Response to Scottish Law Commission Discussion Paper No 159 -

Discussion Paper on Compulsory Purchase

I write to comment on the Paper insofar as time and my areas of knowledge allow me to do so.

Background

In the course of a contentious practice over many years, I have frequently encountered issues arising from or connected with compulsory purchase processes. In the main, these have not related to details of procedure, but to more contentious issues.

I have conducted a number of inquiries into proposed compulsory purchase and advised on many other instances that for one reason or another did not proceed to inquiry. By the nature of my practice, particularly in more recent years, many of the issues which have crossed my desk on this topic have tended to be at the end of the spectrum labelled "difficult" or "esoteric". The type of work is however characterised, as in many other areas of contentious work, by very high proportions of cases that are resolved, usually for pragmatic or financial reasons or both.

Disclaimer

Time has not allowed an exhaustive study of the Paper (which it no doubt deserves). Likewise I have not been in a position to research authorities or cross reference points to ensure internal consistency. For practical reasons the assembly of notes on the Paper has had to be carried out on a disjointed basis over a period of time,

A number of the comments I make are based on actual examples. Details of these examples are not usually provided due to a combination of client confidentiality, lack of time to carry out file research and failing memory of details. If I have at any stage drifted into inaccuracy, the fault will be unintentional.

Responses – General

While I will endeavour to deal with matters in the way set out in the Paper, I first raise a number of points which to my mind permeate any discussion, even one focussed on procedural niceties.

1. **Public Interest, Private Interest and "Back-to-Back Agreements"**

The Commission will be aware that in modern practice a significant number of compulsory purchase projects involve a private interest often as a driver for the entire endeavour. This is touched on only briefly in the Paper (see for example 17.6) but in my respectful suggestion raises issues which are capable of having a very significant impact on the entire structure of compulsory purchase and the procedures which go with it. The "why" affects the "how".

In a traditional CPO, a project developed and controlled by the public interest (a road scheme say) is promoted. The scheme involves the taking of private property. There is no private interest behind it. The process itself and any decisions which require to be taken within it, can be taken by relying on the principle on which CPOs are meant to function i.e. that the public interest justifies a major interference with private property rights (that theme is reiterated throughout the Paper).

As I understand it, so-called back-to-back arrangements first started to emerge for purely technical reasons. For instance, I first encountered such an arrangement in advising on issues arising out of a development of a city block in Glasgow. In the course of investigating the historic title, it was discovered that a small triangle could not be traced to an owner. It was thought undesirable, and may even have been impossible, to transfer this enormously costly new development to a new owner without being able to give clear title to the whole of the ground area. In the circumstances, the project having received planning permission (and no

doubt being perceived to be broadly in the public interest) a CPO was promoted over the whole site. The local authority then transferred the site to the developer, thus clearing the title impediment. This was done subject to an indemnity in respect of costs from the developer. No compensation was payable because the developer was either the owner or had agreed terms for the acquisition of the remainder of the site and was content to indemnify the council against any potential claim – unlikely though it may be - by the owner of the triangle which might emerge in the future. Reviewed from the perspective of an example of that kind, such arrangements have an evident utility and are unobjectionable.

However, whether driven by more straitened economic times or otherwise, what has emerged is a somewhat different pattern in which the circumstances range across a spectrum. At the one extreme, a public project - or perhaps one should say publicly-driven project - of what is said to be evident public utility is promoted by a public authority in the public interest. The public authority lacks the funds to put the project into operation. It accordingly makes arrangements for the transfer of that "project" to a private party in due course. However, the rights and wrongs of the acquisition process and any contentious issues which arise during it, are entirely governed by the public interest arguments in favour of the project, in all its detail.

At the other extreme of the spectrum will lie a project conceived by and primarily for the benefit of a private sector owner or developer, but nevertheless one which cannot be brought into reality without the acquisition of other private interests (who are by definition not prepared to sell). In that scenario, there may - to use the Commissions own phrase - be only a peripheral public interest in the scheme - even if it is generally in accordance with the planning regime or has planning permission or the like. In the end of the day, what is being authorised is the acquisition from one party who wishes to make profit from his property of that property so that another party may make the profit he in turn wishes to make from it. Critically, for the present point, in that event the arguments and details of procedure and justification which may arise during any contentious process, are, in reality, governed by the private developer and his requirements. The public authority is reduced to a mere cipher necessary to achieve the statutory power of compulsory purchase. In that example, if an issue arises, for instance at inquiry, over why this or that should be done or why a particular detail is or is not included, the driver for its inclusion is not in reality the public interest at all but the private commercial interest of the developer. Indeed the public authority may even be prohibited by the agreement from becoming involved. He who pays the piper calls the tune!

Other schemes will stand somewhere in that spectrum. It respectfully seems to me that the law has not yet faced up to - and by the law I include the procedural law - the way in which that should proceed. An examination, from the point of view of principle, rather than governed by the facts of any particular case, is long overdue – and legally - a CPO process in which a local authority, apparently the promoter, takes no decisions and is the master of nothing, does not fit the structures under which on the face of it such a process is intended to proceed. In those circumstances it has in fact surrendered its role to another party, becoming little more than - at best - a postbox.

I do not have the answer. However, total transparency seems the key so that any decision-maker can analyse the material to determine whether the public interest, whatever it is, justifies the steps sought and can identify where the private interest is intervening.

2. **Chicken and Egg – Merits and Compensation**

This is an issue which impacts significantly on the practical manner in which CPOs proceed and has the capacity to make a real impact on the efficiency of the process and the timing within which decisions are reached.

I am on record (in response to previous Scottish Government consultations) in pointing out that compensation is often a critical component, whatever the legal framework, in the decision-making process involving those unhappy with CPOs. While a landowner may or may not oppose the objectives of the CPO, he may also be in a position to take a view - or take advice - on his prospects of successfully persuading any decision-maker that his objection will be

sustained. In that situation, a difficulty arises if he is unable to ascertain what compensation he is likely to receive.

In my experience, it is common for parties, who may - realistically - believe that their prospects of opposing the fundamentals of the CPO project are not strong, to nevertheless maintain objections to that project in order to facilitate discussions with the acquiring authority over compensation. In many instances the acquiring authority, whatever the Scottish Office guidance, is unwilling, or professes itself unable, to enter such discussions in advance. The net result is unnecessary objections on grounds which are not truly intended to lead to a decision and thus delay to the process (and expense to all concerned).

While the parallel is not exact, I can illustrate that by reference to the Edinburgh Tram Project. I was instructed by a number of land-owners, opposed to the Project but also, realistically, taking the view that their prospects of persuading the Scottish Parliament not to approve the project at all were poor. They were unable to persuade the tram promoters that they could or should enter into discussions on compensation at an early stage. The result was that, under the then system, Scottish Parliament committees were forced to deal with objections on the merits which, on one view, were unnecessary (indeed were subsequently dealt with following negotiations over compensation and removed before decisions had to be taken on them).

Somewhere in the process it would potentially aid the speed and efficiency immeasurably if a mechanism could be found for requiring compensation to be discussed and perhaps even for some swift form of arbitration on the principles of such compensation, if contentious, so that these matters could be swept out of way early (or at a minimum key decisions be taken on them).

3. Chicken and Egg – More Elaborate Issues

As is illustrated in a number of sections of the Paper, this relatively simple point has a more complex incarnation where there are more significant issues over compensation. Particularly when viability may be an issue in commercially-based schemes, any step which materially increases compensation over that budgeted for may lead to the scheme being unable to proceed. In the context of traditional CPOs for roads, schools or whatever, these issues would not arise. It would simply be assumed that the relevant authority would pay whatever compensation had to be paid. That may not be true even for traditional types of schemes nowadays due to the strict need for budgetary constraints and the straitened economic climate. It will certainly not be true for any scheme which involves a back-to-back element or commercial redevelopment proposals as part or all of the scheme. Unfortunately, the processes for dealing with these matters are, because of their traditional origin, placed at a stage in a process well after the CPO is approved. Examples are for instance, severance - which might conceivably lead to a very substantial piece of property having to be taken because of material detriment - or procedure for CAADs which again could lead to a property having a very much higher than hoped - for compensatable value.

The point goes further. On one view of the present law, any issue which relates to these points is not only not dealt with at inquiry but not relevant for consideration at the inquiry - yet it may be absolutely critical in a financial sense to whether the scheme proceeds. One could then have an extensive inquiry on the principle of a CPO which is, in the result, completely academic. A waste of time and effort because of one of the financial impacts. It may be difficult to create an elegant scheme to deal with the issue, but it does respectfully seem to me that it requires to be addressed so that these matters can be looked at early, if they have the capacity to materially impact on the likelihood of the scheme proceeding. Indeed, the question perhaps is not whether they should be, but how arrangements can be made for their compulsory examination early in process.

4. Acquisition of Rights Short of Ownership - Temporary Acquisition

Although this is not a matter much dealt with in the Paper, it touches on areas which are tackled under other heads and it may therefore be of value. It arises from an example which ultimately did not reach the courts.

In the context of the building of the M74 extension, a large site was identified as required, not for part of the new road, but for a construction compound to be used by contractors working on the road during the lengthy period anticipated for construction. I do not know what approach had been adopted to such a requirement in the past. It may be that voluntary arrangements were reached or indeed that an area was compulsorily purchased. In this instance, what was sought was a right to 'acquire' <u>temporarily</u> for the duration of the works.

This gave rise to debate on the part of the site owner as to whether it was, in law, competent to acquire such a temporary right. It was not one which readily fitted with the pattern of acquisition of ownership on which CPO procedure is based. Valuation could clearly be problematic given the difficult of crystal-ball gazing to a point at some future date when the property was returned. There was indeed a difference among the advisers - myself on the one part and a leading member of the bar on the other - with one arguing that it did not fall within the statutory acquisition powers and the other arguing, pragmatically, that if it was of evident utility for the scheme, the Court would likely hold that it did (and I cannot now recall on which side of the fence I sat!)

Matters proceeded. I have no further information as to the basis on which that occurred or on the basis on which compensation was arranged.

It seems to me to be unlikely that this would be the only scheme with a requirement of this nature. Consideration might usefully be given as to whether, in principle, such rights ought to be capable of being compulsorily purchased and if so, on what basis. The matter could then be made clear by statute or rule to avoid future litigation.

Answers to specific questions (and some that were not asked directly)

1. The answer is clearly yes. The current system has become ridiculously complicated. It resembles some kind of under-sea wreck, so encrusted with layers of barnacles laid down in successive years that it is now difficult to see what the original structure was. Indeed, although for obvious practical reasons the form of the Consultation Paper follows an analysis of the existing law a more radical approach to produce a stripped-down version, may be justified on the grounds of accessibility and simplicity.

Utility way-leaves should be a separate topic as they raise a series of slightly different issues.

5. Yes. See the discussion below.

Chapter 3

Does A1 P1 not depend on looking at the matter wholly through the telescope of a public interest? (See for example 3.34 and 3.46).

7. This question on the convention is debateable, given some of the issues discussed above.

13. No

14. No. That would be unnecessarily rigid.

15. Some form of "court hearing" should be required i.e. decisions on paper should be avoided. The form of the hearing should be capable of being more flexible than at present. Parties should be able to opt the other way i.e. for the matter to be dealt with on paper if they so wish.

17. No, confirmation should be allowed where there are no objections.

19. Yes.

22. Yes.

24. No. The period is too long. A suggestion might be 18 months?

25. Yes. All the material supporting this should be available for scrutiny and to enable potential challenge (see the point made above about the order in which issues of principle and issues of compensation should be taken).

29. No. A similarly wide interpretation should be adopted as in planning. Most points should be allowable.

30. Not necessarily.

32. Yes.

34. Yes. This seems sensible.

35. No. This may affect other parties.

Chapter 7 - I suggest that as part of a more radical approach a single method of obtaining title should be adopted. The justifications for having more than one do not seem strong.

The issue of material detriment and the timing at which that must be considered are matters dealt with above. The logic of having an enormous process to confirm a CPO, a battle over material detriment and then discover that the developer pulls the plug when they discover the cost seems weak.

56. Yes.

60. Yes.

65. Yes.

Para 10.20 Agreed.

81 – 84. These are difficult questions to which I do not pretend to have the answer. The logical starting point ought to be that one should aim to come as close as possible to true value. In addition the fewer artificialities about that process, including artificial assumptions, the better. While an artificial situation is being considered the closer that resembles reality, the better.

85. Yes. This reflects reality.

86. Yes.

87. The vesting date - but later planning permission would come into value in any event in a real valuation.

88. Yes.

89. Yes.

94. Yes.

96. Yes – this is little used and it might be sensible to try to draw a line.

98. Logically the answer is yes (but see the discussion above about bringing issues of CPO confirmation and compensation closer together or in a different order). The period might be within six months of confirmation if the present system is adopted.

99. This is questionable but more would be better. That then might turn out to be difficult in a number of cases. For instance, an outline application for housing will normally be expected to

give some indication of numbers and types of houses. On the other hand that might be difficult to determine.

100. This is debateable. Possibly the start date with ideally a discretion to vary that if it turns out to be unfair, although I do recognise that that would be difficult for a local authority, rather than an appeal body to consider.

101. Yes.

102. Yes.

103. Yes.

105. As elsewhere, oral procedure by way of some form of hearing should always be available with a written procedure if the parties wish.

106. Sensibly this should be made as the same as other cases i.e. 3 months. It is not necessarily to be assumed that the urgency to determine a matter of this kind is greater than the urgency which would arise to determine an issue over a real planning permissions.

14.42 In my view the commentary is wrong. All kinds of systems of this type are open to abuse if some form of non-decision is not appealable. Judicial review is not a suitable alternative remedy. Arguably the substantive decision in the case is wrong because it leads to a preference for form over substance, in the absence of any indication that the failure to produce the document had any material significance whatsoever to the substantive determination which would have followed.

107. The answer is no on logical grounds because as discussed if should be the same as for ordinary planning permission. However, were a specialist planning tribunal to be available to determine such matters, that would be preferable because it would eliminate all possible issues of political influence on decision-making.

108. No.

109 – 111. Assuming certainty on one view departs from reality whereas some form of value reflects the reality of the market. The hypothetical purchaser would treat anything less than actual consent as only giving rise to hope, but would reflect the likelihood in the degree to which discount would be necessary.

119. Yes

120. Yes

121. Yes - this should be done by way of short statement in the relevant new wording.

122. Yes - although there is an argument for discretion for exceptional cases.

123. Yes. Points of this kind can cause practical difficulties. I can think of one case on our files at present where the lack of agreement that the local authority will pay the cost of professional advice is holding up what might well have been constructive discussions on the acquisition of property, which was not otherwise objected to in principle.

125. On one view the reference to "wider" losses is the incorrect approach. Once the new wording is settled on, all losses falling within it should be payable.

129. Yes.

Para 17.7. I agreed with the proposition here. However, this raises the question of whether the type of case mentioned in the second sentence of 17.6 is really a public-interest-justified CPO at

all. The taking of profitable property from A to give it to private company B to make a profit from it sits at the margins discussed above.

124. My own view, for what it is worth, is that the Tribunal offers a mix of formality (where required) and informality which is capable of dealing with most cases more than adequately. In endeavouring to review the Tribunal's procedures should be borne in mind – particularly based on experience in the English courts – of an increase in party litigants (or litigants in person in England). This has tended to increase cost and delay in many cases rather than the reverse. In many instances representation (obviously of a suitable quality!) can shorten and focus the issues by eliminating the irrelevant and focussing on what truly matters. The siren-call therefore to simplify should be viewed with a degree of caution.

145. Yes.

18.22 - The Six Year Rule

I was involved in what is probably the leading case on the rule (Royal Bank of Scotland v Clydebank Council). The argument which failed was that the only function of the rule was to cut off the right to have a dispute determined by the Lands Tribunal. Since the point had never been reached where compensation had been offered and a dispute arose, the right to compensation remained.

In the context of the taking of property on a compulsory basis, particularly having regard to a modern, rights-influenced, approach, it respectfully seems to me to be an odd conclusion that an authority can accept that it has acquired the property of the subject, accept that it has not paid compensation, but rely on a procedural rule to prevent any requirement to pay compensation. I appreciate that six years is not an unusual figure for a time limit (for instance the general prescription period in England and Wales) but in the context of the taking of property - assuming that it is admitted - I do wonder whether the right to obtain compensation for the taking of that property ought, in effect, to be imprescriptible. The intention in the RBS case had been to argue that, if it was once accepted that the right remained, the local authority would be obliged, in good faith, to both value the interest and make an offer of compensation. That they acted in good faith would be verifiable and challengeable, if need be by judicial review. The only difficulty which might arise would be if a *bona fide* offer of compensation were to be rejected in which case the jurisdiction of the Lands Tribunal had been excluded. However, *bona fides* was capable of being challenged (for example by the failure to include within compensation the value of part of the site or something of that kind) and a decision could be struck down on normal judicial review principles and the authority required to revisit it.

This may be a somewhat esoteric point but the six year rule is not well-known. It is possible to envisage a number of circumstances in which for one reason or another, matters have not come to a conclusion in that time.

146 – 148 - The real question here is the knowledge of the time limit which in my experience is very limited, most probably because in the vast majority of cases it simply does not arise. However the Paper, for instance para 18.23, highlights the number of circumstances in which that might not be the case. Restatement of the law should perhaps allow an opportunity for greater clarification.

149. Yes. Circumstances could well arise in which it would be regarded as equitable for compensation still be paid. See the discussion above.

150. This is unnecessary. The discretion available already is appropriate.

151. No. The justification for PEOs and other circumstances is not applicable to this type of case.

158. Determination by a flexible and speedy procedure before an Expert Tribunal is of the essence of the Lands Tribunal system and bears considerable similarities to arbitration. It is not immediately apparent why arbitration or similar forms would be preferable. Mediation may be of

assistance particularly where a log jam has developed with one party not moving from what is perceived to be an unjustifiable position or there is some "personality conflict" causing difficulty. That could be broken by the use of the neutral chairman which the mediator represents. However, I have no experience of this being used in cases of this kind.

Chapter 19 - The Crichel Down Rules

As far as I have been able to ascertain, these are rarely the subject of contentious dispute but I have had the dubious advantage of being involved in the past in a matter which touched very closely on these Rules.

The first point which arises out of that example, is that I can see evident utility in the enshrining of the Rules, so-called, in statute. In the case in question, there was evident resistance to the application of the "rules", one argument being that they were merely guidance not binding in any particular instance. That simply led to unnecessary debate and confusion. Either they should apply or they should not, but the matter should be clear.

It would also be of assistance if it could be made clear to which bodies the rules apply. Given the varying nature of compulsory purchase arrangements in modern times, logic would suggest that any property acquired by compulsory purchase, by anyone, should be due to be returned to the original owner if no longer required (subject of course to payment of then current market value). I recollect that in the case with which I was concerned, the party involved was a Health Board. While technically part of the Crown, the Board had of course its own governmental arrangements and was not, at least initially, attracted at all to the proposition that it required to return the property to a former owner.

Another issue may be whether the rule which prevents the return under Crichel Down of property which has materially changed should apply. In the context in which the Rules originated from wartime exigencies, the typical example was likely to be, for instance, a large house used for some other purpose and then no longer required, thus capable of being returned as a large house. The example with which I was concerned was, I recollect, some form of military encampment acquired for hospital purposes, the effect being to leave the same buildings in use and therefor capable of being returned at the end of the requirement. It is at least for consideration whether once buildings, or whatever other development has taken place, are no longer required they should sensibly be offered for return to the original landowner. After all, if market value is paid why should it matter?

A series of practical issues arise which might also conveniently be dealt with. For instance, the date at which the transfer is required could be clarified. If that date, was, for instance, the date when land was declared as surplus, then in the real world transfer on that date is highly unlikely, and the legal consequences of the passage of time ought to be considered. If there are buildings, who is responsible for their maintenance in their condition at the relevant date? What are the consequences if they are not so maintained? Does the landowner require to be compensated for the consequences of any delay in transfer? These are all matters which were at issue in the case with which I was concerned (*Robertson v The Secretary of State)*. I offer no particular views as to what, in the public interest, ought to be the ruling on these points save to say that they were ones which caused considerable concern to those involved. These instances may involve individuals who have reluctantly had, possibly through predecessors in title, valued property taken from them. Matters can become ones of emotional attachment, thus a degree of clarity and sensitivity might be required in any formulation.

160. Yes

161. Yes

162. No. The stated reason for not changing the position (i.e. increased administration) does not hold water. There is no reason why the administration of finding the owners from whom the property has been compulsorily acquired should be any different depending on what has happened in the land since acquisition.

164. Yes. I do not have the knowledge to fix a figure.

168. See the general discussion above. The time limits are less critical than a proper understanding of the financial consequences of the passage of time.

170. Yes

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