternative dispute resolution ("ADR") would be cheaper. We have not found published figures for ADR cases in compulsory purchase cases, but disputes involving complex legal or planning issues will require suitable experts to be instructed and paid for. One particular concern expressed in relation to expense is that claimants are reluctant to apply to the LTS because they may be found responsible for all expenses, if unsuccessful.[39] We ask the question:

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

Current compensation claims decided by LTS

18.18 At present the following compensation claims are decided by the LTS:-

- Disputed compensation where land is authorised to be compulsorily purchased;[40]
- Apportionment of rent payable under a lease where part of the land which is being compulsorily purchased is subject to the lease but the lease also comprises land not

[37] At para 6.4.
[38] For the Court of Session, see the Court of Session etc. Fees Amendment Order 2012 (2012/290), Sch 3, and for the sheriff court, see the Sheriff Court Fees Amendment Order 2012 (2012/293), Sch 3.
[39] The Murning Review, para 6.5. See also the discussion at paras 18.24-18.26 below.
[40] 1963 Act, s 8.

being compulsorily purchased.[41] (This does not apply to a short tenancy, where a dispute is currently determined by the sheriff under the 1845 Act.[42] See paragraph 18.19.);

- Disputed compensation under the Land Clauses Acts where there is injurious affection in relation to any land;[43]

- Disputed compensation for depreciation caused by use of public works, under Part 1 of the 1973 Act;[44]

- Disputes about other payments under the 1973 Act, such as disturbance and farm loss payments;[45]

- Voluntary references under section 1(5) of the 1949 Act where the LTS acts as an arbiter to determine the price where land is being acquired by negotiation.

18.19 In relation to the second bullet point above, it seems preferable for disputes about short tenancies in compulsory purchase situations to be dealt with by the LTS, rather than by the sheriff court, as at present, as the LTS deals with most other compulsory purchase cases. Therefore we propose that:

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to the tenancy should be referred to the LTS rather than the sheriff court.

18.20 The categories of claimants eligible to claim compensation are dealt with in Chapter 7.

Time limits to claim compensation

18.21 In the case of service, or constructive service, of a notice to treat, or a notice of claim, no application for compensation can be made until after 30 days.[46] For GVDs, at the end of the period specified, the general statutory provisions relating to compensation apply as if, on the date on which the GVD was made, a notice to treat had been served on every person entitled to notice. Therefore no application for compensation can be made until after 30 days from that date.

18.22 However it is less clear in what circumstances the right to make a claim to the LTS prescribes[47] after a period of time. There is a six-year time limit to refer disputed compensation to the LTS following a GVD, running from the date at which the person claiming compensation (or the person from whom he derives title) first knew, or could reasonably have been expected to have known, of the vesting of the interest by GVD.[48] It is

[41] See fn 40 above.
[42] 1845 Act, s 114.
[43] 1949 Act, s 1(3)(b).
[44] 1973 Act, s 14. This subject matter is not within the scope of this Discussion Paper.
[45] Above, ss 32(9) and 35(4).
[46] 2003 Rules, rule 8.
[47] If the right "prescribes" it becomes time-barred and a claim can no longer be enforced. Any future payment would only be paid by agreement and not by entitlement.
[48] 1997 Act, Sch 15, para 36.

not clear if this means the date that the notice of vesting was sent out, or the date that the land vested, which will be later. In addition, it has been suggested that it is not clear whether the six-year time limit also applies to a disputed claim for compensation which follows a notice to treat in a non-GVD situation.[49] Therefore we ask the questions:

146. Should it be made clear in the proposed new statute that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

147. Should it be made clear in the proposed new statute that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?

18.23 On occasion, an owner may be served with a GVD, but then be left in possession of the property for a long period, in some cases negotiating about compensation, and unaware that the time limit is expiring.[50] In disturbance cases it might be many years before it is possible to fully quantify a claim for the overall loss. However, at the 2014 conference, it was suggested that in some cases the six-year time limit is too long, and can lead to claimants have to wait excessively long periods to receive compensation. It was suggested that two or three years would be more appropriate. In certain cases, the LTS could be given a discretion to extend the deadline for raising a compensation case, where failure to do so would lead to injustice. Another possible solution would be to have different time limits for considering: (a) the value of the land, and (b) the value of compensation for disturbance. Therefore we ask the questions:

148. What, if any, changes should be made to the time limit to claim compensation?

149. Should the LTS be given discretion to extend the time limit in some circumstances?

Expenses awarded in LTS cases

18.24 In compulsory purchase cases before the LTS, the current position is that expenses usually follow success. Successful claimants will usually receive their expenses in addition to the compensation due to them.[51] Counsel's fees are recoverable if specific sanction is obtained from the LTS.[52] In addition professional fees incurred during the Tribunal process can be recovered if they are reasonable. For example, in *Downsworth v Manchester City Council,*[53] it was confirmed that only professional fees which were incurred reasonably in negotiating settlement, may be recovered. In some cases, management time spent by a

[49] Rowan Robinson & Farquharson-Black, para 3-28. By contrast, in *Hillingdon London Borough Council v ARC Ltd* [1998] RVR 242, the Lands Tribunal for England and Wales held that the six year limitation period in s 9(1) of the Limitation Act 1980 applied, following service of a notice to treat and entering on the land.
[50] See *Smith and Waverley Tailoring Co v Edinburgh District Council* 1976 SLT (Lands Tr) 9, where the LTS questioned this time limit in relation to claiming compensation.
[51] 1963 Act, s 11, which supersedes the 1845 Act s 50 and 51. The 1845 Act, s 52, provides for recovery of expenses by poinding and sale.
[52] 1963 Act, s 11(4) and the 2003 Rules, rule 28, para 4.
[53] [2013] UKUT 142 (LC).

claimant dealing with a compensation claim, incurred before a case is raised, may be recoverable.[54]

18.25 Notwithstanding the above, if there is a formal offer tendered in the LTS process, a claimant will usually be awarded expenses only up to the date the offer is tendered. After that point the claimant is at risk of having to pay both his or her own expenses and those of the acquiring authority, if the eventual award is less than the offer which has been made. Although section 11 of the 1963 Act allows the LTS some discretion not to make an adverse award against the claimant in this situation, it can only do so if "for special reasons it thinks proper not to do so". In the *Purfleet*[55] case Potter LJ held that it would rarely be appropriate to make an adverse costs award against a claimant, even if the claim had been "exaggerated" as long as it was based on the valuation of an expert.

18.26 On one view, an individual facing the compulsory loss of his or her property should be entitled to have the amount of any compensation fully examined and determined by the LTS. If the offer to the claimant was only very slightly higher than the eventual award, section 11 might operate harshly.[56] However, an alternative view is that if the presumption were changed so that only a claimant who had been vexatious or unreasonable would be liable to an award of expenses, this might result in claimants taking a less reasonable approach to settlement, generating uncertainty and increasing the number of disputed cases. On balance, it may be preferable instead to extend the discretion of the LTS. Therefore we ask the question:

150. Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?

Protective Expenses Order ("PEO")

18.27 It may be appropriate in certain cases for a claimant to be awarded some type of protective order, to limit, at an early stage, the level of any LTS case expenses that he or she would have to bear. At the 2014 conference it was suggested that some form of PEO or "expenses undertaking" might help to resolve inequality of arms issues, and any sense of injustice, felt by claimants in having to take part in a dispute that was not of their choosing. Provision could be to allow PEOs which would be similar in effect to those set out in the Court of Session Rules – Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Review).[57] There have been some concerns that applications for such orders would have to be carefully scrutinised, so ensure that they do not encourage frivolous claims. We ask the question:

151. Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?

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[54] In *Willow Tech v Neath Port Talbot Ltd* 2010, [2010] UKUT 44 (LC) £750 was awarded for dealing with notices to treat and entry.
[55] In *Purfleet Farms v Secretary of State for Transport, Local Government and the Regions* [2002] 1 and CR 20.
[56] See Guy Roots QC: *Compensation for Compulsory Purchase, Modernising Compensation* (1999). See also DETR Review at page 35 and Murning Review at 5.8 and 6.7 and the CLA Report.
[57] Rules of the Court of Session 1994, as amended by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SI 2013/81).

Advance payments

Prescribed form

18.28 Under section 48 of the 1973 Act, claimants who have lost possession of their property on compulsory purchase are entitled to an advance payment, amounting to 90 per cent of the level of compensation as either agreed by the parties or as estimated by the acquiring authority.[58] A claim for an advance payment must be made in writing to the acquiring authority and give sufficient detail of the claimant's interest in the land. Any advance payment agreed by parties should be made within three months of the date of request, or the date of possession where those three months end before the date on which the acquiring authority take possession.[59] The acquiring authority must arrange for notice of the advance payment to be registered on the Register of Sasines or the Land Register.[60]

18.29 There is no prescribed form for the claim. It has been suggested that a prescribed form would "balance the needs of the authority for reasonable information with the level of information a claimant can practically be expected to provide in the early stages of a claim".[61] A prescribed form may encourage quicker and more effective negotiations between the parties. We therefore propose that:

152. There should be a prescribed form to claim an advance payment.

Advance payment before possession

18.30 An advance payment does not affect a claimant's right to apply to the LTS. Although the right to an advance payment arises at the point that the acquiring authority take possession of the land,[62] claimants may incur significant expenditure some time before a request is made or the acquiring authority takes possession of the land. For example, where a business relocates due to the existence of a CPO, it may incur significant up-front expenditure. Currently, the business requires to bear these costs initially, and seek to recover them later, when possession is taken. This may cause difficulties, particularly in adverse economic circumstances, when it may be hard to borrow funds to cover relocation costs. Homeowners may also experience difficulties in relocating before the acquiring authority takes possession.

18.31 A discretionary power to make an advance payment before possession is taken by the acquiring authority, might alleviate this burden on claimants. However, a balance needs to be struck, as acquiring authorities are paying out public funds. It is reasonable that an authority should only pay out compensation when they are certain that they will receive good title.[63] However, in the event of overpayment to a claimant, section 48(5) of the 1973 Act currently requires the claimant to repay it. We ask the question:

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[58] S 48(3). Although different rules apply where the property is the subject of a heritable security (s 48(6)) See below.
[59] S 48(4).
[60] S 48(7).
[61] Memorandum submitted by the Compulsory Purchase Association to the Public Bill Committee on the Growth and Infrastructure Bill, November 2012, Appendix 4, para 6.
[62] S 48(1).
[63] Although, if our proposals in Chapter 8 are implemented, a conveyance in implementation of a CPO will always provide good, unchallengeable title.

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

Fixing and enforcing

18.32 Concerns have been raised by several bodies, as well as some members of our Advisory Group, about the operation of advance payments in practice. Where an acquiring authority refuse to reply to a request for an advance payment, or do not pay within the three month timeframe, there seems to be no effective mechanism for the claimant to enforce payment. The claimant's only option is to raise judicial review proceedings, which would probably delay the advance payment even further.

18.33 The Law Commission considered judicial review to be "unduly elaborate for what is usually a local issue, requiring a local, quick and economical remedy" and accordingly recommended that the courts should have a limited statutory power of enforcement where the acquiring authority have failed to make a proper estimate of the advance payment within the required time or has made one which is manifestly too low.[64] In Scotland, it may be appropriate to give the LTS an extended role in determining advance payments by allowing it to substitute its own valuation of the advance payment. We ask the question:

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

Interest on advance payment

18.34 Section 48A of the 1973 Act provides for annual payments of accrued interest on outstanding sums, but only where the interest is in excess of £1,000. It has been suggested that a higher rate of interest should be payable where an acquiring authority delay making an advanced payment.[65] RICSS have suggested to us that statutory interest should be due on unpaid advance payments, on an annual and compound basis, even if the total sum is under £1,000. At present, there may be no real incentive for the acquiring authority to pay within a reasonable time. We accordingly ask the question:

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

Advance payments and securities

18.35 Section 48(6) of the 1973 Act provides that no advance payment is to be made in relation to land which is subject to a heritable security, the principal of which exceeds 90 per cent of the estimated compensation. In such a case, the advance payment is to be reduced by such sum as the acquiring authority consider necessary to secure the release of the interest of the heritable creditor. In relation to the English 1973 Act, UK Ministers proposed in 2001 that an acquiring authority, with the consent of both the mortgagee and the mortgagor, should be able to make an advance payment of compensation to the mortgagee irrespective of whether or not the mortgage exceeds 90 per cent of the value of the land as

[64] See Law Com 286, para 10.1-10.9 and Rule 19.
[65] See e.g. CLA Report, para 2.3.3. For a comparison see Expropriation Act 1972, Ch 6, s 16 (Sweden).

assessed by the acquiring authority.[66] This recommendation was implemented by amending section 52 of the English 1973 Act.[67]

18.36 The law in Scotland has not been changed. Comments by RICSS, and by some members of our Advisory Group, suggest that difficulties have been encountered in practice in a significant number of cases. It has been suggested that section 48(6) of the 1973 Act has either been ignored, or applied inconsistently, by acquiring authorities. It seems sensible that, where all parties agree, it should be possible for an advance payment to be paid to a landowner who owns a property burdened with a heritable security. The advance payment would be reduced by such sum as the acquiring authority consider necessary to discharge the security. There seems no valid reason why no advance payment is possible where the principal of the security exceeds 90 per cent of the valuation. Therefore, we propose that:

156. It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.

Interest on awards of compensation made by LTS

18.37 Where an acquiring authority take possession of land before paying compensation, interest is payable on the compensation from the date of possession until payment.[68] Similarly, where a GVD is used to vest land prior to payment of compensation, interest is payable on the compensation from the date of vesting until payment.[69]

18.38 However, the LTS has no general power to award interest in respect of a period before the date of its award unless there is specific statutory power to do so.[70] It can determine that a sum awarded as compensation carries interest from the date of the award at the same rate as would be applicable for a decree in the Court of Session.[71] The rate of judicial interest to be paid on awards made by the LTS is prescribed by regulations made under section 40 of the 1963 Act,[72] and is calculated at 0.5 per cent below base rate, on a simple rather than compound interest basis. It was suggested by the Law Commission[73] that there should continue to be a fixed rate of interest in most cases, to provide certainty, but that it should be possible to increase the rate if there has been unreasonable conduct. RICSS have suggested to us that there should always be a positive figure awarded for interest payments, and have proposed 3 per cent above base rate. We ask the question:

157. Should the LTS have discretion to:

(a) provide for interest from a date earlier than its award, and

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[66] DTLR Report, para 4.19.
[67] By the Planning and Compulsory Purchase Act 2004, s 104(3).
[68] 1947 Act, s 1(3), Sch 2, para 3(1), applying the 1845 Act, s 84.
[69] 1997 Act, s 195(1) and Sch 15, para 30.
[70] In *Hobbs (Quarries) Ltd v Somerset Country Council* (1975) 30 P and CR 286, it was held that interest could not be awarded as the award was limited to compensate the claimants as at the date of the revocation and discontinuance orders, and such compensation was limited to the loss arising from the service of the notice and order.
[71] Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 18.
[72] Acquisition of Land (Rate of Interest after Entry) (Scotland) Regulations 1995 (SI 1995/2791).
[73] Law Com 286, paras 10.22–10.28.

(b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?

Alternative methods to assess compensation – Alternative Dispute Resolution ("ADR")

General

18.39 It has been suggested by some in our Advisory Group that greater use should be made by parties of ADR either in addition to the existing right to apply to the LTS, or possibly in place of that right. The Scottish Government recently announced that the default position for all new Scottish Government contracts is to refer disputes to arbitration through the Scottish Arbitration Centre.[74] The UK Government has made a Dispute Resolution Commitment aimed at encouraging the increased use of flexible, creative and constructive approaches to dispute resolution.[75] Furthermore, ADR is encouraged in the Upper Tribunal (Lands Chamber) in England and Wales.[76]

18.40 Specific provision for ADR is not made within the 2003 Rules, although the LTS has general discretion in relation to procedure. This flexibility could be used to assist ADR, for example by sisting (suspending) a case while ADR is attempted. In the LTS General Guidance Note[77] claimants are advised to consider compromise and mediation, and referred to some organisations which can provide ADR. It also seems likely that, in some of the disputes settled by agreement, parties have used ADR, although we have no evidence of specific figures. One feature of most forms of ADR is that the process is confidential, which may lead to inconsistency in decisions and a lack of transparency in the process.

Different types of ADR

18.41 There are various possible ADR methods of assessing compensation, and the following seem most relevant to compulsory purchase.

(a) Mediation

18.42 The parties are free to try mediation, with a view to agreeing compensation.[78] At the 2014 conference it was suggested that mediation can be helpful in allowing early resolution of some issues in dispute. It can also provide the first opportunity for claimants to set out directly to the acquiring authority the extent of the negative impact felt by them as a result of the compulsory purchase process. This may help to reduce some negative feelings about their treatment in the process and assist settlement.

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[74] See http://www.journalonline.co.uk/News/1013899.aspx, 14 April 2014 and the Scottish Arbitration Centre's website at www.scottisharbitrationcentre.org.

[75] See the website link: http://www.justice.gov.uk/courts/mediation/dispute-resolution-commitment.

[76] The procedures set out in the Tribunals Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 and the Lands Chamber of the Upper Tribunal Practice Directions 2010, encourage ADR by, for example, allowing for proceedings to be suspended to allow parties to try to settle by ADR, and allowing any unreasonable refusal to consider ADR to be taken into account in relation to awards of costs.

[77] http://www.lands-tribunal-scotland.org.uk/using/guidance-note-for-hearings, para 15 "Compromise and mediation (ADR)".

[78] See Craig Howell Williams QC *Mediation and Early Evaluation in the Lands Chamber: A Timely Reminder* (2009).

18.43 Mediation is not legally binding. Some have suggested that it should be compulsory and be in place of the right to apply for determination by the LTS. However, concern has also been expressed that if enforced mediation, or any other ADR procedure, were introduced, in place of the current right to apply to the LTS, this may breach Article 6 of the Convention.[79] However, the courts may find that the right to apply to the LTS has been waived, so that there is no breach.[80]

(b) Arbitration

18.44 The parties are free to choose arbitration, in addition to their existing right to apply to the LTS.[81] Some parties may agree, by contract, to restrict their right to apply to the LTS, by waiving their right to determination by the LTS and referring the case to arbitration. Some members of our Advisory Group are keen to promote arbitration as a cheaper and quicker alternative to the LTS.

18.45 It is difficult to quantify the likely costs of arbitration, as these will vary on a case by case basis. Fees will be set by the arbiter at whatever level the market can bear, so it may be difficult for parties to know if they are receiving good value for money. In a recent lecture, Lord Hamilton stated:

> "In arbitration, the parties will be responsible not only for the costs of their representation, but also for the fees and charges of the arbitrator (or arbitrators), of any necessary support services (such as a clerk and for hearings accommodation), and of any arbitral institution through whose offices the arbitration has been established. These costs may be substantial, particularly in international commercial arbitrations, though there is reason to believe that they will be significantly lower in Scotland than in some other jurisdictions, such as England & Wales."[82]

18.46 We have no evidence of the likely costs of arbitration, and would welcome details involving recent cases. We note that the maximum tribunal fee for a LTS hearing is £5,000,[83] and it would be useful to have comparable figures for lengthy arbitrations in complex matters.

18.47 In relation to speed of arbitrations, it is not universally accepted that they will conclude quickly. For example, Lord Hamilton stated "Arbitrations have not always been expeditious."[84] We would welcome evidence in relation to the speed of LTS hearings and comparable arbitrations.

18.48 Decisions made by an arbiter will usually be made in private and not published. Concerns have been expressed that a fluctuating group of arbiters may not build up the level of expertise currently found in the LTS.

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[79] See S Shipman, "*Waiver: Canute against the tide?*" 2013, CJQ 32(4), pp 470-492.
[80] See fn above.
[81] 1845 Act, s 20.
[82] See the Rt Hon Lord Hamilton *Arbitration in Scotland: its Nature and its Future,* in the Journal of the Law Society of Scotland, June 2014, p 15.
[83] 1996 Fees Order.
[84] See previous fn.

(c) Early neutral evaluation[85] ("ENE")

18.49 Under this approach, the parties can agree to employ a suitable expert (for example, a lawyer or surveyor) to adopt an inquisitorial approach, and to evaluate the likely outcome of the case at an early stage, or to consider the respective strengths and weaknesses of the parties, and then advise on how best to conduct the case quickly and economically. Parties are assisted in judging the strength of their case and whether to then settle or proceed. We would welcome evidence of ENE being used in compulsory purchase cases.

Conclusion

18.50 There are various types of ADR which could be used by parties in compulsory purchase cases, and which may have advantages in deciding questions of disputed compensation. Accordingly we ask the questions:

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

[85] See Craig Howell Williams QC *Mediation and Early Evaluation in the Lands Chamber: A Timely Reminder* (2009).

Chapter 19 Crichel Down Rules

Introduction

19.1 If an acquiring authority find that they no longer require land which they have compulsorily acquired, there is a question as to whether, and on what terms, they should be obliged to offer it back to the original owner.

Background

Legislation

19.2 Section 121 of the 1845 Act governs situations in which land which has been compulsorily purchased is later deemed to be surplus to requirements. The section provides that "before the promoters of the undertaking dispose of any such superfluous lands they shall … first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed".

19.3 However, the practical application of section 121 is limited in two ways by subsequent legislation. Firstly, Schedule 2 to the 1947 Act excludes the operation of sections 120 to 125[1] of the 1845 Act in relation to CPOs obtained under the 1947 Act. Secondly, with the consent of a Minister,[2] local authorities acquire the power, under section 73 of the Local Government (Scotland) Act 1973, to transfer compulsorily purchased land from one department to another in order to serve another function. This will limit the number of cases in which local authorities are compelled to offer back land to a former owner.

Crichel Down Inquiry

19.4 In 1954 there was a Parliamentary inquiry in relation to some land at Crichel Down, in Dorset. The land had been acquired compulsorily in 1938 for use as a bombing range, and the owners had been promised a right of pre-emption when the land was no longer required for military purposes. However, it had been transferred to the Ministry of Agriculture, whose use of it put its price beyond the means of the original owner. One result of the inquiry was the issuing of the Crichel Down Rules[3] ("the Rules"), which give former owners the opportunity to repurchase the land before the disposing department[4] seek to dispose of it on the open market. The Rules operate in the absence of a statutory right of pre-emption in respect of land compulsorily purchased. It has been held that a former owner of land[5] should, as a matter of "common fairness" have a preferential claim to buy back the land which he has been compelled to sell.[6]

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[1] These provisions relate to the "Sale of superfluous lands".
[2] S 23(1)(b) of the Town and Country Planning (Scotland) Act 1959.
[3] Scottish Government Planning Circular No 5/2011, *Disposal of Surplus Government Land – The Crichel Down Rules.* See http://www.scotland.gov.uk/Resource/Doc/360205/0121755.pdf.
[4] In the Rules acquiring authorities are referred to as "disposing departments".
[5] Para 2 of the Rules refers to land and property.
[6] *R v Commission for the New Towns*, *ex parte Tomkins* (1988) 59 P & CR 57 at 66 per Bingham LJ.

19.5 The Rules are constituted in a policy circular and are not intended to have statutory effect.[7] Due to their advisory status they may be vulnerable to inconsistent application. In the DETR Report widespread failure to apply the Rules was demonstrated.[8] The report found that there was "wide practitioner and some organisation support for the encapsulation of the offer-back principle in primary legislation".[9] The then UK Government proposed that the Rules should be placed on a statutory footing in England and Wales.[10] At the conference of the SCPA in June 2014, several delegates supported this recommendation for Scotland. Accordingly, we ask the question:

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

The Rules

Scope

19.6 Under the Rules, a general obligation to offer back applies to land in Scotland,[11] which has been acquired by compulsion[12] or under the blight provisions.[13] In addition, land which was disposed of voluntarily where there existed a "threat of compulsion",[14] is also subject to this general obligation. A threat of compulsion is made out in the case of a voluntary sale if a power to acquire the land existed at the time of the disposition, regardless of whether or not a CPO was in place.[15]

19.7 Paragraphs 4 and 5[16] establish the bodies to which the Rules apply:

- All UK Government Departments, Scottish Government Directorates, executive agencies and non-departmental public bodies (NDPBs) in Scotland and other organisations which are subject to a power of direction by a Minister, are **expected to apply** the Rules;[17]

- Local authorities and other statutory bodies, not subject to a Ministerial power of direction, but who have powers of compulsory purchase or who hold land which has been compulsorily purchased, are **expected to apply** the Rules;[18]

[7] *Findlay's Executor v. West Lothian Council* [2006] CSOH 188, para [30], per Lord Hodge.
[8] Department of the Environment, Transport and the Regions, *The Operation of the Crichel Down Rules,* (2000).
[9] See "*The operation of the Crichel Down rules: research report*," JPL 2000, Nov, 1111-1113.
[10] DTLR Report, para 5.2.
[11] Para 2 of the Rules.
[12] Above, at para 6.
[13] Above, at para 7.
[14] Above, at para 6.
[15] *J D P Investments Ltd v. Strathclyde Regional Council* 1997 SLT 408.
[16] Departments must also refer, when disposing surplus land, to the Scottish Public Finance Manual or, where appropriate, the NHS Property Transactions Handbook.
[17] See para 3 of the Appendix to the Rules.
[18] See para 4 of the Appendix.

- Partnership projects between public and private sector organisations are **not subject** to the Rules.[19] However, such departments are advised to seek legal advice regarding the application of the Rules,[20] and

- Bodies in the private sector to which public land holdings have been transferred, are **recommended to apply** the Rules.[21] (emphasis added)

19.8 The exemption of private sector organisations can lead to significant inequities in practice. In many cases, a public sector organisation with powers of compulsory acquisition may enter into a partnership project with a private sector organisation, known as a "back-to-back" agreement.[22] In terms of the contract between the acquiring authority and the private sector organisation, the latter is likely to have full responsibility for the future operation, repair and maintenance of the land for many years to come. Most of these organisations will be reluctant to dispose of the land during the term of the contract, even where the land appears to be surplus to requirements. As a result, it is possible that there may be some prejudice to former owners by the current formulation of the Rules in respect of land transferred to the private sector.

19.9 Accordingly, there may be merit in providing that the Rules should be mandatory with regard to all land which is acquired by, or under the threat of, compulsion, including land which is then transferred from the acquiring authority to a private sector body. Such an approach, which would undoubtedly introduce a greater degree of consistency in the application of the Rules, has been advocated by the UK Government in the past.[23] We ask the question:

161. Should the Rules apply to all land acquired by, or under threat of, compulsion?

Material change

19.10 At present, former owners are invited to repurchase surplus land that was compulsorily acquired from them, provided that the land has not materially changed in character since being acquired. The Rules list examples which might result in the land being regarded as having materially changed, such as by the building of dwellings or offices, afforestation, the completion of substantial works to existing property, substantial demolition or site clearance.[24]

19.11 There may be scope for extending the Rules to apply in some situations where there has been a material change in the character of the land. Any such material change would be reflected in the market value assessment of the land. However, as the then UK Government noted,[25] such widening of the Rules might lead to an increased administrative burden by extending the requirement to find, contact and negotiate with additional former owners. Therefore, we ask the question:

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[19] Para 5 of the Rules.
[20] Appendix to the Rules, para 5.
[21] Para 4 of the Rules.
[22] See para 20.5
[23] See "*Proposed changes to the Crichel Down Rules: consultation paper*" JPL 2003, Dec, 1522-1527.
[24] Para 10 of the Rules.
[25] See DTLR Report, para 5.3.

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

Interests qualifying for offer back

19.12 The acquiring authority owe an obligation to offer land back to the former owner and, in the event of the former owner's death, any successor in whom the property would have vested, had the land not been compulsorily purchased.[26] If the former owner does not wish to buy back the land, the Rules confer a discretionary power on the disposing department to offer the heritable interest to a former leaseholder who, at the time of acquisition, enjoyed a long lease and more than 21 years of the term would have remained unexpired at the time of disposal. We ask the question:

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?

Length of obligation to offer back

19.13 The usefulness of inviting a former owner to repurchase his or her interest in the land might diminish over time. The former owner of a house may well have become settled in a new house. On the other hand, where the land was used for agricultural purposes, it may be in the interests of that former owner to buy back the land, even after a significant period of time. Therefore, it is necessary to consider the time limits in the current Rules.

19.14 The Rules set out different limit limits for (a) non-agricultural land and (b) agricultural land, as follows:

(a) *Non-agricultural land*

The obligation to offer back lasts for 25 years after the date of acquisition.

(b) *Agricultural land*

(i) If purchased prior to 1 January 1935, the obligation to offer back has prescribed.

(ii) If purchased between 1 January 1935 (inclusive) and 30 October 1992, the land remains subject to the obligation to offer back, in perpetuity.[27]

(iii) If purchased on or after 30 October 1992, the obligation to offer back lasts for 25 years after the date of acquisition.[28]

19.15 There is potential for an administrative burden to arise from these varying time limits and it may be preferable to have one time limit applying to all land acquired compulsorily. Accordingly, we ask the questions:

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[26] Para 12 of the Rules.
[27] "See "*Proposed changes to the Crichel Down Rules: consultation paper*" JPL 2003, Dec, 1522-1527.
[28] The prescription period of 25 years was first introduced with regard to agricultural land under the Scottish Government Planning Circular No 38/1992 for the Disposal of Surplus Government Land, which was published on 30 October 1992.

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

Exceptions to obligation to offer back

19.16 Paragraph 15 of the Rules and the accompanying Appendix,[29] set out seven situations in which a disposing department are entitled to dispose of the land on the open market, without offering the former owner a right of first refusal. These seven exceptions to the obligation to offer back, cover a wide variety of situations, which we do not discuss in detail. We invite consultees to comment on the following:

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

Special procedure where boundaries of agricultural land have been obliterated

19.17 Paragraph 23 of, and Annex 1 to, the Rules make special provision for circumstances in which land is prevented from being sold back as agricultural land in its original parcels, owing to changes to the character of the land caused by obliteration of boundaries. We ask the question:

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

Procedures for disposal -address known

19.18 Once a general obligation to offer back is established, paragraph 18 sets out the procedure for offering back the land to a former owner whose address is known. Former owners have two months in which to intimate their intention to purchase and a further three months to agree terms and price.

19.19 Where the former owner does not wish to buy back the surplus land or where, on the expiry of two months from delivery of an invitation to purchase, there has been no response, the disposing department will proceed to dispose of the land. The former owner will be informed that this step is being taken.

Procedures for disposal - address unknown

19.20 Paragraph 19 sets out steps which the disposing department must take in order to attempt to trace a former owner whose address is unknown.

[29] See the link in fn 3.

Extending time limits

19.21 Research conducted in 2000 highlighted that many practitioners considered the various timescales in the Rules to carry out the process to offer back land, were unrealistic in practice. It was accordingly proposed that that an overall time limit of up to eight months should be allowed for the process.[30] In view of this observation, we ask the question:

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

Valuation date

19.22 Under paragraph 18 of the Appendix to the Rules, the date for valuation is established as the date on which the disposing department receives intimation of the former owner's intention to purchase.

Clawback provisions

19.23 Paragraph 25 of the Rules sets out that disposing departments should obtain planning consent to ascertain the potential for development of the land. If the likelihood of obtaining planning permission is not adequately reflected in the market value assessment, and the planning position cannot reasonably or appropriately be established prior to disposal, the disposing department will include clawback provisions in its terms of sale. These entitle the disposing department to recover additional development value attributable to the returned land, at a later date.

19.24 Clawback provisions are considered to be necessary mechanisms to protect the public purse and are part of wider Government policy that a former owner should not benefit, at the expense of the public, from any uplift in the market value of the surplus land by virtue of exercising his or her right to repurchase. The right of the disposing department to clawback is, to some extent, the corresponding right to that of the landowner to claim compensation for planning permission which is subsequently granted in respect of their land up to 10 years after the compulsory acquisition, contained in section 31 of the 1963 Act. In paragraphs 13.69 to 13.79, above, we discussed that section and asked whether it should be repealed and whether the 10 year time limit is appropriate. We ask the following:

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

Dispute resolution

19.25 Where the former owner is invited to buy back the surplus land, the Rules provide that the asking price will be at market value, as advised by the disposing department's professionally qualified, appointed valuer.[31] However, there may be disagreement about the asking price. If the former owner has any dispute as to the operation of the Rules, the only legal challenge currently available is by judicial review, which might be costly and lead to a long period of legal uncertainty. The delay involved in any such action may also mean that

[30] See DTLR Report, para 5.9.
[31] Para 24 of the Rules.

the former owner misses out on the opportunity to repurchase. It is also possible that disputes will arise which go beyond the issue of the market value of the land in question – for example, whether or not the land has "materially changed". Therefore it seems appropriate to provide for a mechanism for appeal or arbitration.

19.26 The LTS has experience of dealing with a range of issues surrounding compulsory purchase,[32] and therefore we propose that:

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

[32] See Ch 18 above.

Chapter 20 Miscellaneous Issues

Introduction

20.1 In this Chapter we consider a number of issues which do not readily fit into any of the preceding Chapters. We deal with enforcement procedures, compensation for short tenancies, compensation where land is subject to a heritable security, taxation of compensation for disturbance and some other minor issues.

Enforcement procedures to obtain possession of compulsorily acquired land

General

20.2 Where land is compulsorily acquired and the occupier refuses to leave the property by the end of the period prescribed by the notice of entry, the acquiring authority can act under section 89 of the 1845 Act, which provides:

> "If in any case in which … the owner or occupier of any such lands or any other person, refuse to give up the possession thereof … it shall be lawful for the promoters of the undertaking to apply by petition to the sheriff for possession of the same, and upon such application the sheriff may authorize and order possession of any such lands accordingly."

20.3 This is a general provision which will apply wherever it is incorporated into an enabling piece of legislation. However, a significant number of enabling Acts provide their own statutory enforcement provisions, albeit often similar to section 89. For instance, paragraph 2(3) of Schedule 2 to the Offshore Petroleum Development (Scotland) Act 1975[1] provides:

> "Where the Secretary of State is authorised under this paragraph to enter on and take possession of land, and the owner or occupier of any of that land, or any other person, refuses to give up possession of it, then a copy of the order shall be sufficient warrant for the ejection of the person refusing to give up or hindering possession; and in such a case section 89 of the said Act of 1845 shall not apply."[2]

20.4 Moreover, it appears that acquiring authorities will often simply raise an action for recovery of heritable property using the summary cause procedure, rather than relying on the specific statutory provision. In *Glasgow Airport Limited v Chalk*,[3] the court confirmed that the form of procedure provided by section 89 of the 1845 Act was included in the definition of summary cause in section 35(1) of the Sheriff Courts (Scotland) Act 1971 and did not require

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[1] 1975, c. 8.
[2] See too, New Towns (Scotland) Act 1968 s 22, British Railways Order Confirmation Act 1994 s 22, Land Reform (Scotland) Act 2003 s 57, Housing (Scotland) Act 2006 s 38, Forth Crossing Act 2011 s 39, etc.
[3] *Glasgow Airport Ltd v Chalk*, 1995 SLT 111.

to be pursued as a separate form of action.[4] This suggests that section 89 is redundant in practice. We ask the question:

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

Back-to-back agreement

20.5 It is increasingly common for acquiring authorities to make a CPO on behalf of third parties. The acquiring authority acts as an agent and the third party indemnifies the acquiring authority in respect of the compensation and other costs involved.[5] The acquiring authority will, when they acquire title, simultaneously convey the property to the third party.[6] This is commonly known as a back-to-back agreement. In normal circumstances, the acquiring authority would be able to rely on section 89 of the 1845 Act if there is a difficulty in removing the proprietor. However, it is not clear whether the acquiring authority or the third party would be able to rely on the enforcement procedures under either section 89 or the summary cause procedure after they have conveyed the land. Therefore we propose that:

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

Compensation for short tenancies

Non-agricultural tenancies

20.6 In Chapter 8 we proposed that an acquiring authority should be able to serve a notice to treat (or equivalent) on any tenant, regardless of the length of her or his tenure, and extinguish the tenant's right under the lease in return for compensation.[7] Where the land is subject to a lease which is no longer than a year or which continues from year to year, the acquiring authority will have two options under the current law. They may either persuade the landlord to serve a notice to quit,[8] or serve notice to quit themselves and purchase the landlord's interest. If the latter approach is taken then the lessee will have no entitlement to compensation. Alternatively, the acquiring authority may, and will, where they require early possession, acquire the right of the lessee by entering on the land and extinguishing the lessee's interest, in which case the lessee will be entitled to compensation reflecting the value of the unexpired term of the lease.

20.7 As described in Chapter 8, the effect of compulsory purchase on short tenancies differs depending on whether notice to treat or GVD procedure is used. Where notice to treat procedure is used the tenancy is "simply snuffed out by entry".[9] A GVD, on the other hand, has no effect on a short tenancy. If the acquiring authority require early entry, they will need to serve a notice to treat on the tenant before serving a notice of entry and taking

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[4] We note that the action against Mrs Jaconelli appears to have been raised using the Summary Cause Procedure: *Glasgow City Council v Jaconelli* 2011 Hous. LR 17.
[5] See *Standard Commercial Property Securities Ltd v Glasgow City Council* [2006] UKHL 50.
[6] See CPO Circular, para 35. See also s 189(4) of the 1997 Act which makes express provision for the compulsory acquisition of property for development by a third party.
[7] Paras 8.52–8.54.
[8] Notice to quit: formal notification of the requirement that the tenant must vacate the premises.
[9] *Greenwood Tyre Services Ltd v Manchester Corporation* (1971) 23 P & CR 246 at 250 (concerning the equivalent provision in the 1965 Act).

possession. This is the only situation in which a tenant in a short tenancy will be entitled to a notice to treat; under normal notice to treat procedure a short tenant is not so entitled.[10] However, the service of a notice to treat will not alter the basis of compensation available to a short tenant; this is established in section 114 of the 1845 Act.[11]

Agricultural short tenancies

20.8 Tenancies of agricultural land will often run from year to year and will, therefore, often be "short tenancies".[12] As with other short tenancies, the acquiring authority has two options when compulsorily acquiring such an interest. If the acquiring authority acquire the landlord's interest and serve a notice to quit, or persuade the landlord to do so without acquiring the landlord's interest, then the tenant will be entitled to compensation, as between landlord and tenant, under the Agricultural Holdings (Scotland) Act 1991.[13] The tenant will be entitled to the ordinary period of notice. Where early entry is required, the acquiring authority must serve a notice of entry in order to enter on the land and extinguish the tenant's interest.[14] In this case, the agricultural short tenant will be entitled to compensation under section 114 of the 1845 Act, as described above.

20.9 Upon extinguishment of a short tenancy, there are four heads of compensation to which a tenant is entitled[15] under section 114 of the 1845 Act:[16]

(1) the value of his unexpired term;[17]

(2) any just allowance which ought to be made to him by an incoming tenant;

(3) any loss or injury he may sustain; and

(4) if part only of the land is taken, compensation for damage arising from severance or injurious affection.[18]

20.10 In Chapter 8 we discussed the potential for rationalising the position regarding short tenancies in relation to the current differences between notice to treat and GVD procedure. Harmonising compensation for short tenancies with the rules that apply more generally in relation to the compulsory acquisition of any existing interest, may make the law clearer and more consistent. On the other hand, consultees may consider that a separate system of

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[10] 1947 Act, Sch 2, para 3.
[11] *Smith and Waverley Tailoring Co v Edinburgh District Council (No 2)* 1977 SLT (Lands Tr) 29.
[12] Although "new" agricultural leases granted after 30 November 2003 will have significantly adjusted periods of tacit relocation (Agricultural Holdings (Scotland) Act 2003, ss 4 and 5).
[13] Although see 1973 Act, ss 55 and s 57.
[14] Where a GVD has been used, as noted above, the acquiring authority must first serve a notice to treat followed by a notice of entry before taking possession of the land as a GVD has no effect on a short tenancy (see 1997 Act, Sch 15, para 8).
[15] S 54 of the Agricultural Holdings (Scotland) Act 1991 also provides that the tenant in an agricultural tenancy will be entitled to a "reorganisation payment" which is equal to four times the annual rent of the holding to help in the reorganisation of affairs.
[16] Although a person over the age of 60 who has a short tenancy over business premises which do not exceed a certain prescribed value and who does not wish to relocate the business, is entitled to compensation under s 43 of the 1973 Act on the basis of total extinguishment of the business.
[17] See 20.11, below. Where an interest in an agricultural holding is acquired, s 44(3) of the 1973 Act provides that in making an assessment regarding the value of the unexpired term or interest in the land, no account is to be taken of the consequences of the acquiring authority's scheme on the nature of the interest being extinguished.
[18] See Ch 15 above.

compensation for short tenancies is necessary, particularly as it applies to agricultural land, for instance. We ask the question:

173. Does section 114 of the 1845 Act work satisfactorily?

Value of unexpired term

20.11 In the case of *Greenwood Tyre Services*[19] it was held that the "unexpired term"[20] referred to in section 114, was the period of ten-and-a-half months which would have elapsed from the date when the acquiring authority took possession until a notice to quit deemed to have been served on that date, would have expired. No authority supported the contention that a notice of entry should be treated as a notice to quit.

20.12 However, in *Bishopsgate Space Management*[21] the Lands Tribunal held that, in relation to a claim under section 20 of the 1965 Act (which contains the same heads of claim as those contained in section 114 of the 1845 Act), it had to be assumed as a matter of law that the tenancy would end on the earliest day on which the landlord could bring it to an end.[22] In applying this rule, the Tribunal found that there was no reason to distinguish between a periodic tenancy and a tenancy for a term subject to a break clause. The rule would also seem to apply to the valuation of an unprotected or contracted-out tenancy with a short unexpired term.[23] The Tribunal also held that, for the purposes of assessing any "loss or damage" claimed by the claimant under section 20 of the 1965 Act, no account was to be taken of any possibility which may have existed that the tenancy might have been renewed.

20.13 The approach taken in *Bishopsgate* gives rise to legitimate concern that the tenant will be unable to recover the full value of her or his loss. The decision conflicts with the earlier decision of the Court of Appeal in *Trocette Property Co Ltd,*[24] where it was held that "nothing compelled or permitted the tribunal, in assessing compensation for a leasehold interest, to ignore evidence known to the market of the likelihood of renewal".[25]

20.14 The rule in *Bishopsgate*, that the tenancy would end on the earliest date on which it could, may apply harshly where the tenant can establish, on a balance of probabilities, that the landlord would have renewed the lease on the same terms, had it not been for the compulsory purchase. The application of the rule puts the short tenant at a significant disadvantage when compared to owner-occupiers who may be entitled to significant compensation for disturbance under rule 6.[26] The failure to take the prospect of renewal into account would be particularly harsh for a tenant who, due to having formed a good, and perhaps informal, relationship with their landlord, has been lax in obtaining a formal option to renew.

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[19] *Greenwood Tyre Services Ltd v Manchester Corporation* (1971) 23 P & CR 246.
[20] Referred to at 20.9, above.
[21] *Bishopsgate Space Management v London Underground Ltd* [2004] EGLR 175.
[22] See also *Lynch v Glasgow Corporation* (1903) 5 F 1174 where the Inner House of the Court of Session held that, in a statutory valuation by arbiters of a tenant's interest in lands taken under the 1845 Act, the tenant of licensed premises under a lease for a term of years was not entitled to have the chance of a renewal of the lease at its expiration taken into account in the valuation.
[23] B Denyer-Green, "The recovery of disturbance and other compensation for tenancies with short terms or early determination clauses," JPL 2009, 7, 825-830 at 828.
[24] *Trocette Property Co Ltd v Greater London Council* (1974) 28 P & CR 408.
[25] (1974) 28 P & CR 408 per Megaw LJ at 416.
[26] See Ch 16.

20.15 The application of the rule is also inconsistent with the principles established under the common law of damages. Under the common law, damages can be recovered for loss of a chance. A common example is where a chance is lost due to the negligence of a professional adviser.[27] It seems counter-intuitive that a short tenant would be able to recover his loss where he loses the chance to renew his tenancy due to the negligence of an adviser but does not have the same right where he loses the chance to renew his tenancy through the operation of the law of compulsory purchase.

Comparative practice

20.16 For England and Wales, in considering the prospects of lease renewal in terms of compensation, the Law Commission noted:

> "Even where there is no enforceable right to security, the circumstances may be such that the prospect of renewal should be fairly taken into account. For example, the known policies of a public authority lessor may be such that renewal of a lease may in practice be assumed, in the absence of a particular public requirement. The strength of such prospects, and how they should be reflected in the valuation, are matters to be determined on the evidence in any particular case."[28]

20.17 Federal law in both Australia[29] and Canada,[30] provides that the likelihood of the continuation or renewal of the interest, and the likely terms and conditions on which any continuation or renewal would be granted, is one of the factors which is to be taken into account when considering the market value of the interest for compensation purposes. The Australian law follows from a recommendation of the Australian Law Reform Commission in 1980. The Commission found that:

> "The reasonable prospects of renewal of a lease should be taken into account in determining compensation … . The chances of a particular tenant being given a week's notice of termination of his lease are low. But if the premises are compulsorily acquired, compensation has to be assessed on the basis that the tenant was entitled to remain in them for only one week. This is an absurd situation."[31]

20.18 On the other hand, it may be difficult in practice to estimate accurately the prospects of renewal of a short tenancy. It could be argued that the mere possibility of renewal is too speculative to warrant consideration. However, the principle of equivalence suggests that such loss should be recoverable and we, therefore, ask the question:

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

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[27] See *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 CA (Civ Div) and in Scotland, *Yeoman's Executrix v Ferries* 1967 SLT 332 and *Kyle v P &J Stormonth Darling* 1994 SLT 191.
[28] Law Com 286, para 5.3.
[29] Lands Acquisition Act 1989, s 55.
[30] Expropriation Act 1985, s 29(9)(b). See also the law of each Canadian province, e.g. Expropriation Act 1996, s 39(c) (British Columbia), following a Report by the Law Reform Commission of British Columbia (Law Reform Commission of British Columbia, *Report on Expropriation,* (Project No 5, 1971), p 136-137).
[31] Law Reform Commission of Australia, *Lands Acquisition and Compensation*, (Report No 14, 1980), para 276.

Compensation where land is subject to a heritable security

Negative Equity

20.19 The situation where the owner of a house has negative equity – i.e. where an outstanding security exceeds the value of the land – is discussed in Chapter 16.

Compensation for creditor

20.20 In Chapter 8 we discussed the effect of acquiring ownership through compulsory purchase on existing rights over the land, including securities. Section 99 of the 1845 Act provides that the acquiring authority may purchase or redeem the interest of any existing security by paying the security holder the principal and interest due on the security, together with any expenses and charges and six months additional interest.[32] The security holder must then immediately convey his interest to the authority. Section 99 additionally provides that the acquiring authority may notify the security holder that they will pay off the principal and interest at the end of a period of six months. Upon payment of the principal and interest by the acquiring authority at the end of the six months, together with any expenses and charges, the security holder must discharge its interest in the lands comprised in such security to the acquiring authority or as they shall direct.

20.21 Section 101 of the 1845 Act deals with the situation where the outstanding security exceeds the value of the land. It provides that if the land subject to the security is of less value than the principal, interest and expenses secured on the land; then the value of the land or the compensation to be paid by the acquiring authority, shall be agreed between the parties. If the parties fail to reach agreement on the value of the land, or the amount of compensation to be paid, the amount shall be determined as in other cases of disputed compensation. The amount agreed upon, or determined, shall be paid by the acquiring authority to the security holder and, upon payment, the security holder shall, at the expense of the acquiring authority, dispone and assign his debt, so far as it is paid, and his security and interest in the land to the acquiring authority. Upon this happening, the security holder will cease to have interest in it or have any right to it, or any part of it.

20.22 Section 103 of the 1845 Act applies where the land required by the CPO is part of a wider parcel of land which is subject to a security and the part required is of less value than the principal, interest and costs secured on the whole land. If the security holder considers that the remainder is not a sufficient security for the sum due, then the value of the severed part, together with the compensation for severance is to be agreed between the parties or, failing agreement, as in other cases of disputed compensation. The amount agreed or determined will be paid by the acquiring authority to the security holder in satisfaction of the debt, as far as this will extend. Upon payment, the security holder will convey or discharge his interest in the land and the security holder will cease to be interested in or have any right to it, or any part of it.

[32] Although there would appear to be no obligation on the acquiring authority to do so. If the acquiring authority does not then the security holder will continue to be able to enforce the security: *Caledonian Railway Company v Governors of George Heriot's Trust* [1915] AC 1046 at 1078.

20.23 In terms of the provisions of the 1845 Act, the current system for compensation the security holder can be described as the "outstanding balance" approach.[33] The security holder is paid the principal and interest secured plus any costs and expenses. For a security holder, this approach may be particularly appealing where interest rates are high at the time of the compulsory acquisition by the acquiring authority.[34] This approach has the advantage of being reasonably straightforward to understand and apply. We propose that:

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

Taxation of disturbance compensation

20.24 For a landowner, compulsory purchase can have significant taxation implications. Compulsory purchase removes the landowner's ability to forward plan regarding capital gains tax ("CGT"), and, in some cases, inheritance tax, and may result in a higher taxation liability being incurred or a tax bill having to be paid sooner than if there had been no compulsory acquisition. Compensation for compulsory purchase will be received as a capital sum and will therefore be liable to CGT under the Taxation of Chargeable Gains Tax Act 1992.[35] Section 245 of the 1992 Act provides for the apportionment of a sum of compensation received for compulsory purchase into a sum which is of a capital nature[36] and therefore subject to CGT, and the amount which is attributable to temporary loss of profits which is treated as a trading receipt and non-taxable income.[37]

20.25 The compensation payable to the claimant for the land will not be increased due to the fact that it will be liable to CGT. Such an increase, which would take into account the tax payable on the payment of compensation, would conflict with the market value principle under rule 2. In terms of compensation for disturbance, where tax will be payable by the landowner as a result of the transfer of land, either as income tax or CGT, it has been held, by the English Court of Appeal, that it is not appropriate for the acquiring authority to deduct tax from the award of compensation.[38] The taxation of this compensation is a matter to be determined by the Inland Revenue.

20.26 In the case of *Bishopsgate Parking,*[39] Bishopsgate Parking Ltd sought compensation for the compulsory acquisition of long leasehold interests which it held in a car park in Cardiff. Among other issues, Bishopsgate contended that they were entitled to claim for consequential loss under rule 6 in respect of liability to CGT. The Upper Tribunal held that

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[33] The 1845 Act also provides for depositing money in a bank where it is refused on tender by the security holder (ss 100, 102 and 104); compensation for costs related to the early discharge of the security (s 105) and compensation in respect of the security holder's lost interest payments (s 106).

[34] We considered another approach, the "market value" approach; but since it was tried, and then replaced, in Canada, we do not describe it further here.

[35] 1992, c. 12. Although this will not apply where the property that is acquired is a primary private residence as this is exempt from CGT (s 222 of the 1992 Act).

[36] Compensation for loss of good will, for the land taken and for severance or injurious affection ,will be capital in nature.

[37] *Stoke-on-Trent City Council v Wood Mitchell & Co Ltd* [1979] 2 All ER 65, CA. Compensation for losses on trading stock and to reimburse revenue expenditure, such as removal expenses and interest, will be treated in the same way for tax purposes. (See Inland Revenue, Statement of Practice 8/1979).

[38] *Stoke-on-Trent City Council v Wood Mitchell & Co Ltd* [1979] 2 All ER 65, CA and *Pennine Raceway Ltd v Kirklees Metropolitan Borough Council (No 2)* [1989] 23 EG 73.

[39] *Bishopsgate Parking (No 2) Ltd v Welsh Ministers* [2012] UKUT 22 (LC).

compensation for disturbance could, in principle, include an amount which would be payable as CGT on the disposal of land in consequence of a compulsory purchase. They said:

> "If, on the evidence, in the absence of the acquisition there would not have been a disposal until a later date or if the owner would at a later date have transferred the land in a way that did not constitute a disposal for CGT purposes, such loss as the owner can be shown to have sustained by reason of the having to pay CGT at an earlier date rather than at a later date or not at all would in our view undoubtedly be caused by the acquisition."[40]

20.27 The loss was, therefore, recoverable as an element of disturbance.[41] The Upper Tribunal rejected the argument that the loss was too remote but did suggest that the claimant would have to indicate that he had properly mitigated his loss by taking advantage of rollover relief.[42] There is no case in Scotland where tax has been expressly recoverable as part of disturbance although the Murning Review stated: "the effect of capital gains tax, which may be incurred because the acquisition is at a time not of the landowners' choosing is not seen as a material issue because claimants are able to recover the effect of capital gains tax".[43] We propose that the law should be clear in this regard. It seems unfair that the claimant could be forced to bear tax costs where, had it not been for the compulsory acquisition, these would not have arisen. We therefore ask the question:

> **176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?**

Repeal or replacement of other miscellaneous provisions

20.28 In addition to the various specific issues raised so far in this Chapter, there are several other provisions in the main compulsory purchase statutes[44] that we have not yet addressed. In some cases that is because they have fallen out of use. In others they will necessarily be repealed because, in a new statute, the matters with which they were concerned will be dealt with in another way, and they will become redundant. We do not consider that any of these provisions raise issues on which we should consult specifically at this stage.

Conclusion

20.29 We appreciate that this is a very long Paper; but it concerns a very large subject. We hope that, within the areas it covers, it identifies all the matters of importance to those interested in, or affected by, compulsory purchase. In case it does not, and in case there are issues of importance to consultees which are not dealt with, we ask the question:

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[40] At para 109.
[41] See also *Alfred Golightly & Sons Ltd v Durham City Council* (1981) 260 EG 1045 which allowed increased liability to tax, which would not have arisen if it were not for the compulsory acquisition as part of a disturbance claim. Contrast with *Harris v Welsh Development Agency* [1999] 3 EGLR 207 where it was held that the tax liability was a matter based directly on the value of the land and so there could not be a disturbance claim under rule 6. In any event, the recovery of tax did not satisfy the tests of causation and remoteness.
[42] S 247 of the 1992 Act provides for a specific compulsory purchase rollover relief which applies where land is disposed to an acquiring authority and the compensation is reinvested in land in connection with the replacement of business assets.
[43] Murning Review, para 5.38.
[44] I.e., the 1845 Act, the 1947 Act, the 1963 Act and the 1973 Act.

177. Are there any other aspects of the current compulsory purchase system, not mentioned in this Paper, to which consultees would wish to draw our attention?

20.30 As we indicated in Chapter 3, a workable system of compulsory purchase is a necessary feature of any modern society. The legislative structure underpinning the system currently in place in Scotland is no longer fit for purpose. We trust that the responses to the questions we ask, and the proposals we make, will enable us to propose reforms of the law, and, in particular, a new statute, which will put the regime of compulsory acquisition on a clear, firm basis for the twenty first century.

Chapter 21 Summary of questions and proposals

PART 1: INTRODUCTORY AND GENERAL

Chapter 1 Introduction

1. The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

(Paragraph 1.14)

Chapter 2 General issues

2. For the purposes of compulsory purchase, is the current definition of "land", set out in the 2010 Act, satisfactory?

(Paragraph 2.56)

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?

(Paragraph 2.70)

4. What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?

(Paragraph 2.70)

5. Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?

(Paragraph 2.73)

Chapter 3 Human rights

6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.

(Paragraph 3.51)

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

(Paragraph 3.87)

PART 2: OBTAINING AND IMPLEMENTING A CPO; THE MINING CODE

Chapter 5 Procedure for obtaining a CPO

8. Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.

(Paragraph 5.5)

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

(Paragraph 5.18)

10. Is there any relevant legislation missing from that list?

(Paragraph 5.18)

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

(Paragraph 5.20)

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.24)

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

(Paragraph 5.25)

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

(Paragraph 5.26)

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

(Paragraph 5.30)

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.

(Paragraph 5.32)

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

(Paragraph 5.41)

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.42)

19. An acquiring authority should be able to revoke a CPO.

(Paragraph 5.46)

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

(Paragraph 5.46)

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.

(Paragraph 5.47)

22. Acquiring authorities should be required to register CPOs and revocations of CPOs.

(Paragraph 5.50)

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register?

(Paragraph 5.50)

24. Is the current three year validity period of a confirmed CPO reasonable?

(Paragraph 5.59)

25. Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?

(Paragraph 5.59)

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

(Paragraph 5.64)

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

(Paragraph 5.64)

28. Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?

(Paragraph 5.65)

Chapter 6 Challenging a (confirmed) CPO

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

(Paragraph 6.38)

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

(Paragraph 6.38)

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

(Paragraph 6.39)

32. Should any challenge to a CPO, on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six-week period for general challenges to a CPO?

(Paragraph 6.44)

33. Are there circumstances in which such a challenge should be permitted to be made at a later stage?

(Paragraph 6.45)

34. Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?

(Paragraph 6.48)

35. Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?

(Paragraph 6.51)

Chapter 7 Implementation of a CPO

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

(Paragraph 7.9)

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served?

(Paragraph 7.15)

38. It should be made clear that a person claiming to be the holder of an interest in land, and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

(Paragraph 7.19)

39. Should there be a time limit within which such proceedings must be raised?

(Paragraph 7.19)

40. Should a notice to treat be accompanied by information as to how compensation may be claimed?

(Paragraph 7.25)

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

(Paragraph 7.29)

42. When fixing interests in land, should any action taken or alterations made before service of a notice to treat, be considered differently from any action taken or alterations made after such service?

(Paragraph 7.29)

43. Does the three-year time limit on the validity of the notice to treat work satisfactorily in practice?

(Paragraph 7.40)

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period?

(Paragraph 7.51)

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on to the land?

(Paragraph 7.51)

46. Should the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days?

(Paragraph 7.67)

47. Alternatively, should it be competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

(Paragraph 7.67)

48. For how long should a notice of entry remain valid?

(Paragraph 7.73)

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year to run?

(Paragraph 7.78)

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

(Paragraph 7.86)

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

52. Are the time limits for implementing a GVD satisfactory?

(Paragraph 7.89)

53. Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.

(Paragraph 7.97)

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed as at, and interest on compensation should run from, the date of entry.

(Paragraph 7.98)

55. In a situation falling within section 12(5) of the 1963 Act, the date upon which compensation should be assessed, and the date from which interest on the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

(Paragraph 7.99)

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date at a date different from any of those mentioned above, where it appears to the LTS to be in the interests of justice?

(Paragraph 7.101)

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular part of a parcel of land which they intend to acquire, where title is in the Register of Sasines, they should be able to:

(a) use a GVD in relation to the whole of the land, and

(b) register the GVD in the Land Register.

(Paragraph 7.106)

58. The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced.

(Paragraph 7.114)

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

(Paragraph 7.115)

60. Would a new method of implementation of a CPO, along the lines described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

(Paragraph 7.120)

61. If so, what features should it have in addition to, or in place of, those mentioned above?

(Paragraph 7.120)

Chapter 8 Conveyancing procedures

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

(Paragraph 8.39)

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and

(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

(Paragraph 8.40)

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

(Paragraph 8.42)

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

(Paragraph 8.43)

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

(Paragraph 8.45)

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

(Paragraph 8.46)

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

(Paragraph 8.54)

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

(Paragraph 8.57)

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

(Paragraph 8.65)

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation?

(Paragraph 8.75)

72. It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent.

(Paragraph 8.81)

Chapter 9 The Mining Code

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

(Paragraph 9.26)

PART 3: COMPENSATION

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

(Paragraph 11.30)

75. Should depreciation of the value of the acquired land, caused by its severance from the retained land, be taken into account when assessing its value?

(Paragraph 11.34)

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made?

(Paragraph 11.42)

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute.

(Paragraph 11.53)

78. Should a test along the lines of the "devoted to a purpose" test be retained?

(Paragraph 11.55)

79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that compensation assessed on the basis of market value (and disturbance, where appropriate) would be insufficient for the activity to be resumed on another site?

(Paragraph 11.58)

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

(Paragraph 11.66)

Chapter 12 Valuation of land to be acquired – rule 3 and the "no-scheme" world

81. How should the "scheme" be defined?

(Paragraph 12.78)

82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

(Paragraph 12.78)

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

(Paragraph 12.78)

84. Should any such disregard be limited by reference to the time elapsed since the adoption of the scheme or, if not, on what alternative basis should or might it be limited?

(Paragraph 12.78)

Chapter 13 Valuation of land to be acquired – establishing development value

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

(Paragraph 13.14)

86. Any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired.

(Paragraph 13.19)

87. What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?

(Paragraph 13.22)

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

(Paragraph 13.30)

89. If so, should this continue to be limited (a) to planning permission which might reasonably be expected to be granted to the public and, (b) by the *Pointe Gourde* principle?

(Paragraph 13.30)

90. The statutory assumption of planning permission for development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

(Paragraph 13.34)

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

(Paragraph 13.36)

92. In terms of special assumptions in respect of certain land comprised in development plans, what should be the relevant date for referring to the applicable development plan?

(Paragraph 13.40)

93. The underlying "scheme" should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, at the time when the CPO is first published.

(Paragraph 13.59)

94. The scope of the underlying "scheme" to be deemed to be cancelled for the purposes of considering statutory planning assumptions, should be the entire scheme and not simply the intention to acquire the relevant land.

(Paragraph 13.61)

95. Provision along the lines of section 14 of the 1961 Act, as amended, should be included in the proposed new statute.

(Paragraph 13.68)

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

(Paragraph 13.76)

97. If not, should the period for considering subsequent planning permission remain as 10 years?

(Paragraph 13.76)

Chapter 14 Valuation of land to be acquired - CAADs

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

(Paragraph 14.6)

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide?

(Paragraph 14.12)

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

(Paragraph 14.19)

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, with no assumption to be made about what may or may not have happened before that date.

(Paragraph 14.30)

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

(Paragraph 14.30)

103. The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs.

(Paragraph 14.30)

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

(Paragraph 14.31)

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?

(Paragraph 14.33)

106. Should there be any change in the current (one month) time limit for appealing against a CAAD?

(Paragraph 14.36)

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?

(Paragraph 14.53)

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?

(Paragraph 14.53)

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?

(Paragraph 14.64)

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

(Paragraph 14.64)

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions?

(Paragraph 14.64)

Chapter 15 Consequential loss – retained land

112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

(Paragraph 15.18)

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.

(Paragraph 15.25)

114. Claims for injurious affection should be assessed as at the date of severance.

(Paragraph 15.37)

115. Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.

(Paragraph 15.44)

116. The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.

(Paragraph 15.49)

117. Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?

(Paragraph 15.59)

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

(Paragraph 15.70)

Chapter 16 Consequential loss - disturbance

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(Paragraph 16.30)

120. There should be an express statutory provision for disturbance compensation.

(Paragraph 16.34)

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

(Paragraph 16.38)

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(Paragraph 16.44)

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(Paragraph 16.45)

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(Paragraph 16.47)

125. Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation?

(Paragraph 16.50)

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?

(Paragraph 16.57)

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law?

(Paragraph 16.69)

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

(Paragraph 16.77)

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

(Paragraph 16.78)

130. It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.

(Paragraph 16.88)

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?

(Paragraph 16.92)

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

(Paragraph 16.99)

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

(Paragraph 16.99)

134. Section 38 of the 1963 Act should be repealed and not re-enacted.

(Paragraph 16.101)

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

(Paragraph 16.104)

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

(Paragraph 16.104)

Chapter 17 Non-financial loss

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

(Paragraph 17.14)

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained?

(Paragraph 17.21)

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima or for an automatic increase (or reduction) to reflect inflation?

(Paragraph 17.21)

140. As an alternative, should a system, either of a flat rate payment, or of a payment individually assessed in each case, be introduced?

(Paragraph 17.21)

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?

(Paragraph 17.28)

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

(Paragraph 17.33)

PART 4: RESOLUTION OF DISPUTES; THE CRICHEL DOWN RULES; MISCELLANEOUS MATTERS

Chapter 18 Process for determining compensation

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

(Paragraph 18.4)

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

(Paragraph 18.17)

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to the tenancy should be referred to the LTS rather than the sheriff court.

(Paragraph 18.19)

146. Should it be made clear, in the proposed new statute, that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

(Paragraph 18.22)

147. Should it be made clear, in the proposed new statute, that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?

(Paragraph 18.22)

148. What, if any, changes should be made to the time limit to claim compensation?

(Paragraph 18.23)

149. Should the LTS be given discretion to extend the time limit in some circumstances?

(Paragraph 18.23)

150. Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?

(Paragraph 18.26)

151. Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?

(Paragraph 18.27)

152. There should be a prescribed form to claim an advance payment.

(Paragraph 18.29)

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

(Paragraph 18.31)

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

(Paragraph 18.33)

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

(Paragraph 18.34)

156. It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.

(Paragraph 18.36)

157. Should the LTS have discretion to:

(a) provide for interest from a date earlier than its award, and

(b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?

(Paragraph 18.38)

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Chapter 19 Crichel Down Rules

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

(Paragraph 19.5)

161. Should the Rules apply to all land acquired by, or under threat of, compulsion?

(Paragraph 19.9)

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

(Paragraph 19.11)

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?

(Paragraph 19.12)

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

(Paragraph 19.15)

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

(Paragraph 19.15)

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

(Paragraph 19.16)

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

(Paragraph 19.17)

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

(Paragraph 19.21)

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

(Paragraph 19.24)

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

(Paragraph 19.26)

Chapter 20 Miscellaneous issues

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

(Paragraph 20.4)

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

(Paragraph 20.5)

173. Does section 114 of the 1845 Act work satisfactorily?

(Paragraph 20.10)

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

(Paragraph 20.18)

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

(Paragraph 20.23)

176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?

(Paragraph 20.27)

177. Are there any other aspects of the current compulsory purchase system, not mentioned in this Paper, to which consultees would wish to draw our attention?

(Paragraph 20.29)

Appendix A

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Appendix B

Chronological table of current legislation conferring powers of compulsory purchase in Scotland

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
Defence Act 1842	Secretary of State	Yes[2]	No	No
Harbours, Docks and Piers Clauses Act 1847	{Special Act}[3]	Yes	No	No
Markets and Fairs Clauses Act 1847	{Special Act}[4]	Yes	No	No
Commissioners of Works Act 1852[5]	Scottish Ministers	Yes	Yes	No
Burial Grounds (Scotland) Act 1855	Local Authorities[6]	Yes	No	No
Allotments (Scotland) Act 1892	Scottish Ministers	No	No	No
Military Lands Act 1892	Secretary of State, Army Reserve, Local Authorities	Yes	No	No
Light Railways Act 1896[7]	Local Authorities[8]	No	No	No
Allotments (Scotland) Act 1922	Local Authorities	No	No	No

[1] For the purposes of this table, it is noted whether the Lands Clauses Act, Railways Clauses Act and/or the 1947 Act are mentioned, notwithstanding the fact that some provisions may be excluded. In many cases, the purpose of mentioning the Act is to exclude certain provisions. This is because the Acts themselves provide that, unless expressly excluded, they are to apply in compulsory purchase matters: the 1845 Act, s 1; the 1845 Railways Act, s 1 (for Acts authorising the construction of railways) and the 1947 Act, s1 (for certain public bodies listed in the provision).

[2] See Lands Clauses Consolidation Acts Amendment Act 1860, s 7.

[3] S 6 provides that "where by the special Act the undertakers shall be empowered, for the purpose of constructing the harbour, dock, or pier, to take or use any lands otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject … if the harbour, dock or pier be situated in Scotland, to the provisions and restrictions contained in this and in the Lands Clauses Consolidation (Scotland) Act 1845"

[4] S 6 provides that "where by the special Act the undertakers shall be empowered, for the purpose of constructing the market or fair, to take or use any lands otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act … and the Lands Clauses Consolidation (Scotland) Act 1845 when the special Act relates to Scotland."

[5] 1845 Act and 1845 Railways Act incorporated by Commissioners of Works Act 1894, s 1.

[6] See para 5.9 of this Discussion Paper.

[7] As amended by Light Railways Act 1912. Powers of compulsory purchase legislation under the Light Railways Act 1896 and 1812 have been rendered largely obsolete by virtue of s 22 of the 2007 Act.

[8] Or an "individual, corporation or company" or jointly between a council and individual, corporation or company (Light Railways Act 1896, s 2).

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
Harbours, Piers and Ferries (Scotland) Act 1937	Local Authorities	Yes	No	No
Agriculture (Scotland) Act 1948	Scottish Ministers	No	No	Yes
Coast Protection Act 1949	Coast Protection Authority[9]	Yes	No	Yes
National Parks and Access to the Countryside Act 1949	Local planning authority, Scottish Ministers, Local Authorities, Scottish Natural Heritage	Yes	No	Yes
Atomic Energy Authority Act 1954	UK Atomic Energy Authority	No	No	Yes
Housing and Town Development (Scotland) Act 1957 [10]	Local Authorities	No	No	Yes
Opencast Coal Act 1958	Coal Authority	No	No	Yes
Land Powers (Defence) Act 1958	Secretary of State	No	No	No
Pipelines Act 1962	Scottish Ministers[11]	No	No	No
Transport Act 1962	Scottish Canals[12]	No	No	Yes
Harbours Act 1964[13]	Local Authorities/Harbour Authorities	Yes	No	No
Gas Act 1965	Public gas transporter[14]	Yes	Yes (s 6 only)	Yes
Forestry Act 1967	Scottish Ministers	Yes	Yes	No
Agriculture Act 1967	Rural Development Board	No	No	Yes
New Towns (Scotland) Act 1968	Development corporation/local roads authority	Yes	Yes	Yes

[9] Under s 1 of the Act, a council constituted under s 2 of the Local Government etc. (Scotland) Act 1994, any part whose area adjoins the sea shall be the coast protection authority for that area.
[10] See also the 1959 Act, s 45.
[11] A person proposing to execute works in land for the placing therein of a pipe-line or a length of a pipe-line may, by means of an order made by the Minister, be authorised to purchase compulsorily land described in the order which is required by him as the site of any of the works.
[12] Powers transferred from British Waterways Board, see British Waterways Board (Transfer of Functions) Order 2012.
[13] See also Docks and Harbours Act 1966, section 42.
[14] See Gas Act 1986, s 7.

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
Social Work (Scotland) Act 1968	Scottish Ministers	No	No	Yes
Transport Act 1968	Strathclyde Partnership for Transport	No	No	Yes
Harbour Development (Scotland) Act 1972	Scottish Ministers	No	No	Yes
Local Government (Scotland) Act 1973	Local Authorities	Yes	Yes	Yes
Zetland County Council Act 1974	Shetland Islands Council[15]	Yes	No	Yes
Offshore Petroleum Development (Scotland) Act 1975	Scottish Ministers	Yes	Yes	Yes
National Health Service (Scotland) Act 1978	Scottish Ministers, Health Board, HIS, NHS	Yes	Yes	No
Refuse Disposal (Amenity) Act 1978	Scottish Ministers	No	No	Yes
Ancient Monuments and Archaeological Areas Act 1979	Scottish Ministers	Yes	Yes	Yes
Education (Scotland) Act 1980	Education Authority	Yes	No	Yes
1980 Act	Urban development corporation, local highway authority	Yes	Yes	Yes
Slaughter of Animals (Scotland) Act 1980	Local Authorities	No	No	Yes
Water (Scotland) Act 1980	Scottish Water	Yes	Yes	Yes
Animal Health Act 1981	Local Authorities	No	No	Yes
Transport Act 1981	Associated British Ports	No	No	Yes
Civil Aviation Act 1982	Secretary of State, CAA, Air traffic services licence holder	Yes	No	Yes
Roads (Scotland) Act 1984	Roads Authority, Special Road	Yes	Yes	Yes

[15] See Shetland Islands Council Order Confirmation Act 1979.

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
	Authority, Scottish Ministers			
Road Traffic Regulation Act 1984	Local Authorities	No	No	Yes
Telecommunication Act 1984[16]	An "Operator"[17]	No	No	No
Housing Associations Act 1985	Local Authorities	Yes	Yes	Yes
Airports Act 1986	Airport operator	Yes	No	Yes
Gas Act 1986	Public gas transporters	Yes	No	Yes
Housing (Scotland) Act 1987	Local Authorities	No	No	Yes
Housing (Scotland) Act 1988	Scottish Ministers	No	No	No
Electricity Act 1989	Licence Holders	Yes	No	Yes
Prisons (Scotland) Act 1989	Scottish Ministers	Yes	No	Yes
Enterprise and New Towns (Scotland) Act 1990	Scottish/Highlands and Islands Enterprise	Yes	Yes	Yes
Natural Heritage (Scotland) Act 1991	Scottish Natural Heritage	No	No	Yes
1991 Act	"Responsible Authority"	Yes	No	Yes
Further and Higher Education (Scotland) Act 1992	Education Authority	No	No	Yes
Crofters (Scotland) Act 1993	Scottish Ministers	Yes	No	Yes
Highland Regional Council (Wester Bridge) Order Confirmation Act 1993	Highland Council	Yes	No	Yes
British Railways Order Confirmation Act 1994	Department for Transport	Yes	Yes	Yes
British Railways (No 2) Order Confirmation Act 1994	Department for Transport	Yes	Yes	Yes
Coal Industry Act 1994	Coal Authority	No	No	Yes
Environment Act 1995	SEPA	No	No	Yes
Merchant Shipping Act 1995	Northern Lighthouse Board[18]	Yes	No	No

[16] Sch 2 provides an electronic communications network provider with the power to compulsorily acquire rights to install and keep installed electronic communications apparatus in, on or under land. The procedure that applies for the acquisition of these rights is separate from the procedures set out in the 1947 Act and 1845 Act and involves applications to the relevant Sheriff Court.
[17] See Sch 2, para 1(1).
[18] See also, Secretary of State for the Environment Order 1970/1681, Sch 3, para 15(1).

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
1997 Act	Local Planning Authorities, Scottish Ministers	Yes	Yes	Yes
Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997	Local Authorities, Scottish Ministers	Yes	Yes	Yes
City of Edinburgh (Guided Busways) Order Confirmation Act 1998	City of Edinburgh Council	Yes	No	Yes
National Parks (Scotland) Act 2000	National Park Authority	No	No	Yes
Postal Services Act 2000	Universal service provider[19]	Yes	No	Yes
Water Industry (Scotland) Act 2002	Scottish Water	Yes	Yes	Yes
Building (Scotland) Act 2003[20]	Local Authorities	No	No	Yes
Land Reform (Scotland) Act 2003	Local Authorities	No	No	Yes
Communications Act 2003	Provider of communications network	Yes	No	Yes
Nature Conservation (Scotland) Act 2004	Scottish Natural Heritage	No	No	Yes
Stirling-Alloa-Kincardine Railway and Linked Improvements Act 2004	Clackmannanshire Council	Yes	Yes	No
Fire (Scotland) Act 2005	Scottish Fire and Rescue Service	No	No	Yes
Transport (Scotland) Act 2005	Regional Transport Partnerships	No	No	Yes
Housing (Scotland) Act 2006	Local Authorities	No	No	Yes
Waverley Railway (Scotland) Act 2006	Scottish Borders Council	Yes	Yes	No
Edinburgh Tram (Line One) Act 2006	City of Edinburgh Council	Yes	Yes (s 6 only)	Yes
Edinburgh Tram (Line Two) Act	City of Edinburgh	Yes	Yes (s 6 only)	Yes

[19] See Postal Services Act 2011, s 65.
[20] See also, Defective and Dangerous Buildings (Recovery of Expenses) Bill.

Legislation authorising powers of compulsory purchase	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?[1]	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
2006	Council			
Edinburgh Airport Rail Link 2007	tie Limited	Yes	Yes	No
Glasgow Airport Rail Link Act 2007	Strathclyde Partnership for Transport	Yes	Yes	No
Airdrie-Bathgate Railway and Linked Improvements Act 2007	Network Rail	Yes	Yes	No
2007 Act[21]	Scottish Ministers	No	No	No
Glasgow Commonwealth Games Act 2008	Local Authorities	No	No	No
Planning Act 2008	Promoter of "nationally significant infrastructure project"	No	No	Yes
Flood Risk Management (Scotland) Act 2009[22]	Local Authorities	No	No	Yes
Forth Crossing Act 2011	Scottish Ministers	Yes	Yes	No
Police and Fire Reform (Scotland) Act 2012	Scottish Police Authority	No	No	Yes

[21] This Act grants power to the Scottish Ministers to make orders in relation to the construction or operation of a transport system, including railways, trolley or guided buses, trams or waterways. This power includes the power to acquire land compulsorily. The procedures contained in the Act are similar but distinct from the 1947 Act. It can reasonably be expected that the effect of this Act will be that the number of private Bills of the Scottish Parliament which relate to transport projects and contain powers of compulsory purchase will be significantly reduced.

[22] See also Flood Prevention (Scotland) Act 1961 for schemes which were promoted prior to the implementation of the 2009 Act.

Secondary Legislation	Acquiring Authority	1845 Act expressly incorporated (either partially or wholly)?	1845 Railways Act expressly incorporated (either partially or wholly)?	1947 Act expressly incorporated (either partially or wholly)?
Highland Council (Eigg) Harbour Empowerment Order 1999/201	Highland Council	Yes	No	Yes
Highland Council (Muck) Harbour Empowerment Order 1999/203	Highland Council	Yes	No	Yes
Comhairle Nan Eilean Siar (Eriskay Causeway) Order Confirmation Act 2000	Comhairle Nan Eilean Siar	Yes	No	No
Highland Council (Inverie) Harbour Empowerment Order 2004/171	Highland Council	Yes	Yes	Yes
Highland Council (Raasay) Harbour Revision Order 2006/17	Highland Council	Yes	Yes	Yes
Network Rail (Waverley Steps) Order 2010/188	Network Rail	Yes	No	No

General Notes

1.1 The provisions concerning GVD procedure are contained in the 1997 Act, s 195 and Sch. 15. S 195(2) states that "this section applies to any Minister or local or other public authority authorised to acquire land by means of a compulsory purchase order" and any such authority is referred to in Sch. 15 as an acquiring authority. It appears that a GVD may be employed in connection with orders made under the 1947 Act procedure or under any other procedure (Sch 5, paras 2(1) and 6(1)). Nevertheless, for the avoidance of doubt, several Acts provide that the acquiring authority will be deemed to be a public authority to which s 195 of and Sch 5 to the 1997 Act applies.[23]

1.2 The subject-matter of some of the pre-1998 Acts mentioned in this list has now been devolved to the Scottish Parliament. Where these Acts empowered UK Ministers to compulsorily acquire land, this power has been transferred to Scottish Ministers by virtue of

[23] See, for instance, Offshore Petroleum Development (Scotland) Act 1975; the 1980 Act; Housing (Scotland) Act 1987; Enterprise and New Towns (Scotland) Act 1990; Further and Higher Education (Scotland) Act 1992; Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997; Highland Council (Eigg) Harbour Empowerment Order 1999/201; Highland Council (Muck) Harbour Empowerment Order 1999/203; Highland Council (Inverie) Harbour Empowerment Order 2004/171; Waverley Railway (Scotland) Act 2006; Edinburgh Tram (Line One) Act 2006; Edinburgh Tram (Line Two) Act 2006; Highland Council (Raasay) Harbour Revision Order 2006/17; Edinburgh Airport Rail Link 2007; Glasgow Airport Rail Link Act 2007; Airdrie-Bathgate Railway and Linked Improvements Act 2007; Network Rail (Waverley Steps) Order 2010/188; Police and Fire Reform (Scotland) Act 2012.

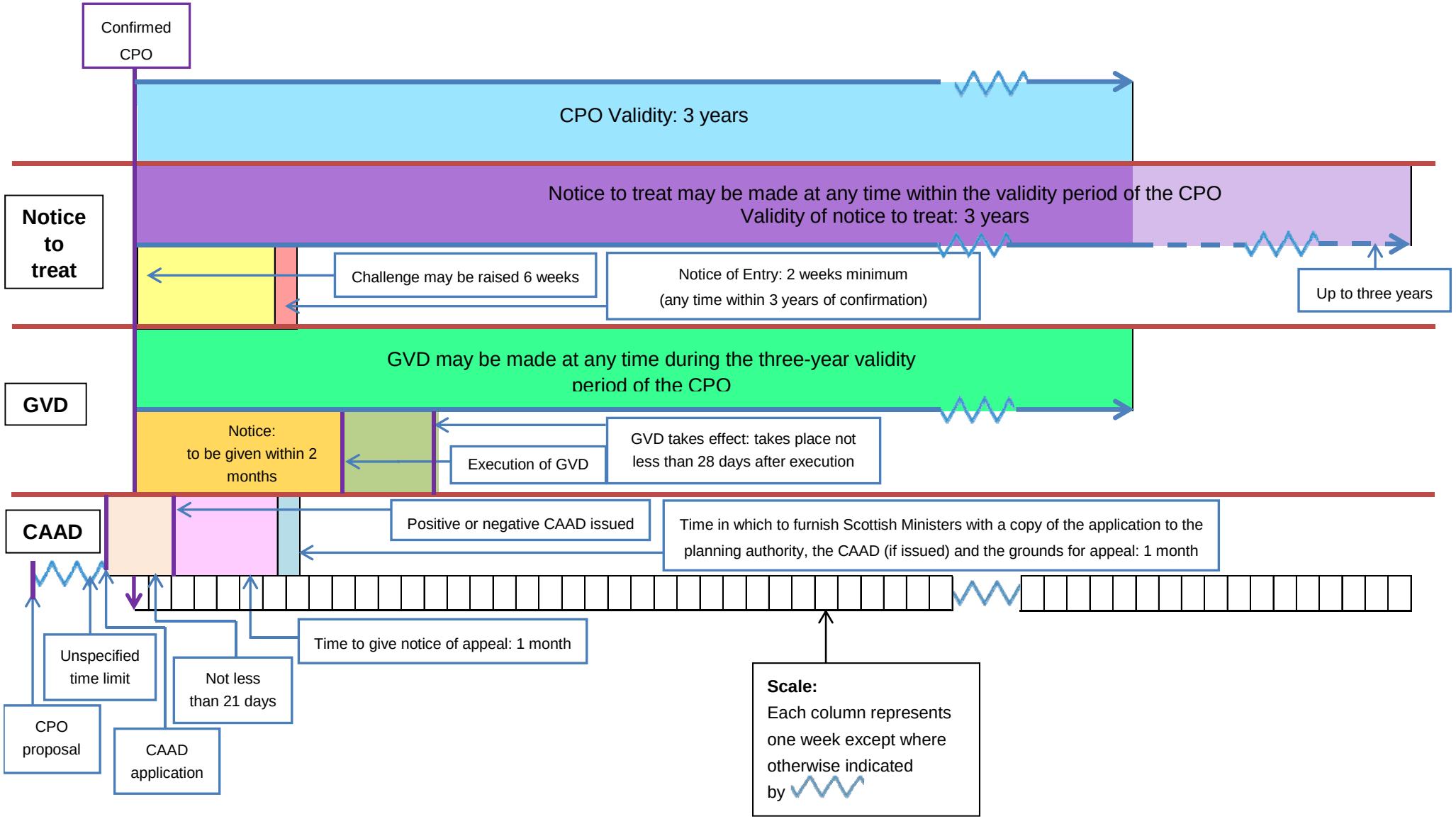
s 53 of the Scotland Act 1998. Nevertheless, the Act in question may still refer to the Minister of the Crown/Secretary of State.

1.3 We are aware that the Scottish Parliament would be unable to amend some of the Acts listed above (e.g. Land Powers Defence Act 1958). If the relevant authority possessing compulsory purchase powers under a particular Act, the subject of which is a reserved matter, wishes to use the procedure in our new proposed statute then an order under s 104 of the Scotland Act 1998 would be required.

1.4 Some of the Acts which authorise powers of compulsory purchase in the above list concern specific projects which may now have been completed and for which claims for compensation will soon be time-barred (e.g. Airdrie-Bathgate Railway and Linked Improvements Act 2007). Such Acts are included in the list for the sake of completeness and it would be both unnecessary and ineffectual to amend these Acts now.

Appendix C

Timeline: Notice to treat, GVD and CAAD



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