

Subject: Scottish Law Commission. Discussion Paper No 159

I have now had time to review the above document – a mighty tome with many useful points for discussion both north and south of the border. I found that much research had been undertaken and the wide ranging detail makes it a very useful reference document in itself.

However, I believe that Scotland's CPO problems are more basic and fundamental. It was noted that the discussion paper does not cover justification for CPOs (beginning of Chapter 3 noted). Being a Welshman I feel comfortable in making a nationalist orientated comment. The problem lies in Scotland not tracking English CPO legislation perhaps gearing up for a time when Scotland would go it alone. Wales tracked the law but the guidance is still in draft after 10 years – it is like pulling teeth. However I am comforted by the fact that Wales will be closely aligned with Circular 06/04 which itself is under review. I noted that, when in discussion with the Scottish civil service, on the preparation of the Scottish CPO Guidance there appeared much background political /civil service pressure to make CPOs easier by diluting the guidance notwithstanding that it may put it at odds with sound CPO principles regarding individuals proprietary rights. To the external observer it seems that Scotland (pre devolution vote) was bent on being distinctive not wishing to take on board anything coming out of England, never minding that it may have merit. Scotland's politics still seems to have a progressive flavour but is now (for a while) firmly under the overarching cover of UK law.

I have drawn an example to make the point. The T&CP (Scotland) Act 1997 could have prudently followed the empowerment changes to the T&CPA 1990 in 2004 in England and Wales which was specifically to make a whole swathe of general CPO power easier to apply. Much case law has evolved because of it. In your discussion document you mention the Argos case, the underlying CPO of which, New Street Station, was successful under the post 2004 Act. The T&CP (Scotland) Act 1997 is still like the unamended English version with the words 'suitable' and 'required' instead of the more flexible 'think will facilitate' let alone there not being the safe-guarding 'well being' factors.

In England to make CPOs available for the community all that was needed was an addition to the Appendices (KA) of Circular 06/04 and use the T&CPA 1990 as amended. In Scotland because there is not that underlying flexibility in CPO power it set its course on the Community Empowerment (Scotland) Bill. Empowering the community is dangerous when it should be the local authorities alone who promote CPOs.

My concern is that although there is much in the discussion document that aligns with England and Wales, Scottish CPO empowerment will take Scottish CPOs on a course of divergence only to find that they are ultimately challenged somewhere in the Supreme Court

Whereas I can generally agree with much in the discussion document, the problem lies in what was omitted – a robust review of empowerment and justification.

I hope that helps but most of what I have said may be in realm of pushing string uphill.

Stan Edwards MBA, FRICS, Hon CPA,
DIRECTOR
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