



Francis Taylor Building

Key Valuation Principles

9 June 2020



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Compulsory purchase compensation: an overview of Rule 2 and injurious affection compensation

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Section 5(2) of the LCA 1961 – Rule 2

- The value of land is taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise
- This refers to the expectations of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property, and its capabilities, and the demand for it
- So far as possible the assessment of compensation should reflect what would be likely to happen if the property were actually sold at the valuation date

Rule 2 compensation

- It must be assumed that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life
- The hypothetical buyer is assumed to have behaved reasonably and made proper enquiries about the property and not to have appeared too eager to buy
- The willing seller is a hypothetical character and the personal characteristics of the actual seller are not to be taken into account

Hoffmann LJ in IRC v Gray [1994] RVR 129

“one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable.”

Valuation assumptions

- The starting point is that a search for the value of land at a particular date must take account of the attributes of the land at that date
- Land is to be valued in the state in which it was in and in the circumstances prevailing at the valuation date
- An interest in land is assumed to be sold in the state in which it existed as at the valuation date, taking into account any tenancies or restrictions to which it was subject

Counter-factuals

- Where property is to be valued on an open market basis as at a certain date, no counter-factual assumptions should be made other than those which are inherent in the valuation exercise or those which are directed by statute
- There are particular statutory rules and provisions arising from case-law (including *Pointe Gourde v Sub-Intendent of Crown Lands* [1947] AC 565) which require the effect on value of the scheme underlying the compulsory acquisition to be ignored in certain circumstances
- Plus statutory planning assumptions

Section 7 of the CPA 1965

- Severance and injurious affection
- Section 7 provides that, in assessing compensation for land taken, regard must be had to the damage to be sustained by the owner through any injurious effect on the owner's other land by reason of the exercise of the relevant statutory powers
- This has been described as loss caused to the retained land by the works or use of the land acquired for the statutory purpose

Section 7

- Section 7 requires in effect that where a person's land is compulsorily acquired, if certain retained land suffers a diminution in value because of the project, then that diminution in value should be included in the compensation paid for the acquisition
- Any loss of amenity which affects the value of the land could give rise to compensation

Main features of s7 compensation

- Land must have been acquired compulsorily from the claimant
- The harm must be caused by the exercise of the statutory powers
- Injurious affection can arise from both the execution and the use of the works or the land taken, and would include temporary loss during the execution of the works
- There is no need for there to be an underlying right to claim in tort (contrast with s10)

Main features of s7 compensation cont'd

- Injurious affection extends beyond matters that would normally be compensatable in tort, such as loss of privacy and general amenity
- Injurious effect may arise from the works as a whole and not just from that part of them on land taken from the owner
- Compensation may (and ought to) be prospective, to include what is reasonably anticipated to happen as it must be claimed once and for all
- Damage to purely personal rights unconnected with the land is not compensatable

Section 7: other land

- The “other land” (the retained land) must be held with the land taken, but it need not be contiguous with or part of the same title, or used in the same way or occupied by the same person, as the land taken
- The two parcels of land must merely be owned by the same person and “so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them” (*Cowper Essex v Acton Local Board* (1889) 14 App Cas 153 at 167)

Section 7 claims

- For there to be a claim for injurious affection under s7 of the CPA 1965, the value of the owner's retained land must have been depreciated by injurious affection as a result of the construction or use of the scheme or the acquisition of land
- Section 7 provides that compensation is payable for injury done "by the exercise of the powers conferred by... the special Act" – so, the injury must be caused by the exercise of the relevant statutory powers
- The measure of compensation is the diminution in value of the owner's retained land

Section 10 of the CPA 1965

- Injurious affection
- Not necessary for a person to have had any land taken for the scheme
- The land must be affected in a way which reduces its value
- The injury can only arise from the carrying out of the works, not from the subsequent use of the works
- Entitlement to compensation would be limited to cases where a person would have had a claim in tort but for the statutory authority

Section 10: McCarthy rules

- The injurious affection must be the consequence of the lawful exercise of statutory powers
- The injurious affection must be such that, if not done under statutory authority, would have given rise to a cause of action in tort
- Compensation is payable only for damage to the claimant's land or interest in land
- Compensation is payable in respect of only the execution of works and not their use

Section 10

- The value of a claimant's interest in land must be affected by physical interference with some legal right, public or private, of which the claimant is entitled to make use in connection with his property
- Compensation must be ascertainable in accordance with the general rules applicable to damages in tort, including the requirements of foreseeability and directness of harm
- The measure of damages is usually the diminution in the value of the interest in land affected, assessed at the date of the injury, for all the anticipated injury



Section 10: business losses

- Damage arising from business lost by reason of an obstruction or interference making land less accessible or attractive to customers is recoverable, where such loss of business reduces the value of land (see *Wildtree Hotels v Harrow LBC* [2001] 2 AC 1)
- However, compensation is not available for personal losses, including lost business profits



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Key Valuation Principles: Disturbance

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Overview

- History of disturbance claims
- Types of disturbance:
 - Occupiers without an interest
 - Occupiers with an interest
- General principles of assessment
- Relocation and extinguishment bases



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History of disturbance claims

- Compensation = value of land *to owner*
- C19th decisions include losses not directly based on value of land
- Preserved by six rules introduced in 1919
- Now see Land Compensation Act 1961, s5

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Types of disturbance

- (1) Occupier with an estate/interest: LCA 1961, s5 r6
- (2) Occupier without an estate/interest: LCA 1973, s37

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Occupiers without an interest

- Requirement: lawful possession at dates in s37(3)
- Entitlement: “disturbance payment”:
 - Reasonable moving expenses
 - Trade/business loss consequent on quitting
 - Interest from date of displacement s37(6)
- Does not apply to agricultural land
- Have regard to reasonably expected availability of land and availability of other suitable land

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Occupiers with an interest: Rule 6

“The provisions of rule 2 shall not affect the assessment of compensation for **disturbance** or any other matter not directly based upon the value of the land”

LCA 1961, s5

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Occupiers - requirements

- Occupier of land
- With an estate/interest
- Lost possession of the land
- Not claiming on a basis inconsistent with value of land/duplicating land value



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Assessment: general principles

- Causal connection
- Loss not too remote
- Requirement to mitigate loss
- Basis: relocation or extinguishment

Director of Buildings v Shun Fung [1995] 2 AC 111 at p126.

NB – defer assessment until facts are known



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Relocation

- Costs of search, including time cost
- Extra cost of new premises IF no alternative/benefit
- Adaption of premises to make equivalent
- Removal expenses and costs
- Permanent loss of capital value ('goodwill')
- Temporary loss of profits
- Staff time as a proxy for lost revenue

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Extinguishment

- Total value of business to the Claimant
- Difficult to assess:
 - Annual profits x multiplier
 - DCF approach
 - 'Robust' approach
- NB automatic right to extinguishment basis where over 60 and undertake not to dispose of goodwill

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The Principle of Equivalence

Alex Booth QC

Michael Fry

9 June 2020



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The Principle of Equivalence

- Michael Fry
 - What is the principle of equivalence
 - Historical development and current position
- Alex Booth QC
 - The practical application of the principle of equivalence



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Horn v Sunderland Corp [1941] 2 KB 26, 42

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



Scott LJ

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Horn v Sunderland Corp [1941] 2 KB 26, 42

“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...”

Scott LJ

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Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111, 125

“... no allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be *compensated fairly and fully* for his loss. Conversely, and built into the concept of *fair compensation*, is the corollary that a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.”

(emphasis added)

Lord Nicholls



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What is Equivalence?

- Underlying principle of principle of statutory compensation
- Uncontroversial?
- Historical development towards increasing emphasis on “fairness” to landowner
- Zenith Planning and Compulsory Purchase Act 2004? – home loss payments



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Why are we still talking about equivalence?

- Cornerstone of law of compensation
- Should be obvious, but still controversial
- Current controversy – fairness to whom? What is a fair price and does that conflict with principle of equivalence?



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Law and guidance

- “Complex amalgam of statute law and judicial interpretation” – The Law Commission ‘Towards a Compulsory Purchase Code Final Report’ December 2003



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Statute Law

- Land Compensation Act 1961
- Compulsory Purchase Act 1965
- Land Compensation Act 1973
- Acquisition of Land Act 1981



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Section 5 Land Compensation Act 1961

Rule 2:

“...shall, subject as hereinafter provided, be taken to be an amount which the land if sold on the open market by a willing seller might be expected to realise.”

Plus Rule 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”

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Guidance

- Compulsory purchase and compensation booklets 2, 3 and 4
 - **General Principle:**
 - 2.1 Compensation following a compulsory acquisition of land is based on the principle of equivalence. This means that you should be no worse off in financial terms after the acquisition than you were before. Likewise you should not be any better off.
 - 2.2 Because the effects of the CPO on the value of a property are ignored when assessing compensation, it is necessary to value the land on the basis of its open market value without any increase or decrease attributable to the scheme of development which underlies the CPO

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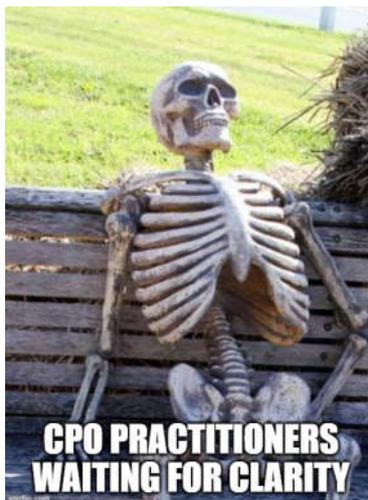
The theoretical principle of equivalence

- How is it meant to work:
 - The same position in monetary terms
 - No-scheme world
 - Fair
- But is it really?
 - Landowners: Monetary not practical equivalence
 - Acquiring Authorities: Land value capture

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The Principle as per Horn

“...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”.

“...the principle of equivalence ... is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss.



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Scenario 1 – Inadequacy of the Statutory Framework

Farmhouses in Buttercup Valley

Owner (A)

- Lifelong resident
- Long standing family and working connection

Owner (B)

- New owner
- No substantive connection to property or area



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Scenario 2 – Dispute as to fact of loss

- Section 10A of Land Compensation Act 1961
- Right of non-occupying owner to recover expenses incurred in acquisition of replacement investment property

Acquiring Authority Position

- Entitlement to recovery of Section 10A losses only available where compensation for Rule (2) Value assessed on 'existing use' basis
- Rule (2) recovery on basis of development potential precludes recovery for Section 10A

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Re-investment / Re-development

- For re-development to occur, owner required to sell and then incur reinvestment expense in any event
- Costs of reinvestment therefore not attributable to the compulsory acquisition,
- The owner has a choice
 - To receive Rule 2 compensation reflecting existing use of building **and** Reinvestment costs
- Or
 - To receive Rule 2 compensation reflecting development potential, but **only** that compensation

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Finding in Horn

“How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm?”

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Landowners as Developers?

- Not all landowners are created equal...
- ‘Landowner developers’ different to owner-occupiers who live or carry on a trade at a property
 - Able to undertake development
 - No need to effect sale to realise potential
- Why penalised in respect of re-investment costs incurred in consequence of compulsory acquisition?

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What use the Principle?

- More than just a maxim
- A light that should *actively guide* the Tribunal in its application of the framework



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