[Coat of Arms]

The Law Commission

(LAW COM No 286)

TOWARDS A COMPULSORY PURCHASE CODE: (1) COMPENSATION

FINAL REPORT

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Lord High Chancellor by Command of Her Majesty
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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

TOWARDS A COMPULSORY PURCHASE CODE – (1) COMPENSATION

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ABBREVIATIONS

the 1961 Act	Land Compensation Act 1961
the 1965 Act	Compulsory Purchase Act 1965
the 1973 Act	Land Compensation Act 1973
the 1981 Act	Acquisition of Land Act 1981
the 1990 Act	Town and Country Planning Act 1990
the ALRC Report	The Australian Law Reform Commission Report No 14: Lands Acquisition and Compensation (1980)
CP 165	Towards a Compulsory Purchase Code (1): Compensation (2002) Consultation Paper No 165
CP 169	Towards a Compulsory Purchase Code (2): Procedure (2002) Consultation Paper No 169
CPPRAG	Compulsory Purchase Policy Review Advisory Group, established by the Department of the Environment, Transport and the Regions
the CPPRAG Review	*Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report* (July 2000)
DETR	Department of the Environment, Transport and the Regions
Denyer-Green	Barry Denyer-Green, *Compulsory Purchase and Compensation* (6th edition 2000)
DTLR	Department of Transport, Local Government and the Regions
Horn v Sunderland Corp	*Horn v Sunderland Corporation* (1941) 2 KB 26
the *Indian* case	*Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302
the LAA (Cth)	Land Acquisition Act (Commonwealth) 1989
ODPM	Office of the Deputy Prime Minister
Overview	Towards a Compulsory Purchase Code: (1) Compensation, An Overview (2002) Consultation Paper No 165
Pointe Gourde	*Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565

the Policy Statement	*Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR, December 2001)
RICS	Royal Institution of Chartered Surveyors
Rugby Water Board	*Rugby Water Board v Shaw-Fox* [1973] AC 202
Scott Report	*Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes* (L Scott QC, Chairman), Cd 9229 (1918)
Shun Fung	*Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111
Waters	*Waters v Welsh Development Agency* [2002] 2 EGLR 107
West Midland Baptist	*Birmingham Corp v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874
Wildtree Hotels	*Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1

EXECUTIVE SUMMARY

COMPULSORY PURCHASE AND THE COMPENSATION CODE

The current law of compulsory purchase is a patchwork of diverse rules, derived from a variety of statutes and cases over more than 100 years, which are neither accessible to those affected, nor readily capable of interpretation save by specialists. The case for reform has been recognised for many years. In July 2000, the Compulsory Purchase Policy Review Advisory Group ("CPPRAG"), which had been established by the DETR, reported that the law was "an unwieldy and lumbering creature" and made a number of recommendations for detailed improvements to the law. In particular, it proposed that the Law Commission should be asked to prepare new legislation which would both set out standard procedures and contain a clearly defined Compensation Code. The Lord Chancellor subsequently approved terms of reference, requiring the Commission to review the law relating to compulsory purchase of land and compensation, and to make proposals for simplifying, consolidating and codifying the law.

Two Consultative Reports were published in 2002. The first (CP 165) dealt with Compensation; the second (CP 169) with Procedure. This Report carries forward the issues covered by the first Consultative Report, makes final recommendations for the reform of the law relating to compensation for compulsory purchase, and sets out the basis for a Compensation Code. We intend to publish a further Report in 2004 on compulsory purchase procedure, dealing with the issues contained in the second Consultative Report.

Although the Report does not contain a Bill, it presents a Compensation Code as an indicative framework for possible future legislation. The "Code" is designed to maintain, and build on, the main features of the existing law within a simpler and more logical structure, using more accessible labels. Its essential objective is clarification of principle. Clarity, consistency, and accessibility should reduce the time expended on legislative interpretation, facilitate and expedite negotiated settlements, and enable the Lands Tribunal to concentrate on disputes of fact and valuation, not law. In view of the policy changes already proposed by CPPRAG and DETR, we have regarded our primary task as related to form, rather than substance. However, the Code is not simply a restatement. We have proposed amendments where necessary to remove unfairness or anomalies.

THE RIGHT TO COMPENSATION AND HOW IT IS TO BE ASSESSED

The Code commences with a clear statement of entitlement confirming that any person ("the claimant"), from whom an interest is acquired (or whose interest or right in land is extinguished or overridden) by compulsory purchase, is entitled to compensation. The assessment of compensation is made in accordance with the underlying principle of "fair compensation", having regard to four heads (based on traditional principles): market value of the acquired land; injury to retained land; consequential loss; and (where the tests are fulfilled) equivalent reinstatement.

MARKET VALUE

Market value, under the first head, is the amount which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

(The amount cannot be less than nil.) This rule follows the existing law, and existing case-law will continue to be relevant.

INJURY TO RETAINED LAND

The claimant is also entitled to compensation for the reduction in value of other land previously held with the acquired land ("retained land"). This encompasses two largely distinct categories of compensation, long recognised under existing law: first, for the effect of the severance of the acquired land from the retained land ("severance"); and secondly, for the effect of the works on the retained land , both during construction and subsequently ("injurious affection"). Compensation is measured by the decrease in the market value of the retained land. Any increase in value of any retained land must be off-set, as "betterment", against the decrease due to severance or injurious affection. (We have taken account of a recommendation of CPPRAG, accepted by Government, that such betterment should be off-set only against severance or injurious affection, and not against other heads.)

CONSEQUENTIAL LOSS

The claimant may have suffered consequential loss which is not reflected in the sums attributable to the loss of the land acquired or to the reduction in value of any land retained. Typical examples are removal expenses, temporary loss of profits of a business, and legal or other professional costs reasonably incurred by the claimant in connection with the acquisition.

We have used the term "consequential loss", rather than the traditional term "disturbance", to make clear that compensation is not necessarily confined to loss suffered by disturbance of occupation. This reflects case law under section 5(6) of the Land Compensation Act 1961. In general, the Code permits recovery of all losses, not reflected in the value of land, which are the natural and reasonable consequence of the compulsory purchase and not too remote.

There are special rules concerning displacement of businesses. The normal rule is that compensation is paid on "the relocation basis" (including loss of profits and incidental costs of relocation), provided relocation is reasonably practicable and genuinely intended, and the cost is not unreasonable. Where a higher price is paid for the relocation premises, there is a presumption of "value for money" (as under the existing law. Where relocation is impracticable, the claim may be on "the extinguishment basis", reflecting the value of the business as a going concern. To remove a possible doubt under existing law, it is made clear that, in determining whether compensation should be assessed on a relocation or extinguishment basis, the claimant's personal circumstances, including financial circumstances, are to be taken into account.

EQUIVALENT REINSTATEMENT

Compensation may be exceptionally assessed on the "equivalent reinstatement" basis, where the acquired land has been adapted and used for purposes for which there is no general market, and where reinstatement in some other place is genuinely intended. (For instance, the land may be used as a church or other place of worship.) In such cases, the claimant may seek to be compensated for the reasonable cost of the reinstatement. The Tribunal has a residual discretion to refuse compensation on that basis, where the cost of reinstatement is disproportionate having regard to the likely benefit to the claimant. This rule reflects existing law. However, we include a new provision, enabling the authority to impose conditions to ensure that the compensation is used for its intended purpose.

GENERAL RULES

We retain three incidental rules, recognised by existing law: first, the "illegality" principle, that any element of value or loss attributable to a use which is contrary to law is to be disregarded (subject to a new, but limited discretion for the Tribunal to disapply the rule having regard to the nature of the breach); secondly, the "consistency" principle, that where the land is valued on the basis of potential for development or change of use, compensation is not allowed for loss or damage that would necessarily have arisen in realising that potential; and, thirdly, the "mitigation" principle, that compensation is liable to be reduced where the authority shows that the claimant failed to mitigate his loss.

DATE OF VALUATION

The cases establish that land is to be valued at the date of when compensation is agreed or determined, or if earlier the date when possession is taken by the authority. The Code takes that as the basic rule for deciding all issues relevant for compensation, including physical and planning circumstances, save as otherwise provided. Again reflecting existing case-law, compensation for consequential loss is assessed by reference to the circumstances known or anticipated at the date of assessment; and compensation on the equivalent reinstatement basis is assessed by reference to the date on which reinstatement becomes reasonably practicable.

DISREGARD OF THE STATUTORY PROJECT AND PLANNING STATUS

Relatively straight-forward to state, but often very difficult to apply, the principle of project disregard (otherwise known as the "no-scheme" or "*Pointe Gourde*" rule) is one of the most complex issues in compulsory purchase law. The problem arises mainly from the lack of consistency in the many formulations of the rule, in statute and case-law. Essentially, assessment of compensation payable for the acquired land should not take account of any increases or decreases in value attributable to the statutory project or scheme for which the land is acquired. Under the existing law, this has required consideration of the state of affairs which would have existed had there never been a scheme of acquisition. The proper identification of "the scheme" may then become the source of dispute between the claimant and the acquiring authority; as may "the rewriting of history" in the "no-scheme world", sometimes over many years.

The Report notes the unanimity among respondents for the need to "clear the decks", by replacing all existing formulations, by a single set of statutory rules. In an attempt to clarify its operation, the Report seeks to redefine the purposes of the rule, which differ in relation to the effects respectively on claimants and acquiring authorities. The proposed Code contains a new set of rules, based on "the statutory project", the definition of which follows our "preferred version" of previous formulations. The room for speculation is limited by use of the "cancellation assumption" (approved by the House of Lords in relation to planning assumptions); that is, the position is considered as though the project were cancelled at the valuation date, rather than as though there never had been such project or any indication of it.

The rules for planning assumptions are treated separately. They follow the general approach of the existing law. Account is taken of any planning permissions in force at the valuation date, as well as the future prospect of any other such planning permissions. Account is also taken of the value of any appropriate alternative development (that is development of a type which, applying the cancellation assumption, might reasonably have been expected to be permitted on an application considered on the valuation date). The main difference from the existing law is that there is no automatic assumption of permission for the authority's own proposals, unless it has been granted, or would have been granted, to a private developer.

We follow the existing law, by providing for an application for an alternative development certificate from the local planning authority, and the likely conditions obligations or requirements of such permission. An important change is that the right of appeal against a certificate would be to the Lands Tribunal, rather than to the Secretary of State (or National Assembly for Wales). This is designed to ensure that the Tribunal is the ultimate arbiter of all issues relevant to compensation, and also to avoid the possibility of the appeal agency being judge in its own cause (as may happen, for example, in relation to a road scheme promoted by the NAW).

ACQUISITION OF NEW RIGHTS AND INTERFERENCE WITH EXISTING RIGHTS

Where the acquiring authority obtains a new right over land of the claimant, compensation will be assessed having regard to any depreciation in the market value of the claimant's land (not only the land over which the right is acquired, but also any other land whose value is reduced) and any consequential loss.

The Code also recognises the right to compensation of those persons whose rights over the acquired land (such as easements or restrictive covenants) are overridden by carrying out the project. Compensation will be assessed by reference to the reduction in the market value of the land to which the right is attached, and any consequential loss. (The provision for consequential loss in this case is an innovation, to ensure consistency with the other rules.)

DEPRECIATION CAUSED BY PUBLIC WORKS

Under a provision going back to 1845, adjoining owners, whose land is not acquired but is adversely affected by the *construction* of the statutory works, have a right to compensation for "injurious affection", but only if they would have had a claim at common law. In 1973, a new statutory right was created for compensation for depreciation to adjoining land caused by the *use* of statutory works, not subject to the same restriction.

We propose that the two rights should be merged in the 1973 Act, to create a right to compensation for what we call "depreciation caused by public works". We propose to deal with this subject separately from the Code, because it is not strictly part of compulsory purchase law. Entitlement to compensation for injurious affection does not require any land to have been compulsorily acquired, and the losses being compensated are due, not to compulsory purchase as such, but to the statutory works.

Compensation for *construction* will follow the existing law, save that the claim is not limited to decrease in the value of land, but may include consequential loss such as temporary loss of profits. (This is an innovation intended to achieve greater consistency with the rules applying where land is acquired.) Compensation for the adverse effects of *use* of the works, will continue to be based on the 1973 Act, subject to some detailed amendments proposed by CPPRAG.

ANCILLARY MATTERS

We recommend that additional jurisdiction be vested in the Lands Tribunal to determine any claim relating to damage to land or the use of land where it arises out of substantially the same facts as a compensation claim referred to it. This is principally to avoid arguments about the correct forum for dealing with cases arising out of negligence in carrying out the statutory works.

The rules for interest on compensation are based on the existing law, but allow more flexibility to take account of the fact that different heads of loss may be suffered at different times. The general rule, as now, is that interest is payable on compensation from the date when the authority takes possession, at a rate prescribed by statute. We recommend, however, as a change to the existing law, that the Lands Tribunal should have discretion to award interest at a higher or lower rate to reflect unreasonable conduct on the part of either party.

Claimants will continue to be entitled to advance payments on account of compensation, in accordance with sections 52 and 52A of the Land Compensation Act 1973. However, we propose a new statutory procedure in the County Court, on judicial review principles, by which the obligations of the authority in this regard may be better enforced.

THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

TOWARDS A COMPULSORY PURCHASE CODE – (1) COMPENSATION

FINAL REPORT

To the Right Honourable the Lord Falconer of Thoroton, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

TERMS OF REFERENCE

1.1 On 12 July 2001 the Lord Chancellor[1] approved terms of reference for the Law Commission in the following terms:

> To review the law (legislation, case law and common law rules) relating to compulsory purchase of land and compensation, with particular regard to
>
> (i) the implementation of compulsory purchase orders
>
> (ii) the principles for the assessment of compensation on the acquisition of land
>
> (iii) compensation where compulsory purchase orders are not proceeded with
>
> (iv) compensation for injurious affection
>
> and to make proposals for simplifying, consolidating and codifying the law.
>
> As part of the Review, the Law Commission will give priority to consideration of the rules relating to the disregard of changes in value caused by the scheme of acquisition.

We now present this report to the Lord Chancellor in fulfilment of (ii) and (iv).

[1] The Government announced on 12 June 2003 that the post of Lord Chancellor would be abolished and replaced by the post of Secretary of State for Constitutional Affairs. Legislation will be needed formally to abolish the role of Lord Chancellor. References in this report will continue to be to the Lord Chancellor.

BACKGROUND TO THIS REPORT

The existing law

1.2 Essential background for the recommendations in this report is an understanding of the tortuous development of the law of compulsory purchase, over more than 150 years since the 1845 Act (parts of which survive virtually unchanged in the current statutes). In Part II of CP 165, we gave an account of that history, and of the main features and sources of the law, as it stood before any reforms resulting from the present review. For ease of reference we reproduce that Part in Appendix C of this report.

CPPRAG Review

1.3 The reference arose out of a recommendation of the Compulsory Purchase Policy Review Advisory Group ("CPPRAG"), established by the Department of the Environment, Transport and the Regions ("DETR").[2] Their Final Report (referred to in this report as "the CPPRAG Review") was published in July 2000.[3]

1.4 The CPPRAG Review commented that the law had become "an unwieldy and lumbering creature"; they found "the existing legislative base… complex and convoluted" and requiring simplification and codification.[4] The problem was seen as lying partly in the fact that the legislation was derived from 1845[5] or earlier, and that:

> Even where the provisions of that Act have been subject to later amendment or re-enactment, the Victorian concepts and antiquated phraseology have often been carried forward, leading inevitably to difficulties in interpretation, or even comprehension.[6]

1.5 The CPPRAG Review made a number of recommendations for detailed improvements of the law. However, the first recommendation proposed a direct

[2] Subsequently the Department of Transport, Local Government and the Regions ("DTLR") and now the Office of the Deputy Prime Minister ("ODPM").

[3] *Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report* (July 2000). Its publication was announced in a Parliamentary Answer by the Minister (Nick Raynsford MP) on 27 July 2000. The DETR published at the same time a report, by Gerald Eve and Co and the University of Reading, on the operation of the "Crichel Down" rules (the administrative rules under which, following compulsory purchase, land surplus to requirements is offered back to the original owners). The Minister invited views on the two reports, which would be taken into account in preparing the government's response.

[4] CPPRAG Review, p 7, para iii.

[5] The Lands Clauses Consolidation Act 1845 (largely re-enacted in the Compulsory Purchase Act 1965) remains the foundation of much of the law. Judges have commented on the difficulty of keeping "the primitive wording ... in some sort of accord with the realities of the industrial age": *Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation* [1975] AC 99, 129 *per* Lord Wilberforce. The problem is not limited to the older enactments: see eg *Davy v Leeds Corporation* [1964] 1 WLR 1218, 1224, *per* Harman LJ, describing s 6 of the Land Compensation Act 1961 as "a monstrous legislative morass".

[6] CPPRAG Review, para 20.

role for the Law Commission in preparing new legislation "consolidating, codifying, and simplifying the law".[7] They added:

> In framing the new statute, particular care should be taken to bring the language up to date and to standardise procedures except where that would create difficulties of its own. The new statute(s) should set out procedures as well as a clearly defined Compensation Code.

Work since the CPPRAG Review

1.6 First, the Law Commission published a preliminary paper ("the Scoping Paper") in March 2001. This included a draft framework for a new Code, and discussion of the main issues and a suggested programme for further work.[8] The Law Commission's proposals were generally accepted by the DETR, and were reflected in the terms of reference set out above.

1.7 Next, the Law Commission published a discussion paper relating to the priority issue identified in the Scoping Paper ("disregarding the scheme") in October 2001.[9]

1.8 The Government published its response to CPPRAG in a Policy Statement in December 2001.[10] This Statement set out the Government's proposals for change and the Minister's foreword makes clear that, although further responses were being invited on certain specific issues, it was intended to represent a firm indication of policy with regard to most matters.[11]

1.9 Following expiry of the consultation period on its Policy Statement, the ODPM, as successor to the DTLR for planning-related functions, published its Policy Response Document in July 2002. That document set out the Government's proposals for a simpler, fairer and quicker system. It also indicated that the Law Commission, in its Consultative Report, would be seeking views on a number of issues, including:

(a) The principles relating to the disregard of the effects of "the scheme" in determining value;

(b) The principles for assessing disturbance;

(c) A consistent set of principles for determining compensation for severance/injurious affection where land is taken and where no land is taken;

7 CPPRAG Review, para 24.

8 *Compulsory Purchase and Compensation: a Scoping Paper* (Law Commission, March 2001). The text is available on the Law Commission's website (www.lawcom.gov.uk).

9 *Compulsory Purchase and Compensation: Disregarding "the Scheme" – A Discussion Paper* (Law Commission, October 2001) (also on the Law Commission's web-site).

10 *Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR, December 2001) referred to in this Report as the "Policy Statement".

11 Policy Statement, foreword by Lord Falconer of Thoroton, then Minister for Housing, Planning and Regeneration.

(d) Compensation where a compulsory purchase order is not implemented.[12]

1.10 On 24 July 2002 the Law Commission published a Consultative Report directed to items (ii) (compensation principles) and (iv) (compensation for injurious affection) of the terms of reference.[13] We will refer to that report as "CP 165".

1.11 On 18 December 2002 the Law Commission published a second Consultative Report, this time directed mainly to issues of procedure: items (i) (implementation) and (iii) (abortive orders) of the terms of reference.[14] We will refer to that report as "CP 169".

1.12 This report takes forward the proposals and questions contained in CP 165. In doing so it addresses the four issues specifically identified by ODPM in July 2002 for further work by the Commission. We plan to publish our report on the issues of procedure (including abortive orders) in 2004.

Government policy

1.13 The 2001 Policy Statement set out the general approach which the Government expected to be reflected in the new Code. The intention was to promulgate new legislation:

> … to provide a single statutory Compensation Code giving effect to the Law Commission's recommendations for achieving the principle that, in all cases, a claimant should [be] properly compensated for all the losses incurred as a direct result of the compulsory purchase order, with no differentiation according to the powers under which any particular order may be made, whether or not it is implemented and whether or not land is actually taken from the claimant.[15]

1.14 The Policy Statement highlighted the need for "simpler compensation arrangements, based on unambiguously defined principles", to ensure that:

(1) those from whom land is taken are restored, as far as possible, to the position they would have been in if there had been no compulsory purchase;

(2) in addition to the value of the land taken, all those affected should be entitled to compensation for any and all of the actual losses which they can show that they have sustained as a result of an acquiring authority's actions;

(3) such an entitlement should apply irrespective of whether land is actually taken from the claimant for the scheme and even if the acquiring authority

[12] *Ibid*, p 3.

[13] Towards a Compulsory Purchase Code (1): Compensation (2002) Consultation Paper No 165.

[14] Towards a Compulsory Purchase Code (2): Procedure (2002) Consultation Paper No 169.

[15] Policy Statement, para 4.2.

decides not to proceed after the compulsory purchase order has been confirmed; and

(4) it is not appropriate for there to be any differentiation in entitlement solely as a result of the powers under which a particular order has been made.[16]

1.15 The Government in its Policy Statement assessed the likely financial implications of the changes proposed. In setting the context for both implementation and compensation changes the paper says:

> The cost of implementing the proposals set out in this policy statement will be partially influenced by the extent to which the revised procedures, accompanied by a fairer and more clearly defined compensation code, result in acquiring authorities making increased use of their compulsory purchase powers. Furthermore, the extent to which any such cost has to be borne by the public sector will depend on the degree to which the availability of more efficient compulsory purchase powers makes replacement schemes more attractive as investment opportunities for private sector bodies working in partnership with acquiring authorities.[17]

1.16 With regard to changes to the law on compensation, the Government's view is that:

> [a] clearly defined, and better understood, compensation code should help to reduce the amount of professional time needed to negotiate compensation settlements. Clear but flexible statements of principles can be expected to reduce the number of cases which need to be referred to the Lands Tribunal and the courts, as both claimants and acquiring authorities will have a better idea of what particular elements of the compensation package are intended to cover and of the basis on which they should be calculated. …[18]

1.17 The paper goes on to accept that:

> Against such potential savings, it has to be accepted that … some of the proposals intended to make the compensation package fairer are also likely to increase the amount payable to some of those whose property is acquired. For example, the proposal that provision for disturbance payments should be expressed in legislation as a statement of principles is likely to widen the range of costs and losses which can be recompensed. However, we are satisfied that additional expenditure can be justified in terms of equity and regard for the human rights of those whose private property is directly affected by schemes for the public good.[19]

[16] Policy Statement, para 4.2.

[17] Policy Statement, Appx, para 6.1.

[18] Policy Statement, Appx, para 6.4.

[19] Policy Statement, Appx, para 6.5.

Planning and Compulsory Purchase Bill 2002/03

1.18 The Planning and Compulsory Purchase Bill 2002/2003, which was first introduced in December 2002, included a number of changes to planning law, which are not relevant to this project. It also sought to implement certain parts of the Government's proposals for improving the law of compulsory purchase and compensation. The latter included some aspects relevant to the Law Commission's report.

1.19 The compulsory purchase provisions in the Bill amend the powers available to local planning authorities to acquire land compulsorily.[20] They provide those authorities with powers to acquire land to facilitate the carrying out of development, re-development or improvement which they think will be of economic, social or environmental benefit to their area. The 1990 Act already gives local planning authorities the power to acquire land compulsorily for development, redevelopment or improvement, but there is some uncertainty about the interpretation of these powers, and so the Bill seeks to provide greater certainty. The aim is to encourage greater use of these powers.[21]

1.20 The Bill also creates an extended "loss payments" regime which is intended to make the compensation package payable more attractive.[22] Again, this is intended to encourage the use of powers of compulsory acquisition.

1.21 On 17 September 2003 the Government tabled amendments to Part 7 of the Planning and Compulsory Purchase Bill 2002/03. The intention is "to help acquiring authorities to assemble land more quickly for regeneration, new major infrastructure projects and other schemes aimed towards implementing the Sustainable Communities initiative."[23]

1.22 The amendments will:

(1) widen the definition of "statutory objector", with the effect that more people will be entitled to be heard at an inquiry;

(2) extend to all acquiring authorities the power to require information about occupiers or those with an interest in the land they seek to acquire;

(3) provide for all types of CPOs to be confirmed in stages where appropriate;

(4) allow for rules for the consideration of written objections to CPOs;

[20] See Part 8 of the Bill before Parliament as amended, on re–committal, by Standing Committee A.

[21] ODPM, Planning and Compulsory Purchase Bill: Regulatory Impact Assessment (2002), para 80.

[22] ODPM, Planning and Compulsory Purchase Bill: Regulatory Impact Assessment (2002), para 37. Basic and occupier's loss payments may be made by an acquiring authority where (broadly) the claimant: has a qualifying interest (as defined) in the subject land; the interest is compulsorily acquired; to the extent that he is not entitled to a home loss payment; and where applicable, the claimant occupied the land for the requisite period.

[23] ODPM, "Background Briefing on Compulsory Purchase Amendments" (Sept 2003) Source: www.odpm.gov.uk.

(5) enable acquiring authorities to confirm their own orders if unopposed; and

(6) define the valuation dates.[24]

1.23 The Government also proposes to table amendments at the Commons Report stage to allow advance payments of compensation to be made direct to mortgagees. Those provisions are currently in draft and being consulted upon.

1.24 The most significant amendments, for the purposes of this report, are those which define the dates to be used for valuation purposes.

1.25 In the course of this report, we shall refer in more detail to the provisions of the Bill where relevant to our recommendations.

The Law Commission's approach

1.26 The Law Commission has a statutory duty to keep under review the laws of England and Wales, with a view to their "systematic development and reform", including in particular

> … the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law[25]

1.27 There can be few areas of the law which are in more obvious need of radical treatment, under each of the heads mentioned in the statute, than the law of compulsory purchase. We have already referred to CPPRAG's description of the "unwieldy and lumbering creature" represented by the present law, as a result of piecemeal evolution over more than 150 years,[26] and the Government's own recognition of the defects of the present law.

1.28 Such a position is unacceptable in a modern society, particularly in an area of the law which has such direct relevance to human rights guaranteed by the Human Rights Act 1998. Modernisation of the law is a key policy objective of the present Government.[27] The Commission's central role in that task has been underlined on numerous occasions.[28]

[24] The tabled amendments seek to achieve these effects by amendment of the 1981 Act: ODPM, "Background Briefing on Compulsory Purchase Amendments" (Sept 2003) Source: www.odpm.gov.uk.

[25] Law Commissions Act 1965, s 3(1).

[26] Para 1.4 above.

[27] See White Paper, *Modernising the Law*, Cm 4155 (December 1998), para 1.11.

[28] In a speech to a Law Commission Conference in 2001 ("Catching the Eye of Government"), Lord Bach (Parliamentary Under-Secretary to the Lord Chancellor) confirmed the Government's commitment to keeping the law "up-to-date, relevant and useable", and to "keeping the Law Commission at the centre of the law reform process".

Sorting out the law

1.29 As we indicated in CP 165,[29] this has been in some respects an unusual Law Commission project. It does not fit naturally into any one of the normal categories – law reform, consolidation or statute law revision. It combines elements of all three. Apart from certain specific areas in which substantive issues remained to be settled, our principal task has been that of sorting out, rather than reforming, the law. That itself has proved to be a challenging task. CPPRAG's description of the existing law as "complex and convoluted" and as "an unwieldy and lumbering creature" has been powerfully endorsed by our own researches, and the responses to consultation. That unhappy position represents the result of more than 150 years of piecemeal and often incoherent development. It cannot be regarded as an acceptable legislative basis, in a modern society, for regulating an issue directly affecting human rights to the protection of property.

Policy framework

1.30 Again unusually, we came in at a relatively late stage of the review. Most of the main policy issues relating to the substance of the law had already been examined in detail by CPPRAG and made subject to public consultation; and the Government's conclusions had been made known. Accordingly, in developing the draft Code for the purposes of consultation, we took account of the reforms proposed in the Policy Statement. Insofar as they represented firm policy conclusions following consultation, we did not see it as our task to reopen them. The questions raised on consultation were therefore generally directed to the issues identified by Government as requiring further work by us, or on other matters which we considered had not been fully examined in the early studies.

Preserving the balance

1.31 We have also had to take a clear view of the proper division between the respective roles of the law reformer and the policy-maker. The development of the law of compensation over its long history has reflected society's fluctuating views of the balance between the public interest in the use of compulsory purchase to promote necessary development, and the protection of the interests of individual owners and occupiers. In the recent *Wildtree Hotels* case,[30] Lord Hoffmann referred to 19th century decisions on compulsory acquisition of land for railways, and noted how conflicting judgments often reflected differing opinions on questions of economic and social policy, rather than strictly legal differences:

> The construction of the railways, which gave rise to most of the 19th century cases on injurious affection, involved massive changes in the urban and rural landscape of the United Kingdom and the disruption of the lives and businesses of very large numbers of people. It is not surprising that strong views were held about the respective claims of the winners and losers in this revolution and the judicial decisions often reveal the opinions of individual judges on questions of economic and social policy. Some were in favour of full compensation

[29] CP 165, para 1.9.

[30] *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1. The case was directly concerned with the rules for compensation for injurious affection where no land is taken; see para 11.6 below.

> for all whose property had been adversely affected by the railway and others thought that the public interest required that liability should be kept within narrow bounds.[31]

1.32 The tension between those two view-points was no less marked in the twentieth century. Our review of the development of the law since 1845 showed how sharp changes in political philosophies and public needs were reflected in shifts in the emphasis of case-law and of statutory reforms.[32] For example, the market value principle was established by the 1919 Act, in the context of post-war reconstruction led by public authorities, and as a reaction from the generous awards given to claimants when most acquisitions were profit-driven. Another legislative upheaval occurred immediately after the Second World War, when compensation was confined for a period to existing use value, until the market value principle was restored in 1959. Those are only the most dramatic examples. The last 40 years have seen further changes of direction, resulting from political change, as well as a succession of piecemeal reforms, not always reflecting a consistent overall view of the law.[33]

1.33 It is clear that there can be no single "right" answer to the balance between private and public interests.[34] A policy of providing more generously for those affected will increase costs for acquiring authorities, and may therefore detract from the public objective of promoting development. On the other hand, a more generous compensation regime may mitigate public resistance to a scheme, and thus achieve savings by reducing delay and procedural costs. The present law represents a compromise between those interests, developed over more than 150 years.

1.34 Against this background, our consultation paper adopted the general position of respecting the existing balance of competing interests, unless it appeared to produce obvious anomalies or unfairness.[35] That remains our approach. Our primary aim has been to preserve the underlying principles, in so far as they are settled and accepted, to resolve the conflicts and to clear away the dead wood. Where, however, we have seen that reform is needed to remove unfairness or anomalies, we have taken the opportunity to propose recommendations for reform.

[31] [2001] 2 AC 1, 8B.

[32] CP 165, Part II, reproduced as Appx C to this report.

[33] A curious example is the law relating to additional compensation for subsequent planning permissions, which was enacted in 1959, repealed in 1967 and re-enacted in 1991; our respondents were unable to provide any examples of its use in practice: see para 8.37 below.

[34] In Appx 7 of CP 165 we referred to the discussion by Hutchison and Rowan-Robinson, "Utility wayleaves: a compensation lottery?" [2002] JPIF 159, where they identify five different approaches to compensation, in summary: (i) "utilitarian" – a small balance of advantage to encourage speedier settlement; (ii) "Rawlsian or justice as fairness" – those faced with expropriation should in fairness end up "marginally better off"; (iii) "financial equivalence", by analogy with damages claims, the claimant should be as well off, but no better off, than before the acquisition; (iv) "householder's surplus" – extra payment as a measure of solace to reflect loss of local ties etc (the same may apply to businesses); (v) "redistribution of profit" – offering owners a share of the equity from the subsequent development.

[35] Including potential conflict with the Human Rights Act 1998.

No draft Bill

1.35 Lastly, we draw attention to the fact that, contrary to our normal practice in a final report, we have not prepared a draft Bill to accompany our recommendations. This is for two connected reasons. First, as we have said, this is not a self-contained study. It has been designed to contribute to a project initiated by the Government involving the fundamental review of the law in this area. We are grateful to the ODPM for the close collaboration we have been able to enjoy. Work on the present report has proceeded in parallel with the preparation by the ODPM, and presentation to Parliament, of a Bill relating to the same subject-matter. Further legislation will need to take account of the progress and final form of that Bill. Secondly, our primary task within the overall project has been to sort out the existing law, and to make recommendations for the general content and shape of the new Code, and for repeals of existing legislation. Until those issues have been considered by Government, in the light of our recommendations, it would not have been a sensible use of our limited drafting resources, to embark on the preparation of a detailed Bill.

1.36 We emphasise, therefore, that the "Code" which we are presenting in this report is intended solely as an indicative framework for possible future legislation. Although we use the term "rules" in the recommendations, that is solely for ease of presentation and analysis. They are not intended to be treated as draft legislation, in any sense; nor to prejudge the form and language of the draft Bill as it may emerge, following instructions to Parliamentary Counsel in due course.

OUTLINE OF THE COMPENSATION CODE

1.37 The Code is designed to maintain the main features of the existing law within a simpler and more logical structure, and using more accessible labels. We believe that a Code which makes the law clear is itself a major step forward. We believe also that where the Code represents a change to the law, it makes for a more equitable distribution of the losses to be borne.[36]

1.38 This Report follows the structure of the new Framework for a Compensation Code (which is itself set out at pages 140–152 below).

1.39 The Code retains the basic features of the present law, including:

(1) the overall principle of "fair compensation", and

(2) the traditional heads of compensation: market value, injury to retained land (currently known as injurious affection) including severance, consequential loss (currently called disturbance), and equivalent reinstatement.

Parts II, III and IV describe these standard provisions of the Code.

[36] The Government, in its Policy Statement, notes that more equitable rules may mean the amounts of compensation payable may increase, and that a consequence may be that acquisitions proceed more swiftly (see paras 1.15 – 1.17 above). We agree with this statement.

1.40 Rules of general application are explained in Part V. Part VI contains our recommended rule on the date for valuation, and two matters to be disregarded in assessing compensation.

1.41 In Part VII we discuss the problems and solutions to the thorny issue of the "no-scheme rule". We set out our recommended rules relating to disregard of the statutory project and planning assumptions in Part VIII.

1.42 Other related rules are addressed also. The Code encompasses:

(1) particular interests (Part IX):

(a) compensation for the acquisition of new rights;

(b) compensation for interference with existing rights;

(c) minor tenancies; and

(2) incidental matters (Part X):

(a) advance payments;

(b) extended Lands Tribunal jurisdiction; and

(c) interest on compensation.

1.43 We also make a recommendation in respect of compensation for depreciation caused by public works (currently known as injurious affection where no land is taken) in Part XI.

ACKNOWLEDGEMENTS

1.44 We were assisted in drawing up our consultative proposals by many groups and people. The memberships of those groups, and those other individuals who helped and responded to earlier papers are detailed in Appendix 8 of CP 165. We repeat our grateful acknowledgement of their assistance.

1.45 Since CP 165 we have been assisted by all those who responded to the consultative report, who are listed at Appendix E of this report. We are very grateful to consultees for the time spent in considering and responding to our provisional proposals. We are also indebted to the officers of the ODPM, in particular, Jean Nowak and Richard Mackley, for the assistance and support they have provided throughout the project.

1.46 We wish to pay special tribute to the help and expert guidance we have had from George Bartlett QC, President of the Lands Tribunal. Many of the proposals, particularly those relating to the intractable problem of "disregarding the scheme" are derived directly from his suggestions, following long discussion with the team. We emphasise of course that we take full responsibility for the recommendations.

PART II
RIGHT TO COMPENSATION

THE RIGHT TO COMPENSATION

Introduction

Extent of the right

2.1 The starting point for the Code should be a simple statement of the right to compensation as defined by the Code.[1] This will cover compensation for compulsory purchase of interests in land (including rights over land). Account also needs to be taken of cases where the right to compensation is not dependent on compulsory purchase of any interest or right, as such. Those considered in this report are:

(1) Interference with existing easements and other rights over land;

(2) Depreciation where no land is taken.

We think that the former should be covered by our proposed Code, since, although the authority acquires no interest, the effect on owners is similar, since they are compulsorily deprived of the full enjoyment of their existing rights over land.[2] On the other hand, separate provision should, in our view, be made for depreciation where no land is taken, by amendment to Part I of the 1973 Act.

Date for identification of interests

2.2 In CP 165, we proposed that the right to compensation for compulsory purchase should apply to any person –

(1) from whom an interest, *in existence at the date of notice to treat*, is acquired by compulsory purchase… (emphasis added)

2.3 The reference to the interest being "in existence at the date of notice to treat" was intended to give effect to the traditional rule that interests are "fixed" at the date of notice to treat.[3] We now consider that we should aim, throughout the Code, to adopt the "valuation date", as defined, as the base date for all purposes, save where expressly provided otherwise.[4] Adopting that approach, we propose to redefine the relevant interests for the purpose of this rule as those in existence on the valuation date, subject to any other provisions of the Code.

[1] CP 165, para 4.2ff.

[2] We use the term "overridden" to describe this effect. See paras 9.6 – 9.13 below.

[3] CP 165, para 5.75ff. At the same time we proposed to retain the rule that the burden of compensation cannot be increased by interests created since the notice to treat, or enhancements made or interests created with a view to increased compensation: paras 5.63 – 5.68.

[4] See the discussion of the Valuation Date: paras 6.1 – 6.7 below. Note that the Government has tabled amendments to the Planning and Compulsory Purchase Bill 2002/03 with regard to the valuation date: see paras 1.21 – 1.22 above.

2.4 This change makes it necessary to consider cases where the compulsory purchase order itself may result in the termination of an interest, for example by providing grounds for a notice to quit. The best known example was the *Rugby Water Board* case:[5]

> The case concerned the compulsory acquisition of two farms held under agricultural tenancies. Under the Agricultural Holdings Act[6] and the relevant tenancies, the landlords could serve a notice to quit where land was required for another use for which permission had been granted. The issue was whether, following compulsory purchase for a permitted reservoir, the respective interests of landlord and tenant should be valued as though such a notice could be served; or whether that possibility should be disregarded as entirely due to the authority's scheme. The House, by a majority, held that the interests had to be assessed as they stood in the real world at the date of notice to treat, taking account of the notice to quit.[7]

2.5 In our view, in accordance with the general principle of "equivalence", the interests of both lessor and lessee in such a situation should be valued as they would have been if they had been no compulsory purchase.[8] Furthermore, it should make no difference that the lessee's interest may have been terminated by notice to quit before the authority takes possession. Accordingly, our recommended definition of the right to compensation needs to cover the case where an interest ceases to exist as a result of compulsory purchase. In our later recommendation relating to the valuation date, we shall include a provision to ensure that in such cases, the relevant interests are valued as though still in existence at the valuation date.[9]

"Qualifying interests"

2.6 The Bill currently before Parliament includes a definition of "qualifying interest" for the purpose of the proposed provisions for "loss payments".[10] For this purpose it is provided that the interest needs to have subsisted for a period of not less than one year before the valuation date.[11] We do not at this stage propose to apply the one year requirement more generally. There is currently no specific limitation to that effect in compensation law. On the other hand, there are special procedural

5 *Rugby Water Board v Shaw-Fox* [1973] AC 202.

6 Agricultural Holdings Act 1948, ss 23, 24(2)(b).

7 See Appx D, paras D.84 – D.85. The effect of this decision, in the context of agricultural holdings, was reversed by statute: 1973 Act, s 48. Otherwise it remains good law. It was followed reluctantly in Australia: *Road Construction Authority v Tiligadis* [1988] ACLD 203 (Gobbo J).

8 We respectfully prefer the dissenting speech of Lord Simon in the *Rugby Water Board* case; he described the majority's reasoning as "artificial, legalistic and destructive of the fundamental principles on which compensation is assessed…" ([1973] AC at p 241H). In CP 165 para 5.79, we indicated our intention to follow Lord Simon's approach, but this point was overlooked in the formulation of our proposals for "project disregard".

9 See Part VI Rule 10(1) below.

10 The Bill proposes to amend the 1973 Act by insertion of new sections 33A–K. Section 33A(4) defines a "qualifying interest" for this purpose.

11 *Ibid* s 33A(4)(a)–(d).

rules for "minor tenancies",[12] and certain compensation rules (which we propose to retain) may have the effect of excluding or reducing compensation in relation to recently created interests.[13] Consideration will need to be given to harmonising the different provisions, if (as we would recommend) the new "loss-payment" provisions are in due course consolidated with our proposed Code.

Consultation

2.7 There was no disagreement with the principle of the proposal, although it was recognised that the detail would be subject to further consideration. We have revised the wording to accord with the scope of the Code as now proposed.

2.8 Accordingly, we recommend:

Rule 1 Right to compensation

This Code confers a right to compensation, assessed in accordance with the following provisions, on an owner of:

(1) any interest in land which is acquired by, or ceases to exist by reason of, compulsory purchase;

(2) any right over land subject to compulsory purchase, which is overridden in the exercise of statutory powers.

BASIS OF COMPENSATION

Introduction

2.9 Proposal 2 in CP 165 was as follows:

> The right to compensation shall be a right to an amount (not less than nil),[14] assessed in accordance with the principle of fair compensation, having regard to the following matters (as defined below): market value of the subject land; disturbance; injury to retained land (severance or injurious affection, less betterment); (where applicable) equivalent reinstatement.

2.10 This proposal arose from consideration of three preliminary issues:

(1) whether there should be an express statement of the general objective of the Compensation Code;

(2) whether the traditional heads of compensation should be preserved;

[12] See paras 9.13 – 9.17 below.

[13] See Rule 11 and paras 6.9 – 6.12 below. See CP 165 Proposal 7(4) (interests created since notice to treat); CP 169, paras 6.3 – 6.8.

[14] For the reasons explained in Part III, we think that qualification "not less than nil" should apply only to head A (market value of the subject land): see paras 3.9 – 3.11 below.

(3) whether compensation should continue to be treated as a "single global figure".[15]

2.11 We noted that there is at present no statutory statement in the Act of the general principle of "fair compensation", which is said to underlie the compensation rules. That expression was taken from a recent statement by Lord Nicholls of Birkenhead in the Privy Council:

> … 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.[16]

2.12 We considered that compensation should continue to be assessed under the traditional heads (subject to the comments made below). We did not favour giving the Tribunal a general discretion to depart from the detailed rules, in order to achieve "fair compensation".[17] Such a general discretion is given, for example, by the Australian Commonwealth statute,[18] which provides that the amount of compensation is to be such amount as will "justly compensate", regard being had to "all relevant matters", including (but not limited to) the traditional heads. However, we thought that such an unrestricted discretion would create undue uncertainty as to the circumstances in which those heads were or were not to be applied. On the other hand, we thought that a statement of the principle of "fair compensation", as a matter to be taken into account in applying the traditional heads of compensation, would be a useful aid to interpreting the more detailed rules, and would help to ensure that they are construed liberally with that objective in mind.[19]

2.13 As we noted,[20] the treatment of compensation as a "single global figure" is well established:

> … in spite of the separate heads under which compensation is traditionally assessed, it is said to represent "in essence one sum". Historically, the rule was important in relation to tax law, which treated the compensation payment as a whole, as the price for sale of the land. However, this position has been modified by statute, which allows apportionment between capital and income elements.[21] It may

15 CP 165, paras 4.5ff.

16 *Shun Fung* at p 125, *per* Lord Nicholls (emphasis added).

17 Following the "just compensation override" proposed by the Australian Law Reform Commission, and adopted in Australian legislation: CP 165, paras 4.7 – 4.10.

18 LAA (Cth), s 55(1).

19 CP 165, para 4.6.

20 CP 165, para 4.13.

21 See CP 165, paras 8.51 – 8.52.

> also be significant in other respects. For example, the statute provides for interest to run on the whole compensation sum from the date of entry, and makes no distinction between the different elements.[22]

We proposed to retain this approach.

Consultation

2.14 Our proposal was supported by the great majority of respondents.

2.15 Some considered that the principle of "equivalence" should form part of the statement of the general objective. This expression is also well-established in compensation law, as in the law of damages.[23] Thus, in *Horn v Sunderland Corporation* Scott LJ referred to the "principle of equivalence", that is:

> … 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.[24]

However, we have preferred to use the term "fair compensation", following the most recent authoritative statement of the principle. As Lord Nicholls' statement makes clear, that subsumes the principle of equivalence, while acknowledging that it is qualified by other rules, peculiar to the compensation code, such as the no-scheme rule and the market value rule.

2.16 A minority of respondents argued that the fairness principle should be an overriding objective (as in the Australian example cited above). Thus, the Tribunal should have the discretion to order compensation that is fair in all the circumstances where the rules prove to be inadequate. However, the majority supported our view that this would create undesirable uncertainty.

2.17 We have, however, decided to depart from the Consultation Paper proposals in one significant respect. Several consultees suggested that the requirement to treat compensation as a "single global figure" was unnecessary, and could create problems, for example where different dates of assessment are used, and interest may have to run from different dates. On further consideration, we agree with that view. Although the principle is well established, we are not convinced that it is of more than historical significance, or a necessary part of a modern code. For example, where a business is acquired, compensation for the land will be based on the value at the date of entry, but the claim to loss of profits may include both past and future elements, continuing up to the date of assessment and beyond. Although that loss will need to be capitalised, there is no obvious reason to require

[22] See CP 165, para 8.33.

[23] See the classic statement in *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, *per* Lord Blackburn:

> where an injury is to be compensated by damages, in settling the sum to be given for reparation of damages you should as nearly as possible get at that sum which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong….

[24] (1941) 2 KB 26, 42.

it to be assimilated in every respect to the award for the land. The Tribunal should be able to deal with the different elements in the manner which is fairest and most convenient from a valuation point of view. This approach needs to be matched by similar flexibility in the rules for the running of interest.

Structure of the Code

2.18 Since this proposal sets the scene for the whole Code, it needs to be based on a logical relationship between the different heads. As we have said, the underlying principle of statutory compensation is that the owner is entitled to be "compensated fairly and fully for his loss". This is no different in substance from the rules governing common law damages for equivalent torts, for example trespass to land or nuisance. There are, however, certain important differences derived from the nature of compulsory purchase, notably:

(1) The compensating body is not a wrongdoer, but a public authority acting in the public interest;

(2) The acquisition is not an isolated event, but is designed as part of a project in the public interest, which is carried out over a period, and which may itself have adverse or beneficial consequences for the claimant's interests;

(3) Compensation for compulsory acquisition is a hybrid: part consideration for the acquisition of land, part compensation for the injurious consequences of that acquisition.

2.19 The first point underlines the need to ensure that the rules are fair to both parties, and in particular that the compensation is not distorted by the pressure of the public need. The second makes it necessary to have rules to determine the date or dates at which compensation is to be assessed; and as to the extent to which the effects of the project, as opposed to the acquisition, are to be reflected in the compensation. The third provides justification for taking the value of the subject land as the starting-point for assessment. Although historically both elements – consideration and compensation – were treated as part of the "value of the land" to the owner, this was a fiction made necessary by the wording of the 1845 Act.[25] We see no reason to preserve it in a new Code.

2.20 Turning to the new Code, it is logical that the starting point should be the market value of the subject land at the valuation date. This provides a generally fair and objective test of the consideration element. We have reconsidered the relationship of the other two main heads of compensation – consequential loss and injury to retained land. We think that the latter should also be assessed by reference to the diminution in the market value of the land at the valuation date.[26] Not only does this provide an objective measure, but consistency with the rule for the subject land will simplify the valuer's task. This therefore will be the second head of

[25] 1845 Act s 63 (1965 Act s 7) required regard to be had to the "value of the land to be purchased", and to injurious affection to other land, but made no express provision for other consequential loss. It was accordingly treated as part of the "value to the owner", and as such was preserved by rule (6) of the 1919 rules: see CP 165, para 4.20.

[26] See paras 3.20 – 3.24 below.

compensation. The third head will be "consequential loss". As we explain later,[27] we think that this is not, and should not be, confined to "disturbance", in the traditional sense of damage resulting from disturbance of occupation. It will cover any loss to the owner (whether or not related to the occupation and use of the subject land itself) which is properly attributable to the acquisition and not too remote, so far as that loss is not reflected in the first two heads based on market value. The fourth head, applicable only where the special rules are satisfied,[28] is equivalent reinstatement.

2.21 Accordingly, we recommend:

Rule 2 Basis of compensation

Compensation shall be assessed in accordance with the principle of fair compensation, having regard to the following heads (so far as applicable in the particular case):

(a) Market value of the land subject to compulsory acquisition ("the subject land");

(b) Injury to, or betterment of, any other land held with the subject land ("the retained land");

(c) Consequential loss;

(d) Equivalent reinstatement.

[27] Paras 4.4 – 4.5 below.

[28] Para 4.43 below.

PART III
THE COMPENSATION CODE – HEADS A AND B

HEAD A: MARKET VALUE

Introduction

3.1 The principle that land subject to compulsory purchase should be acquired at "market value as between a willing seller and a willing buyer" has been established since 1919.[1] The 1961 Act, section 5(2) ("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.

In CP 165 we proposed no change in principle, save to make clear that the definition assumed both a willing purchaser and a willing buyer.[2]

3.2 As we noted in the Consultation Paper, there was some uncertainty whether rule (2) applies only to the valuation of the land which is being acquired, or whether it applies generally, wherever land value is relevant to the assessment of compensation. We preferred the latter view.[3] In any event, we thought it desirable that the position should be clarified in the new Code, and that any exceptions to the "market value" principle should be specifically identified.

Consultation

3.3 There was no serious disagreement with our proposal to retain the market value principle.

Willing buyer

3.4 Some consultees, however, expressed concern that, by introducing a reference to a "willing buyer", we might be seen to be changing the law. For example, one respondent was concerned that the proposed definition would entail a "fundamental shift" from the principle of equivalence, and would introduce a subjective element with the assumption of a bargain to be negotiated. We believe that this concern is based on a misunderstanding of the effect of our proposal, as compared to the existing law.

1 See CP 165, para 2.6, referring to the recommendations of the Scott Committee, given effect by the Acquisition of Land Act 1919.

2 We noted that the "willing buyer" was not mentioned in rule (2), because his existence was regarded as implicit in the pre-1919 law: *Horn v Sunderland Corporation* (1941) 2 KB 26, 40 *per* Scott LJ.

3 CP 165, para 4.16.

3.5 The effect of the market value approach has been recently clarified by the Court of Appeal.[4] The Court of Appeal confirmed that the test under rule (2) is no different in substance from other formulations of the market value principle. It adopted as authoritative a statement from a recent case relating to capital transfer tax:[5]

> …. the concept of the open market automatically implies a willing seller and a willing buyer, each of whom is a hypothetical abstraction. However the willing buyer "reflects reality in that he embodies whatever was actually the demand for that property at the relevant time". *(see IRC v Gray* [1994] STC 360, 372 per Hoffmann LJ). Whilst both the seller and the buyer are assumed to be willing neither is to be taken to be over-eager… The statute assumes a sale. That means… that the vendor, if he is offered the best price reasonably obtainable in the market, cannot be assumed to say that he will not sell because the price is too low as inadequately reflecting some feature of the property nor can the purchaser be assumed to say that he will not buy because the price is too high..."[6]

3.6 The court rejected an argument that the omission in rule (2) of any reference to the willing buyer implied a departure from the "willing seller/willing buyer" approach proposed in the Scott report. Reference was made to the explanation given by Scott LJ (as he had then become) for the specific mention of the "willing seller"; it was designed to "check exaggerated prices", by reversing –

> the old sympathetic hypothesis of the unwilling seller and the willing buyer which underlay judicial interpretation of the Act of 1845.[7]

Thus, the mention of the "willing seller" was to emphasise the departure from the previous law; the "willing buyer" was already implied.

3.7 The court also noted that "the assumption of 'willingness' has different implications for buyer and seller", adopting the succinct explanation given by Lord Romer:

> The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his

4 *Railtrack plc v Guinness Ltd* [2003] 1 EGLR 124 at 126Gff. The leading judgment was given by Carnwath LJ, with whom the other members of the court agreed.

5 *Walton v IRC* [1996] STC 68. (The statute required the value to be assessed as "the price which the property might reasonably be expected to fetch if sold on the open market…".)

6 [1996] STC 68, p 85–86, per Peter Gibson LJ. In *Guinness* [2003] 1 EGLR 124 at 128B, EWCA Civ 188 para [27], the court observed that this was no different in substance from the RICS Practice Statement 4, 1.3.00:

> The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

7 *Horn v Sunderland Corp* (1941) 2 KB 26, 40. There is no hint in this judgment that Scott LJ himself thought that the recommendation contained in the Scott Report had not been adopted in full.

land and the urgent necessity of the purchaser to buy must alike be disregarded.[8]

3.8 Our proposal, therefore, is designed to preserve the existing law.

Not less than nil

3.9 In the Consultation Paper we proposed that market value should never be less than nil. Thus, in a case where the land has a negative value, perhaps because of contamination, the authority should not be able to force the owner to make a payment for having the burden taken away by acquisition.

3.10 One respondent questioned this approach. It was argued that in certain circumstances a reverse premium would be justified, for example, where the rent payable exceeds the full rental value or where land is contaminated and has onerous maintenance requirements. However, it seems to us that, since the authority is forcing the owner to sell, at a time of its own choosing, it would be unreasonable to require the owner to pay for that privilege. It is the responsibility of the authority to take account of the prospective burden of dealing with the land, when drawing up its proposals of acquisition.[9]

3.11 However, it has been suggested that this question should be considered more broadly. Where the value of the subject land is the only element of compensation, it is right that the threshold should be set at nil; but, where claims are also made under other heads, it might not be unreasonable for any negative value of the subject land to be offset against such claims. For example, where compensation is also claimed for injury to retained land, based on a reduction in the market value of that land, the negative value of the subject land could be set against it. On balance, however, we think it clearer and simpler to apply the "nil" threshold only to the subject land. If the retained land has a positive value which is adversely affected by the works, we think it fair for that loss to be compensated, regardless of the consideration paid for the subject land. Similarly, compensation for consequential loss is likely to relate to expenses (for example, business relocation expenses) which have no relation to the value (negative or positive) of the subject land.

3.12 Accordingly, we recommend:

Rule 3 Market value

(1) "Market value" of land means the amount which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

8 The *"Indian"* case [1939] AC 302, 312, PC. This important case is discussed in detail in Appx D, paras D.34ff; see also *Waters*.

9 Although this reasoning may not apply directly to cases where the procedure is initiated by the claimant (by blight notice or purchase notice under the 1990 Act Part VI), they are treated for compensation purposes as though a compulsory purchase order had been made: 1990 Act, ss 143, 154. It is therefore difficult to justify a different rule for those cases.

Provided that the market value of the subject land for the purposes of head A shall not be less than nil.

(2) Except as otherwise provided, for the purpose of any provisions of the Code which depend on the value of land (including any reduction or increase in the value of land), value means "market value" as so defined.

HEAD B: INJURY TO RETAINED LAND

Introduction

Severance and injurious affection

3.13 In addition to the value of the subject land, the dispossessed owner is entitled to compensation for loss of value to land retained by him. Section 7 of the 1965 Act[10] provides that in assessing compensation:

> … regard shall be had… to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.[11]

This has been treated as giving a right to compensation under two heads:

(1) *Severance*: that is, loss suffered by the separation of the land acquired from land held with it, where the joint holding conferred additional value or advantage;[12]

(2) *Injurious affection*: that is, loss caused to the retained land by the works or use of the land acquired for the statutory purpose.[13]

To qualify for such a claim, the retained land must be "held with" the land which is acquired, in the sense that "the unity of ownership conduces to the advantage or protection of the property as one holding".[14]

10 Reproducing 1845 Act, s 63. The law is discussed in CP 165, paras 5.3ff.

11 The "special Act" is defined as "the enactment under which the purchase is authorised and the compulsory purchase order": 1965 Act s 1(2).

12 For example, parts of a farm severed by a motorway, which increases the cost of working; loss of land from the "safe area" of a rifle club, which was essential to the use of the remainder for rifle practice (*Holt v Gas, Light and Coke Co* (1872) 8 LR 7 QB 728); damage to the development potential of the retained land (*Abbey Homesteads Ltd v Secretary of State for Transport* [1982] 2 EGLR 198).

13 For example, interference with access to retained land for building purposes (*R v Brown* (1867) LR 2 QB 630); noise, dust and loss of privacy caused by a new road (*Buccleuch (Duke) v Metropolitan Board of Works* (1872) LR 5 HL 418).

14 *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153, p 175, *per* Lord Macnaughten. The pieces of land need not be contiguous with each other, nor be held in the same title: *Oppenheimer v Minister of Transport* [1942] 1 KB 242; *Holt v Gas, Light and Coke Co* (1872) 8 LR 7 QB 728.

Example

The claimants held land under two leases for the purposes of a rifle range. They also held other parcels of land (that made up the "safe area" beyond the range) under a separate lease and under a verbal agreement. Part of the "safe area" was acquired to build a road. The rifle range could no longer be used for rifle practice. The claimants were entitled to compensation for injurious affection for the loss of the value of the rifle range.[1]

1 *Holt v Gas, Light and Coke Co* (1872) 8 LR 7 QB 728.

3.14 The measure of compensation is the amount by which the retained land is diminished in value[15] by the severance or injurious affection, and does not include other forms of loss, such as relocation costs.[16] Compensation for injurious affection is assessed by reference to the effect of "the whole of the works", not just those on the land acquired from the claimant.[17] It is not limited to reduced value due to matters which would be the subject of damages for nuisance, but includes, for example, reduction due to loss of privacy.[18] Furthermore, account must be taken, not only of the use at the valuation date, but also of the depreciation due to anticipated use of the public works.[19] Although this is in principle a separate head of compensation from the value of the subject land, in practice assessment of the two heads may be linked by use of the "before and after" method.[20]

3.15 In the Consultation Paper we proposed generally to retain and clarify the substance of the existing law, including specific provision for claimant to elect for the "before and after" method .[21]

15 In our view (as explained in CP 165, paras 5.11 – 5.13) the loss in value is to be assessed by reference to the *market value* of the retained land: 1961 Act, s 5(2).

16 *Hoveringham Gravels Ltd v Chiltern DC* (1978) 35 P&CR 295, 305. The court held that the wording of s 7 of the 1965 Act (having regard to the words "or *otherwise* injuriously affecting *that other land*") made clear that diminution in land value was the sole criterion under the section.

17 1973 Act, s 44 (reversing *Edwards v Minister of Transport* [1964] 2 QB 134) provides:

> Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.

18 *Buccleuch (Duke) v Metropolitan Board of Works* (1872) LR 5 HL 418.

19 *Rockingham Charity v R* [1922] 2 AC 315: a school was entitled to compensation for depreciation in value due to anticipated use of the acquired land as a railway shunting yard.

20 See Denyer-Green, p 231. The "before and after" valuation approach involves valuing the *whole* property (including the land subject to acquisition) before severance, and then deducting from that valuation figure the value of the land *retained* after severance.

21 CP 165 Proposal 5. We proposed that the right to compensation should be related to the effect on the retained land of "the relevant project" (as defined for the purpose of the project disregard rule). It replaces the reference (in 1965 Act, s 7) to the effect of "the exercise of the powers conferred by this or the special Act". The precise effect of this is obscure. However, our approach accords with the spirit of 1973 Act, s 44 (see n 17 above).

Betterment

3.16 Sometimes the value of retained land may be enhanced by the works for which the land is acquired.[22] Provision is made in some statutes for such "betterment" to be deducted from the compensation otherwise payable.[23] For example, section 7 of the 1961 Act makes such provision in relation to increased value due to the prospect of development on "adjacent or contiguous land".[24] In relation to highway schemes, section 261 of the Highways Act 1980 requires the Tribunal to take account of any benefit from the project to "the remaining contiguous lands" (not just increased value due to the prospect of development).

3.17 In the Consultation Paper, we adopted the proposal of CPPRAG and the Policy Statement that betterment should be deducted only from any compensation otherwise payable for injury to retained land, and should not affect other heads of compensation. We proposed that it should be covered by a new set of rules relating to compensation for the effects of the acquisition on retained land.

Other valuation rules

3.18 We mentioned uncertainty as to the application of other valuation rules to compensation for injury to retained land, notably the rules relating to disregard of the project.[25] We noted that some provisions of the 1961 Act are specifically applied only to the "relevant land", that is, the land subject to acquisition;[26] whereas the Lands Tribunal has held that the *Pointe Gourde* rule does apply to the valuation of the retained land, so that the loss must be assessed by comparing the value of the land after the work, with its value in "the no-scheme world."[27]

3.19 We will consider this issue in more detail when discussing our proposed replacement of the *Pointe Gourde* rule, where we recommend specific provision to deal with its application to this head of compensation.[28] It will be necessary for the rules relating to injury to retained land to be made subject to that provision.

[22] See eg *South East Ry Co v LCC* [1915] 2 Ch 252. Land was acquired for widening of the Strand. The retained land had a frontage to the newly widened Strand, which added to its value for commercial purposes. It was held that no deduction for betterment could be made without specific statutory authority.

[23] "Betterment" is not a term used in the compensation statutes, but is a convenient, and well-established, shorthand (cf "betterment levy" under the (now repealed) Land Commission Act 1967, s 27(1)).

[24] An example of the application of s 7 can be seen in *Wilson v Liverpool Corp* [1969] RVR 741, LT. The facts are summarised in CP 165, Appx 6.

[25] CP 165, para 5.14.

[26] For example, s 9 (excluding depreciation due to indications of the threat of compulsory purchase); ss 14ff (planning assumptions). The "relevant land", as defined by s 39(2), excludes the retained land.

[27] See *Clarke v Wareham and Purbeck RDC* (1972) 25 P&CR 423, LT (no compensation paid for retained land affected by a new sewage works, because, in the no-scheme world, similar consequences would have followed from improvements to the existing works). Cf *English Property Corp v Kingston LBC* (1999) 77 P&CR 1, 11, where Morritt LJ declined to apply the *Pointe-Gourde* rule to the retained land, because there was "no scheme for the acquisition" of that land.

[28] Para 7.46 – 7.47 below; Rule 13A.

Consultation

Market value only?

3.20 The main issue raised by consultation was whether compensation under this head should be limited to the reduction in land value, or should take account of other categories of loss, such as loss of profits. A majority of respondents thought that it should not be so limited.[29] In particular, there was general agreement that compensation should be claimable for temporary loss of profits (for example, during the construction period), not limited to a loss of rental value.[30]

3.21 In our view, there are advantages in making loss of market value the primary criterion for compensation under this head. It provides a straightforward test, applicable to both diminution and enhancement of value. It is also consistent with that applied to the acquired land, thereby allowing for a simple "before and after" approach to valuation in many cases.

3.22 For the same reason, we think that differences in value to the retained land should be judged by reference to the same circumstances at the same valuation date as that applied to the subject land. Thus, as is the case in relation to the subject land, the value of the retained land will ordinarily[31] be judged by reference to values and circumstances prevailing at the date when the authority takes possession of the subject land.

3.23 On the other hand, we see no reason in principle why other forms of loss should not be allowed, where these are fairly attributable to the compulsory acquisition, and are not adequately reflected in the loss of market value.[32] We do not think it necessary to make specific provision for that purpose under this head of compensation. Our amended proposal for consequential loss is in our view wide enough to cover any losses properly flowing from the acquisition, including those

[29] Other categories of loss mentioned were: loss of business goodwill, extra travel costs between parts of holding, servicing of temporary loans, reorganisation expenses.

[30] Cf *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1, where it was held that under 1965 Act s 10 (injurious affection where no land is taken) a temporary diminution in value caused by the works should be the subject of compensation, so far as reflected in reduced rental value. See para 11.6 below.

[31] Subject to the possible use of "hindsight": see paras 3.25 – 3.29 below. In para 7.46 – 7.47 below, we consider the application of the "statutory project" rules to compensation under this head.

[32] There was some evidence from respondents that claims for loss of profits on retained land are already accepted by authorities. As we noted in CP 165, para 5.26, such losses are allowed under the common law of nuisance, subject to the ordinary rules of causation and remoteness: see eg *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836, 840 (damage to lessee's hotel caused by vibrations from pumping machinery used by lessor on adjoining land; common law damages for nuisance were not confined to the value of the term lost, but included all loss which was a natural consequence of the wrongful acts, including the cost of moving the business to other premises).

related to its effect on a business on retained land.[33] It is also wide enough to cover temporary losses during the works period.[34]

3.24 There were some respondents who thought that allowing such losses would complicate and delay the process of assessment, and that it would also make it difficult for the authority to budget for the cost of acquisition. However, we do not see such problems as different in kind from those applying to losses already allowed under the head of disturbance. The extent of any such claims will be limited by the principle of remoteness. It is of course important to avoid double-counting. However, we think it unnecessary to make specific provision to this effect. The overriding principle will be that of fair compensation "having regard" to the various statutory heads.[35] This formula, in our view, will allow the Tribunal sufficient flexibility to do justice to both parties in each case: on the one hand, allowing loss which is not adequately reflected in the loss of market value, and, on the other, avoiding any overlap. The primary test will remain that of loss in market value, and the burden will be on the claimant to show that any other loss is not adequately compensated under that test.[36]

Use of hindsight

3.25 If market value at the valuation date (normally the date of possession)[37] is accepted as the primary test, the question arises as to how, if at all, account is to be taken of changes between that date and the date of determination.

3.26 Market value, by implication, is based on the knowledge which the market would have had at the valuation date. The market does not have a crystal ball. This strict market value approach can be defended as appropriate where the object is to fix the price at which the authority are to be taken as acquiring the land at a certain date. Changes in circumstances after that date do not affect the vendor's interest, since he no longer owns the land.

3.27 By contrast, where the object is to assess compensation for injury to property which remains in the ownership of the claimant, fairness may require that, even where the primary test is based on loss of value at a particular date, account should be taken of changes in circumstances up to the date of the hearing at which compensation is determined. This follows the so-called "*Bwllfa*" principle, that, in assessing loss, a

[33] See the discussion at para 4.39 below. We had already proposed that expenses relating to replacement of buildings or installations, required for a business on the retained land, should be compensated as consequential loss: CP 165, paras 4.63 – 4.64; para 4.3 below.

[34] It will be for the Tribunal to determine whether, in the circumstances of the particular case, such loss is properly compensated by reference to reduction in rental value (as under the *Wildtrees Hotel* case: see para 3.20 above), or by some other method.

[35] See Rule 2.

[36] See Rule 5 which applies where it is shown that the loss is not reflected in the loss of market value.

[37] See Part VI below.

Tribunal should not be required to speculate when it knows.[38] The same principle was expressed recently by the House of Lords in a different context:[39]

> Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened.[40]

3.28 The Lands Tribunal has held that the *Bwllfa* principle applies to the assessment of compensation under section 7 of the 1965 Act, so as to enable account to be taken of a planning permission granted on the retained land some three years after the date of the acquisition.[41] In CP165 we criticised this approach as inconsistent with the market value test.[42] However, on further consideration, we think it is correct. We gave insufficient weight to the difference between that test as applied, respectively, to the subject land, in which the risk passes to the authority, and to the retained land, in which it does not.

3.29 Accordingly, in spite of the convenience and apparent logic of a uniform test, we think that in this context there needs to be the possibility of a more flexible approach to give effect to the overriding principle of fair compensation. This may work both ways: in favour of the claimant or in favour of the authority. However, experience, including that of the *Bolton* case, suggests that it is unlikely to make a material difference in many cases. Our recommendation, therefore, requires values to be taken as those prevailing at the valuation date, but allows hindsight in respect

[38] *Bwllfa and Merthyr Dare Steam Collieries Ltd v Pontypridd Waterworks Co* [1903] AC 426. In the words of Lord Macnaughten: "With the light before him, why should (the arbitrator) shut his eyes and grope in the dark?" (p 431). Lord Halsbury contrasted the position where land is acquired: "If it were a purchase, the rights and liabilities and profits, if there were any, would pass to the purchaser, and its value, with all its possibilities, would pass at the time notice to treat was given" (p 428). For a modern application of the *Bwllfa* principle in a different context, see *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143.

[39] *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143 (transfer of shares allegedly at an undervalue, for the purposes of section 238 of the Insolvency Act 1986).

[40] *Ibid* p 156a–b, *per* Lord Scott. He acknowledged that comparable problems might arise "in many different areas of the law" and that "the answers may not be uniform but may depend upon the particular context in which the problem arises." (*ibid*).

[41] *Bolton MBC v Waterworth* (1979) 37 P&CR 104. The case concerned a claim for severance, after the acquisition of land from the claimant (in 1972) had resulted in his retained land, otherwise suitable for development, being deprived of access. 3 ½ years later permission was granted for its immediate development, after the access problem had been solved by selling the retained land to an adjoining owner. The Tribunal accepted the authority's argument that, under the *Bwllfa* principle, this event could in principle be taken into account; but held that it was of no assistance on the facts of the case, because its effect depended on the unknown negotiating position of the adjoining owner. Accordingly, it did not undermine a valuation based on the facts as known at the valuation date, which, as the Tribunal held, would have led the market to assume development in 7 years. The award for severance accordingly was based on the difference between the value of the retained land for immediate development, and its value assuming development deferred for 7 years. The Court of Appeal (42 P&CR 289, 299) upheld the decision on the facts, and found it unnecessary to express a view on the *Bwllfa* point.

[42] CP 165, para 5.16.

of changes in circumstances so far as they would have affected the value of the retained land at that date.[43]

"Before and after"

3.30 There was wide support for our proposal to provide specifically for the "before and after" approach, which some suggested was standard practice already. There was, however, a strong body of opinion that this method should not depend, as we proposed, on the election of the claimant, since it may often be the fairest and most convenient method of valuation, regardless of the subjective views of the claimant. We are inclined to agree. Our amended proposal would leave it as a matter for agreement between the parties, or determination by the Tribunal.

Betterment

3.31 Most respondents agreed with our proposal for dealing with betterment under this head. It was suggested by one respondent that it leaves a degree of discrimination between those whose land is acquired, and neighbouring owners who may enjoy the same betterment without offset. However, any such discrimination is less drastic than under the existing law, since the claimant's right to the value of the subject land is unaffected.[44] Under this proposal, the deduction for betterment will only apply where there is already a claim for reduction in value of other land. We think it reasonable that, where someone makes such a claim, the effects on his or her retained land (both adverse and beneficial) should be looked at overall.

Definition of retained land

3.32 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. It was pointed out, for example, that farm 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.[45]

Contractors' negligence

3.33 A number of points of detail emerged from consultation. One respondent expressed concern that the right to compensation for the effects of the works on retained land may be challenged, where the injury is due to possible negligence of contractors.[46] However, if this is a problem,[47] we see it as related, not so much to

[43] If either party seeks to rely on such subsequent evidence, it is likely to rule out use of the "before and after" approach, which assumes a uniform treatment of subject land and retained land. This is another reason for making that, as we now propose, a matter for agreement of the parties or decision of the tribunal.

[44] See para 3.17 above.

[45] See para 3.13 above.

[46] It was said that it is Government practice to refuse statutory compensation in such cases, on the basis that there is a common law claim against the contractor.

the definition of the statutory head of claim, as to the boundary between statute and common law. It would be alleviated by our proposal that the Tribunal should have jurisdiction to deal with common law claims for damage to land or its use, arising out of the same facts as a compensation claim.[48]

Other points

3.34 Other detailed issues included: problems caused by latent defects (where new losses materialise after the settlement of compensation); problems in settling the details of accommodation works (including costs of upkeep and taxation consequences); loss of privacy caused by diverted footpaths; and the inability to restrict by covenant the future use of the subject land. We accept that these issues may give rise to problems in particular cases. However, a balance has to be drawn between the desirability of certainty for both parties, and the inevitable risk that the nature of the loss may be affected by changes of circumstances, or of knowledge, which arise after determination of compensation. There are also limits to which a general code can or should seek to cater for every case. We would expect particular problems in individual cases to be the subject of individual agreement. Generally, we agree with those respondents who counselled against making the code unduly prescriptive.

3.35 Accordingly we recommend:

Rule 4 Injury to retained land

(1) Subject to Rules 4(2) and 13A(1), compensation for injury to retained land shall be assessed having regard to the following (so far as applicable), as at the valuation date -

(a) any decrease in the value of any interest of the claimant in any part of the retained land attributable to its severance from the subject land ("severance");

(b) any decrease in the value of any interest of the claimant in any part of the retained land attributable to the nature, carrying out, or expected use of the works for which the land is acquired ("injurious affection");

but off-setting -

(c) any increase in the value of any part of the retained land attributable to the nature of, carrying out, or expected use of, those works ("betterment").

47 We have no evidence that the Lands Tribunal has refused compensation in such cases. We would expect it to take a sceptical view of an authority's attempt to limit compensation by relying on the negligence of its own contractors: cf *Colac (President, etc of) v Summerfield* [1893] AC 187 (where compensation was awarded, notwithstanding "negligence" in the exercise of the statutory powers).

48 See Rule 20.

(2) If, in either case, the parties agree or the Tribunal determines:

(a) account shall be taken of changes of circumstances (other than changes in land values) known at the date of assessment;

(b) compensation due under this Rule and Rule 3 may be assessed together, that is, by calculating the difference at the valuation date between:

(i) the value of the subject land and the retained land, taken together, as they were immediately before the acquisition; and

(ii) the value of the retained land, on its own, as it was immediately thereafter.

PART IV
THE COMPENSATION CODE – HEADS C AND D

HEAD C: CONSEQUENTIAL LOSS

Introduction

Existing law

4.1 In CP 165 we described the history of the right to compensation for "disturbance",[1] and its preservation, following the introduction of the "market value" test under rule (2), by what is now section 5(6) of the 1961 Act:

> 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.[2]

We noted one frequently cited statement of the rule:

> … any loss sustained by a dispossessed owner…[3] 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, second, that it is the natural and reasonable consequence of the dispossession of the owner.[4]

4.2 We noted typical examples of claims allowed under this rule:

(1) Moving house (removal costs, adaptation of furnishings, etc);

(2) Relocating a business (cost of search for new premises, removal costs, adaptation of new premises, temporary loss of profits, partial loss of goodwill etc.);

(3) Where the business cannot be relocated, value of the business on a "total extinguishment" basis (including value of goodwill, closure costs etc.);

(4) Legal and professional fees;

[1] CP 165, para 4.20ff; see *Horn v Sunderland Corp* at pp 32, 45.

[2] These principles are applicable to those who have compensatable interests in the subject land. The 1973 Act contains provisions for similar payments for displacement of lawful occupants without compensatable interests: 1973 Act, ss 37–8. Since these are not confined to displacement by compulsory purchase, we have not dealt with them in detail in this project: see CP 165, paras 8.81 – 8.82.

[3] The omitted words were "(at all events one who occupies his house)". In practice, the statement of principle has not been treated as limited to *residential* occupiers. The position of non-occupiers requires further discussion: see para 4.7 below.

[4] *Harvey v Crawley DC* [1957] 1 QB 485, *per* Romer LJ. A more recent authoritative explanation (in relation to business loss) is in *Director of Buildings and Land v Shun Fung Ironworks* [1995] 2 AC 111, 124 per Lord Nicholls.

(5) Additional tax liabilities.[5]

Consultation proposals

4.3 Our Proposal 4 retained the traditional term "disturbance". It began with a general definition:

> "Disturbance" means any monetary loss or expense, not directly based on the value of land, suffered or incurred by the claimant and fairly attributable to displacement in consequence of the compulsory acquisition of the subject land.

There were then set out six sub-rules, to be applied "without prejudice to the generality" of the definition, covering:

(1) Personal circumstances;

(2) Legal and professional costs;

(3) Compensation for relocation of a business;

(4) Replacement of buildings and other installations;

(5) No claim for losses before the first notice date;

(6) Non-occupiers' expenses of acquiring replacement land.

The reasons for these sub-rules were discussed in the Paper.[6] Finally, we proposed that the existing rules[7] allowing traders over 60 to claim business compensation on a "total extinguishment basis" should be preserved.

"Disturbance" or "consequential loss"?

4.4 In using the term "disturbance", we recognised that it was a form of shorthand,[8] since this head of compensation was not confined to the effects of disturbance, in the sense of displacement of occupation. We noted that other categories of losses, such as professional fees,[9] have been allowed under rule (6), not as "disturbance" but as matters "not directly based on the value of land".[10]

[5] See *Alfred Golightly & Sons v Durham CC* (1981) 260 EG 1045. See further CP 165, para 8.59.

[6] CP 165, paras 4.54ff.

[7] 1973 Act, s 46.

[8] We noted that Scott LJ, in the leading case of *Horn v Sunderland Corp* at p 43, used the term disturbance "for brevity" to describe all those elements of "value to the owner", in addition to market value, which were preserved by rule (6) of the 1919 rules. We were also following the usage of the leading textbooks: see eg Butterworths Encyclopedia Part E cap 6.

[9] See *Lee v Minister of Transport* [1966] 1 QB 111, where the claim for professional fees was allowed, even though the statute (relating to acquisition following a purchase notice) excluded compensation for "disturbance".

[10] For example, additional tax liabilities. Loss of a service contract with a company was compensated under this head: *Wrexham Maelor Borough Council v MacDougall* [1993] 2 EGLR 23, see below. Conversely it has been held that pre-acquisition losses relating to unimplemented rent reviews, being based on the value of the land, are compensatable (if at all) as part of market value under rule (2): see *Green Motor Holdings v Preseli Pembrokeshire DC* [1991] 1 EGLR 211, LT.

4.5 Some consultees,[11] however, have proposed that the term “disturbance” is misleading, and should be discarded, in favour of a more general term, such as “consequential loss”. They have also pointed out that our proposed general definition, which confines this head of claim to the consequences of “displacement”,[12] fails to give effect to the second part of rule (6). We agree with these comments.

4.6 They have led us to review in more detail the authorities relating to the second part of rule (6), notably the 1993 decision of the Court of Appeal in *Wrexham Maelor BC v MacDougall*.[13] Our attention has also been drawn to a 1996 decision of the Irish Supreme Court, *Dublin City v Underwood*,[14] which contains a valuable discussion of the authorities in the context of the identical rule in that jurisdiction.[15] Although the *Wrexham* case does not appear to have been cited to the Irish court, the reasoning of the two decisions is similar. Taken together they strongly support the RICS view that the term “disturbance” fails to reflect the full scope of rule (6).

4.7 It appears that the significance of these authorities, in relation to claims of non-occupiers, may not be widely appreciated. We therefore think it useful to describe the facts and reasoning of each case in some detail, before considering whether and (if so) how they should be reflected in the new Code.

The Wrexham case

4.8 The first claimant, M, had a leasehold interest in office premises, which were compulsorily acquired by the Council. He had carried on there an insurance business through two companies, one of which, C Ltd, was also a claimant. He and his wife owned all the shares in C Ltd, and he also had a service agreement with it. C Ltd itself had no compensatable interest in the property, but the Lands Tribunal awarded it £263,000 as compensation for the extinguishment of the business, under section 37 of the 1973 Act.[16] M, as owner of the lease, was entitled to compensation for the value of that interest (under rule (2)), but he also made a claim, under rule (6), for loss of the value of his service agreement, on the extinguishment of the business. The Tribunal held that this was a valid separate

[11] We are grateful in particular to the RICS for encouraging us to reconsider this issue.

[12] The term “displacement” was taken from the 1973 Act s 37(1).

[13] [1993] 2 EGLR 23. This case was noted in CP 165, para 4.24 n 29, but not discussed in detail. By “the second part of rule (6)” we mean “any other matter not directly based on the value of the land”.

[14] 1997 1 IR 117. The judgment of Budd J (reported as part of the same citation) also provides a detailed discussion of the authorities, including reference to a prescient and illuminating article on this issue by Michael Mann QC (subsequently Mann LJ) written in 1974.

[15] Irish law continues to be based on the Acquisition of Land (Assessment of Compensation) Act 1919, s 2 of which enacted the rules now contained in the 1961 Act, s 5, including rule (6).

[16] Compensation for disturbance for those with no compensatable interest: see CP 165, para 4.21.

claim, not involving any "double-counting", and awarded him some £61,000. This was upheld by the Court of Appeal.[17]

4.9 The case is obscured by some aspects of the factual background and of the course of the proceedings. However, the only relevant aspect for present purposes is the court's treatment of the claim under rule (6). The council had disputed M's claim on grounds of causation, remoteness, and "most important" that

> … not having been in occupation of the premises acquired he had no right in law to such an award.[18]

On the latter point, counsel for M conceded that there could be no claim for "disturbance" by an owner not in occupation, but rested his claim on the second part of rule (6).[19] Ralph Gibson LJ accepted that there was nothing in the decided cases to confine the words "compensation for any other matter" to items of cost only.[20] He expressed surprise that the point had not previously been considered in the Court of Appeal, but observed:

> It must, I think, be uncommon for the owner of an interest which is compulsorily acquired, and who is not in occupation, to be able to point to some significant damage, consequent upon the taking of his interest, other than costs and expenses, which is the natural and reasonable consequence of the taking of his interest and not too remote.[21]

4.10 He also noted the decision of the House of Lords in *Woolfson v Strathclyde Regional Council*,[22] where on facts "strikingly similar" to those before him, no award was allowed for the "special value" of the land to the owner (W) by reason of his control of the company (C) carrying on business there. Lord Keith said:

> This line of argument was unsupported by authority and in my opinion it also lacks any foundation of principle. The fact of the matter is that C was the occupier of the land and the owner of the business carried on there. Any direct loss consequent on disturbance would fall upon C, not W. In so far as W would suffer any loss, that loss would be suffered by virtue of his position as principal shareholder in C, not by virtue of his position as owner of the land. His interest in the loss is at best an indirect one…[23]

17 The leading judgment was given by Ralph Gibson LJ, with whom Mann and Nolan LJJ agreed.

18 [1993] 2 EGLR at p 31C.

19 *Ibid* p 31F. The court noted that counsel for M (Michael Barnes QC) accepted that there was "no reported case in which a claim to loss of earnings, or to loss of business profits, has been awarded to an owner who was not in occupation", but submitted that none of the authorities precluded such a claim.

20 *Ibid* p 31F–32G, based on a review of the leading authorities, including *Horn v Sunderland Corp* and *Harvey v Crawley DC*.

21 *Ibid* p 32J–K.

22 (1979) 38 P&CR 521.

23 *Ibid* p 527.

4.11 Ralph Gibson LJ did not regard this decision as fatal to M's case. He noted, and apparently accepted, counsel's submission that Lord Keith was addressing a claim based on "disturbance" only, and that the claim failed because on the facts the loss had been found not to be directly consequential on the taking.[24] Finally, he said that he could see no sensible legislative purpose in the distinction drawn by the council's case.[25] He concluded:

> I have reached the conclusion that the council has failed to identify any error of law by the member in holding that M was entitled to claim in respect of the loss of the service agreement. Such a claim is not excluded merely because M was not in occupation. Further, in my judgement, upon the facts before the member and as found by him, it was, I think, open to the member to conclude that such a claim was not excluded as too remote in law.[26]

The Dublin case

4.12 The council compulsorily acquired two properties, in which the claimant held a leasehold interest, but which he did not occupy. He had bought them as investments. It was found that he intended to use the compensation money to buy a suitable replacement property investment, and that the cost of reinvestment (including stamp duty and legal and agents fees) would be 8.5% of the purchase price. The issue was whether he was entitled to recover this cost under rule (6).

4.13 The council relied on "a series of English decisions" as having established that a claimant in such a position could not recover his re-investment costs in addition to the market value under rule (2). However, having reviewed the authorities, the court concluded that the only support for the council's case was in a passage in the judgment of Denning LJ in *Harvey v Crawley DC*,[27] and a Lands Tribunal decision "which was presumably based on those observations".[28] The passage in question was discussing the compensation payable on compulsory acquisition of a house. Denning LJ contrasted the compensation payable for disturbance to an owner-occupier, with the position of an investor:

> Supposing a man did not occupy a house himself but simply owned it as an investment. If he chose to put the money into stocks and shares, he could not claim the brokerage as compensation. That would be much too remote. It would not be the consequence of the compulsory acquisition but the result of his own choice in putting the money into stocks and shares instead of putting it on deposit at the bank. If he chose to buy another house as an investment, he would not get the solicitors' costs on the purchase. Those costs would be the

[24] [1993] 2 EGLR at p 33B–C.

[25] *Ibid* p 32D.

[26] *Ibid* p 33F.

[27] [1957] 1 QB 485.

[28] *Dublin Corporation v Underwood* [1997] 1 IR 117, 129. The leading judgment was given by Keane J, with whom Hamilton CJ, and O'Flaherty J agreed.

> result of his own choice of investment and not the result of the compulsory acquisition.[29]

Keane J accepted that this passage reflected the view that in a case such as that before him the cost of re-investment would not be recoverable; but he also noted that the passage was "clearly obiter" and was not expressly assented to by the other members of the court.

4.14 Keane J agreed with the court below that, in the absence of authority, the issue had to be decided as one of principle, in line with *Horn v Sunderland Corporation*, and that

> … the (claimant) was entitled to be compensated on the basis of equivalence and… should recover neither less nor more than his total loss.[30]

Reference was also made to the "constitutional prohibition of unjust attacks on the property rights of citizens".[31] The claim was allowed. The claimant had held the properties as an investment; he would have continued to hold them as such if they had not been compulsorily acquired; and he wished to replace them with a corresponding investment. Unless he were paid the costs of replacing the properties he would not have been fully compensated for the loss of his existing investment property. Keane J saw no reason for treating such re-investment costs as too remote:

> They are the immediate and direct consequence of the compulsory acquisition of the (claimant's) property. While it may be that the expression "compensation for disturbance" should properly be confined to those losses which are sustained by a person actually in occupation of the acquired premises, I see no reason why such costs should not be recoverable as one of the "other matter(s) not directly based on the value of land" which are the subject of compensation under rule (6).[32]

Comments

4.15 In our view, the *Wrexham* case must be taken as binding Court of Appeal authority for the proposition that, in relation to a claim by a person with a compensatable interest:

29 [1957] 1 QB 485, 493.

30 *Dublin Corporation v Underwood* [1997] 1 IR 117, 129.

31 In England and Wales, Article 1 of the First Protocol to the ECHR might be regarded as similar in effect: see Appx C, para C.18 below.

32 *Dublin Corporation v Underwood* [1997] 1 IR 117, 130. Keane J noted an argument based on the English Planning and Compensation Act 1991, s 70; Sched 15, part I, para 2; inserting a new s 10A in the 1961 Act, giving a specific right to compensation for expenses of reinvestment within a fixed period. He thought it consistent with the UK Parliament having taken the view, in the light of *Harvey v Crawley DC*, that "it was at least arguable that an owner not in occupation would not be entitled to recover the re-investment costs". However, it had no relevance to Ireland, where there had been no such legislative intervention.

(1) compensation under the second part of rule (6) is not limited to loss to occupiers;

(2) it is not limited to claims for costs or expenses; and

(3) it extends to any loss attributable to the compulsory acquisition, subject only to the ordinary principles of causation and remoteness.[33]

The *Dublin* case is strong persuasive authority in support of a similar approach, at least in relation to (1) and (3), and in particular for including loss to investor-owners in limited circumstances. Its persuasive weight is increased by the fact that it was arrived at independently of the reasoning in the *Wrexham* case, and after full consideration of the other leading English authorities.

4.16 At the same time regard must be had, in both cases, to the particular facts. Each case depended on a favourable finding on causation and remoteness. In the *Wrexham* case, it was held that the loss of the service agreement was the natural and reasonable result of the acquisition and was not too remote.[34] In *Dublin* the court attached importance to the facts that the property was held for investment purposes, and that the compensation was to be used for precisely the same purpose. A similar claim probably would not have been allowed, if, for example, an owner-occupier following compulsory purchase had chosen to rent a home, and put his money into investment property.[35]

4.17 We conclude that the distinction between the two parts of rule (6) is redundant. The general rule should be that any loss caused by the acquisition should be allowable, provided it is not too remote, whether or not the claimant is in occupation. We think there is advantage in retaining the equivalent of 1961 Act section 10A, in the interests of certainty, but this should be without prejudice to the general rule.[36] Accordingly, in our recommendation, we have decided to adopt the terms "consequential loss" rather than disturbance; and to omit the limitation to loss attributable to "displacement".

[33] These principles are discussed further below: paras 4.20 – 4.21.

[34] In holding that the loss was not too remote, the court followed *Lee v Sheard* [1956] 1 QB 192, in which (in a common law claim for damages for personal injury) it was held that the plaintiff, who was a shareholder and director of a company, and was prevented from working by the injury, could include a claim for the loss represented by his share of the reduced earnings of the company.

[35] See Keane J's comments on *Harvey v Crawley DC* at p 129.

[36] See Rule 5(3)(c). For example, on the facts of *Dublin* (see n 32 above), the claim would not have been covered by 1961 Act, s 10A, unless the replacement property was bought within one year of entry. Although it is not entirely clear from the report, it appears that at the hearing before the arbitrator the claimant had not yet bought the replacement property, presumably because he had not received the compensation. If there is a genuine intention to re-invest (cf the *Shun Fung* tests for business relocation: para 4.34 below), but the claimant is unable to do so until the compensation is paid, an arbitrary time-limit of one year may be unfair.

Particular issues

4.18 In CP 165,[37] we commented on a number of issues relevant to our proposals for disturbance. The particular issues were:

(1) Wording of the causation test;

(2) Failure to mitigate;

(3) Personal circumstances;

(4) The test of "reasonableness" in relation to relocation versus extinguishment;

(5) Partial relocation;

(6) Starting date for disturbance compensation;

(7) Other points of detail

4.19 Generally, our approach was supported on consultation, and it is unnecessary to repeat the previous discussion. We comment only on those points on which we have revised our proposals following consultation.

Wording of the general rule

CAUSATION

4.20 Our intention is that the Code should include a general rule apt to reproduce the established principles under rule (6). In the Consultation Paper,[38] we noted Lord Nicholls' comments in *Shun Fung* on the "familiar and perennial difficulty" in seeking to achieve precision in the criteria to be applied "in the infinitely different sets of circumstances which arise".[39] We adopted his expression "fairly attributable" as sufficiently encompassing the ordinary principles.[40]

4.21 The precise formulation of such a general rule will be a matter for the draftsman in due course. However, on further consideration, we think that it may be preferable to base it more closely on the traditional wording. There is in effect a two-fold test for loss to qualify: first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the acquisition.[41] Use of such wording would not only underline the link with the existing case-law,[42] but also emphasise the

[37] CP 165, paras 4.54ff.

[38] CP 165, para 4.56.

[39] [1995] 2 AC 111, 126 D–E.

[40] Lord Nicholls had referred to "losses *fairly attributable* to the taking of (the) land…" *ibid*, p 125D (emphasis added).

[41] Following the words used in *Harvey v Crawley DC* at p 494, *per* Romer LJ. Having regard to the *Wrexham* case (above), we have referred to "compulsory acquisition" rather than "dispossession" (the word used by Romer LJ).

[42] For the same reason, we propose to omit the word "monetary" (CP 165 Proposal 4(1) referred to "monetary loss or expense"). It is not part of the rule as stated in the authorities, and may be seen as implying a further limit on those principles.

significance of remoteness as a limit on the width of the principle, as illustrated by the *Wrexham* and *Dublin* cases.

MATTERS BASED ON THE VALUE OF LAND

4.22 It is implicit in the case-law, and expressly stated in rule (6), that compensation for consequential loss excludes items "directly based on the value of land".[43] Loss represented by the value of the subject land, or by the diminution in value of retained land, is compensated under other heads; it must therefore be excluded from rule (6).

VALUE FOR MONEY

4.23 A similar approach is reflected in the rebuttable presumption that, where a higher price is paid for relocation premises, the claimant has received "value for money", and cannot therefore claim the extra cost under rule (6).[44]

> Example[1]
>
> The claimant's office premises were compulsorily acquired. They leased new premises. However, these were larger than their original premises and although they sub-let the accommodation which was surplus to their needs they were not able to do so immediately and, when they did so, they did not make a profit for 4 years. The claimants sought to recover compensation for disturbance in respect of a range of items including the increased operating costs at the new premises and the initial loss they incurred on the sub-letting. They were disallowed by the Lands Tribunal, and their decision was upheld by the Court of Appeal.[2]
>
> [1] *J A Bibby & Sons Ltd v Merseyside County Council* (1980) 39 P&CR 53.
>
> [2] Increased operating costs were only compensatable "..if it were shown, first, that the claimant, as a result of compulsory purchase, had no alternative but to incur the increased operating costs concerned, and, secondly, that he had had no benefit as a result of the extra operating costs that would have made incurring them worthwhile" (*ibid* p 60 per Brandon LJ).

4.24 Circumstances where it has been considered that value for money has been provided, and therefore the presumption not rebutted, include: structural improvements to new premises;[45] higher rental for better premises;[46] interest incurred on a bridging loan that the claimant could have avoided by making earlier reference to the Lands Tribunal;[47] and delay in the payment of compensation until

[43] 1961 Act, s 5(6).

[44] CP 165, para 4.41.

[45] *Smith v Birmingham Corp* (1974) 29 P&CR 265.

[46] *J A Bibby & Sons Ltd v Merseyside County Council* (1980) 39 P&CR 53; *Yorkshire Traction Co Ltd v South Yorkshire PTE* [2003] RVR 67.

[47] *Simpson v Stoke-on-Trent City Council* (1982) 1 EGLR 195. If the authority in these circumstances takes possession the claimant will be entitled to 90% advance payment of the authority's estimate. In *Harris v Welsh Development Agency* [1999] 3 EGLR 207 a claim in respect of a bridging loan was dismissed because the claimant had not applied for an advance payment.

new premises were built and the old vacated, resulting in interest being incurred to finance the erection of a new building.[48]

THE NEW CODE

4.25 It is our intention that these principles (including the presumption of value for money) should be retained in the new Code.

4.26 It has been suggested by one consultee[49] that the wording of rule (6) ("directly based" on the value of land) may be too wide, since

> …some disturbance losses are directly based on land value such as fees, and replacement accommodation cost (albeit not subject land or retained land value).

We see some force in this point, although it depends on the weight given to the word "directly". This will be largely a matter of drafting in the new Code. However, we agree that it needs to be made clear that items such as fees are not excluded merely because the amount is fixed by reference to the value of land.[50] Furthermore, extra costs relating to replacement accommodation are likely to be excluded by the "value for money" principle; but not solely because they are measured by reference to the value of land.

Personal circumstances and mitigation

4.27 We proposed that the rules should provide expressly that, in assessing consequential loss, the personal circumstances of the claimant were a relevant factor.[51]

4.28 This was largely in response to criticism, in this country and elsewhere, of a 1965 case, in which the Court of Appeal held that where a claimant was unable to re-establish his business, and thereby mitigate his loss, because of ill health, he could not claim compensation for the total extinguishment of goodwill.[52]

[48] The purchase price paid for new premises included an element for interest. It was held that the purchase price paid for the premises was something for which the claimant had received value for money and therefore the interest charges were not recoverable.

[49] Michael Curry, a member of the Northern Ireland Lands Tribunal.

[50] See eg the expenses in the *Dublin* case, which were assessed as 8.5% of the cost of the replacement land.

[51] CP 165, para 4.59.

[52] *Bailey v Derby Corp* [1965] 1 All ER 443.

Example[1]

The acquiring authority compulsorily purchased the claimant's premises. The claimant purchased other premises which would have been suitable for transfer of the business, but, due to his ill health, he let them to another company, in which he took salaried employment. The tribunal found that, if he had been in good health, he would have been able to transfer the business. It rejected his claim for compensation on a total extinguishment basis. The decision was upheld by the Court of Appeal.

[1] *Ibid*.

The rule was partly mitigated by statute in 1973, by giving traders over 60, in certain circumstances, a statutory right to claim compensation on the basis of total extinguishment, even where relocation might be possible.[53]

4.29 There was general support for this proposal from consultees. However, the terms of some of the responses have caused us concern that a reference to "personal circumstances", unless more clearly defined, may introduce undesirable uncertainty. For example, one consultee welcomed the proposal as providing a possible means to compensation for the effects of negative equity for mortgagors. Another referred to compensating for the loss of land with "sentimental value". A contrary view was that it was impractical for authorities to "budget for the personal circumstances of the claimant". While we recognise the problems of negative equity, it was not our intention, and we do not think it appropriate, to find a solution by a significant widening of the law of consequential loss.[54] Nor was it our intention to allow the amount payable for the land to be increased by sentimental considerations peculiar to the claimant.

4.30 The particular problem we were seeking to address was concerned with inability to mitigate loss by relocating the business, as illustrated by the *Bailey* case. We remain of the view that the new Code should go beyond the limited amendments made by the 1973 Act. Compensation should not be reduced, where, due to such factors as age, illness or disability, the claimant cannot reasonably be blamed for his failure to mitigate his loss. However, we now think that this is best addressed in the context of the rules relating to relocation and mitigation, rather than by introducing an express reference to "personal circumstances" under the general rule for consequential loss.[55]

Relocation versus extinguishment

4.31 Where a business is displaced by the acquisition, the question may arise whether compensation should be paid on the "relocation" or "total extinguishment" basis. Normally it will be in the interests of both claimant and authority for the business

[53] 1973 Act, s 46(1) provides that, where the sole trader, partners or major shareholders of a business up to a specified annual rateable value (currently set at £24,600 or less), are more than 60 years old on the date of displacement, compensation may be assessed on the assumption that it is not reasonably practicable to relocate. The claimant is required to give undertakings that he will not dispose of the goodwill, or engage in any other business of the same kind within the area defined by the authority: s 46(3).

[54] We would regard that loss as one "based on the value of land", and therefore excluded by rule (6).

[55] See Rule 5(2)(d)(i).

to be relocated. Compensation will be based on the costs of moving, and any temporary loss of profits. However, in some cases it may be impracticable to relocate the business on another site, in which case the business will be extinguished, and compensation will be based on its value as a going concern.

4.32 In some cases it may only be possible or necessary to relocate part of a business:[56]

> Example[1]
>
> The authority compulsorily purchased land, comprising a bottlery which was part of the claimant's brewery. The claimants constructed a new bottling plant on a site sold to it by the authority. The Lands Tribunal held that, since the bottling plant was a vital part of a single undertaking, the proper measure of compensation for disturbance was, not the market value of the old plant, but the cost of providing a replacement bottlery of equivalent standard. A deduction was made from the actual cost of the new bottlery to take account of the facts (1) that at the end of 10 years the claimants would have a better bottlery than they would have had; and (2) that the new bottlery would be cheaper to operate.
>
> [1] *Tamplin's Brewery Ltd v County Borough of Brighton* (1971) 22 P&CR 746.

4.33 In the Consultation Paper we discussed the existing case law on this issue, including the important decision of the Privy Council in *Director of Buildings and Land v Shun Fung Ironworks*.[57] The subject land in that case was a steel-works in Hong Kong. The case was unusual in that the compensation assessed by the Tribunal on a relocation basis (to China, in the absence of a suitable site in Hong Kong) was substantially higher than that based on the total extinguishment of the business. It was therefore, exceptionally, in the interests of the authority to argue against the relocation basis.

4.34 The relevant questions were explained by Lord Nicholls:

> 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?[58]

4.35 We considered but rejected the suggestion that the new Code should contain a detailed statement of the rules governing the choice between the two bases of

[56] CP 165, para 4.63.

[57] [1995] 2 AC 111. See CP 165, paras 4.27 – 4.28.

[58] *Shun Fung*, at p 128.

claim.[59] However, we thought it helpful to confirm that compensation on the relocation basis may be allowed, even if it exceeds that on extinguishment. We also had doubts about the suitability of the "reasonable businessman" test, stated in *Shun Fung*, as a criterion for general application.[60] Accordingly, we proposed the following (as Proposal 4(2)(c)):

> Where compensation is claimed on the basis of the relocation of a business from the subject land, compensation on the relocation basis shall not be refused solely because it exceeds the compensation which would be payable on the extinguishment basis, unless, in the opinion of the Tribunal, it is unreasonable in all the circumstances (including the cost to the authority and the value of the business to the claimant) to assume relocation of the business.

4.36 The responses to consultation showed general agreement as to the principles to be applied. There was, however, a considerable divergence of views as to how they should be expressed in the Code, particularly as to the requirement of "reasonableness", and the burden of proof. Part of the difficulty lies in the diversity of circumstances which need to be considered. The presumption should normally be in favour of relocation, as being in the interests of both parties. However, their interests may not necessarily be served by relocation, as the *Shun Fung* case demonstrates. Although the facts of that case were exceptional, the Code needs to cater for cases where the authority rather than the claimant is arguing for compensation on a total extinguishment basis.

4.37 In the light of these considerations, we think it is desirable to spell out in rather more detail the rules relating to this issue. In principle, we think that the presumption should be in favour of relocation, and that the burden of proof should lie on the party which seeks to establish compensation on a different basis. We adhere to the view that the test in the Code should be a modified form of the *Shun Fung* guidance. For the reasons explained in the Consultation Paper, we prefer not to express the general test in terms of the "reasonable businessman", although that test may provide a suitable criterion of reasonableness in some cases.[61]

4.38 Our recommendations, giving effect to these principles, are set out below.

Replacement of buildings

4.39 There was general agreement with our proposal that there should be specific provision for the cost of replacement buildings and other installations.[62] This arose

59 CP 165, para 4.62.

60 CP 165, para 4.33.

61 We note that there is an element of circularity in the test, since in many cases a businessman's decision whether to relocate, and his ability to do so, may be reasonably influenced by the amount of compensation he is going to receive. Again, *Shun Fung* cannot be taken as typical in this respect. The claimant company was controlled by a major property company, which would have been able to finance a new steelworks in China, if it had thought it a worthwhile project. Its unwillingness to do so, unless it was financed by compensation, was taken as an indication of the project's lack of "economic feasibility", and underlined the unreasonableness of awarding compensation on the relocation basis: see [1995] 2 AC 111, 131.

62 CP 165, paras 4.63 – 4.64.

from an issue raised by CPPRAG in relation to injurious affection,[63] relating to the lack of compensation for the replacement of agricultural buildings, made necessary by severance, where the cost is not adequately reflected by compensation based on reduction in market value.[64] The Policy Statement suggested that this was more appropriately dealt with as part of compensation for disturbance.[65] We agreed, as did most of our respondents.[66] There was also general agreement with our view that this right should extend to all type of businesses; and that, subject to the test of reasonableness, it should apply whether the building which needs to be replaced is on the subject land or retained land, and wherever the replacement building is to be located.

> Example[1]
>
> Part of the claimant's farm was compulsorily purchased. All the farm buildings with the exception of a modern corn store had to be demolished as they were on the acquired land, and the area of the farm was reduced by 9 acres. It was necessary to construct a new road to serve the farmhouse, and cattle had to be transported in trucks from one part of the farm to the other. The Tribunal disallowed a claim for the cost of the new buildings and works on the retained land, and limited the claim to one for severance, based on the diminution in value of the retained land.[2] Under our proposals, the cost of replacement would be allowed as consequential loss, if not adequately reflected in the award for injury to retained land (based on decrease in market value).
>
> [1] *Cooke v Secretary of State for the Environment* (1974) 27 P&CR 234, LT.
>
> [2] The Tribunal held (following *Re Stockport Ry* (1864) 33 LJQB 251) that compensation was to be assessed by reference to "the difference between the value of the land not taken before the severance or other injurious affection and the value after that date", and that the values are to be arrived "on the same basis as the value of the land acquired, ie by reference to market values…" (27 P&CR 234, 238). In reading the case, it needs to be borne in mind that, although the farm was owned by the claimant, he was not the occupier. It had been let to the claimant's son, who had made a separate claim which had been settled (on terms which are not disclosed in the report). The Tribunal proceeded on the basis that the claimant, not being in occupation, could not claim under rule (6). In the light of the *Wrexham* case (see para 4.15 above) this assumption is doubtful.

Starting date for disturbance compensation

4.40 The *Shun Fung* case established that losses incurred from the time of the announcement of the proposed acquisition, even though preceding the date of acquisition or entry, could be included in the claim:

[63] CP 165, para 5.22.

[64] CPPRAG Review, para 129(ii). This possible unfairness was highlighted in *Cooke v Secretary of State* (1974) 27 P&CR 234, LT (see example below).

[65] Policy Statement, Appx, para 3.39.

[66] Some respondents made points on the detailed wording of the proposal, which can be taken into account in drafting the appropriate provision.

> … 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 resumption.[67]

We followed the Policy Statement in proposing that there should be a starting-date for such losses, and that it should be the "first notice date".[68] We did not consult in terms on this issue, which had already been subject to consultation following the CPPRAG report.

4.41 In subsequent discussions with the ODPM, we have suggested that this rule needs to be qualified to allow for special cases where the claimant reasonably moves before, and in anticipation of, the making of a compulsory purchase order. For the protection of the authority, this should normally only apply where there has been prior agreement. However, we think there ought also to be provision for special cases where, although there has been no agreement, it would be unfair in the circumstances[69] to deny compensation.

4.42 We accordingly recommend:

Rule 5 Consequential loss

(1) "Consequential loss" means loss suffered or expense reasonably incurred, so far as it is

(a) the natural and reasonable consequence of the compulsory acquisition;

(b) not too remote;

(c) not reflected in compensation based on the value of land, under Rule 3 or 4;

(d) incurred after the first notice date, save that compensation for earlier losses may be granted:

(i) by agreement;

[67] [1995] 2 AC 111,137. The company was informed that the land was to be used as part of a New Town, but the actual resumption did not take place until four years later. In the meantime, the business was run down in anticipation of resumption. The resulting losses were led to be "due to" resumption and so compensatable. (The term "resumption" is used in *Shun Fung* to describe the compulsory acquisition of land. It derives from the Crown Lands Resumption Ordinance (Laws of Hong Kong 1991)).

[68] The "first notice date" was our term for the date of publication of notice of the making of the compulsory purchase order, as required by the 1981 Act, s 11, 12: see CP 165, paras 2.30(1), 3.8, 4.65.

[69] Perhaps a misleading impression created by agents of the authority; or a genuine misunderstanding of the legal position, which has caused no detriment to the authority.

(ii) **if the Tribunal determines that, having regard to the special circumstances of the case, it would be unfair to refuse compensation.**

(2) Where compensation is claimed for the displacement of a business:

(a) compensation shall be assessed by reference to either:

(i) the reasonable costs of relocating the business (wholly or partially), loss of profits and any loss or expense incidental to relocation (the "relocation" basis); or

(ii) the value of the business (or part of the business) as a going concern at the valuation date, and any loss or expense incidental to closure (the "total extinguishment" basis); or

(iii) a combination of the two methods.

(b) the claimant will be entitled to claim on the relocation basis, if

(i) it is reasonably practicable to relocate the business (wholly or partially);

(ii) it has been relocated, or the claimant intends to relocate it (or complete its relocation); and

(iii) it is not shown to be unreasonable in all the circumstances for compensation to be paid on that basis.

(c) the claimant will not be entitled to claim on the extinguishment basis, except:

(i) in the circumstances defined by section 46 of the 1973 Act (rights of traders over 60 years of age to claim compensation on the total extinguishment basis);

(ii) if he has not relocated, and does not intend to relocate, the business; and he shows either

(A) that relocation was or is not reasonably practicable; or

(B) that it is reasonable in all the circumstances for him not to relocate.

(d) For the avoidance of doubt, in deciding what is reasonable under (b) or (c):

(i) the personal circumstances of the claimant (including age, illness, disability or financial circumstances) shall be taken into account;

(ii) the fact that higher compensation is payable on the relocation basis than on the extinguishment basis does not of itself make it unreasonable for compensation to be assessed on the relocation basis.

(e) Unless the contrary is shown, where premises acquired for relocation have a greater market value than the premises acquired from the claimant, it shall be presumed that the difference in value reflects advantages for which compensation is not payable.

(3) Without prejudice to the above rules:-

(a) Consequential loss includes the amount of any legal or other professional costs reasonably incurred by the claimant in connection with the acquisition;

(b) Where land on which a business is carried on is severed by the acquisition, compensation shall include costs reasonably incurred in replacing buildings, plant or other installations (whether or not they were on the subject land) if or to the extent that

(i) they are required to enable the business to be continued on the retained land, or other adjacent land acquired for the purpose;

(ii) the need for replacement is caused by the acquisition;

(iii) the cost is not adequately reflected in any other head of compensation; and

(iv) it is not shown to be unreasonable in all the circumstances for compensation to include such costs.

Provided that the compensation may be reduced to such extent (if any) as the Tribunal may determine to reflect any improvement in the facilities so obtained over those replaced.

(c) Where a claimant who was not in occupation of the subject land incurs incidental charges or expenses in acquiring, within one year of the date of entry, an interest in other land in the United Kingdom, those charges and expenses may be claimed as consequential loss.

HEAD D: EQUIVALENT REINSTATEMENT

Introduction

4.43 Compensation may be awarded on an "equivalent reinstatement" basis, where the provisions of rule (5) are satisfied.[70] The main requirements are that the land is used for a purpose for which there is "no general demand or market", and that reinstatement is "bona fide intended". Typical examples of possible qualifying uses are premises used for religious or charitable purposes.[71] Even where the conditions are met, the Tribunal has a discretion to refuse to allow compensation on this basis if the cost would be disproportionate.[72]

> Example[1]
>
> The acquiring authority compulsorily acquired part of a railway line, station and tunnel. The railway had closed in 1946 but had subsequently been acquired by the claimants, a group of railway enthusiasts, who cleared and partially reopened the line. The restored line had historic interest and also became an amenity for holidaymakers. The claimants had also intended to clear and reopen a further part of the line, some of which went through a tunnel. However, this was compulsorily acquired and flooded to make a reservoir. If this further section of the line was to be reopened it would, therefore, be necessary to divert it along the side of the reservoir and construct a new tunnel. The cost of this was substantial and exceeded the value of the claimants' entire assets. The claimants sought compensation in this amount as representing the cost of equivalent reinstatement. It was accepted by the Court that the claimants had a genuine intention to reinstate the railway. However, since the cost of reinstatement was wholly disproportionate to the total value of the claimants' assets, it was not a reasonable basis for compensation.
>
> [1] *Festiniog Railway Company v Central Electricity Generating Board* (1962) 13 P&CR 248.

4.44 In CP 165 we followed CPPRAG and the Policy Statement in proposing no significant change to the present rules, which we understood to have worked reasonably well in practice.[73] We considered that it would be useful to define the circumstances in which compensation might be refused. Among other points, we agree that no specific provision should be made for any deduction to be made to reflect any enhancement in the new accommodation. We accepted that such a deduction might accord "with a strict application of the principle of equivalence". However, we thought it might frustrate the purposes of awarding compensation on this basis, where the owner is unable to finance the shortfall.

[70] 1961 Act, s 5(5): see CP 165, paras 5.36 ff.

[71] See the examples in CP 165, para 5.40.

[72] *Ibid*, para 5.42; *Festiniog Ry Co v Central Electricity Generating Board* (1962) 13 P&CR 248.

[73] CP 165, paras 5.49 – 5.54.

4.45 Accordingly, we proposed:

> (1) Subject to (2), where (a) the subject 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, and (b) reinstatement in some other place is genuinely intended, compensation shall (at the option of the claimant) be assessed on the basis of the reasonable cost of equivalent reinstatement.
>
> (2) Compensation on this basis may be refused by the Tribunal, if satisfied that it is in all the circumstances unreasonable, having regard to the cost to the authority and to the likely benefit to the claimant.[74]

Consultation

4.46 There was a large measure of agreement with the proposal to retain the substance of the existing law.[75] One respondent disagreed with the view that the provisions had worked well in practice, and suggested that more specific criteria were needed. It was said that the words "general demand or market" led the Lands Tribunal to take an unduly restrictive view of the rule, limiting it in effect to charitable purposes. Furthermore, the reference to the use of the land, rather than the nature of the land, was illogical, since it was the marketability of the premises which was relevant.[76]

4.47 However, these views were not generally shared by respondents. We think it right that the rule should apply only in exceptional cases. Its purpose is to cover cases where market value is not a fair test, because there is no general market for premises of that kind. In such cases, market value cannot be used as a fair criterion either of the value of the premises to the claimant, or of the cost of their replacement. The rule has not been confined in practice to charitable uses,[77] although it is less likely that it will apply to businesses, simply because there is more likely to be a market for business premises.

[74] CP 165, Proposal 6. We also proposed the retention of the special right for equivalent reinstatement of dwellings adapted for the disabled (1973 Act, s 46).

[75] One respondent suggested that the right should be confined to owner-occupiers, as opposed to lease-holders. We find it hard to justify such a clear-cut distinction, since a long leasehold may for practical purposes be as good as a freehold. We think that "reasonable" reinstatement implies that the replacement will be reasonably related to the nature of the interest which is lost.

[76] For example, ordinary premises (such as a dwelling-house) might be used for an unusual purpose, such as for religious meetings, without affecting the marketability of the premises.

[77] *Harrison and Hetherington Ltd v Cumbria County Council* (1985) 50 P&CR 396, HL (rule (5) applied to a livestock market, because although there was some demand, that demand was intermittent rather than general).

Example[1]

The claimants owned a livestock market in Carlisle which the defendant county council agreed to acquire for a price based on compensation for compulsory purchase. The Tribunal's decision, that it should be assessed on the reinstatement basis (under rule (5)), was upheld by the House of Lords. On the evidence there was neither a "market" nor a "general demand"[1] for land for use as a livestock market.

[1] *Harrison and Hetherington Ltd v Cumbria County Council* (1985) 50 P&CR 396.

4.48 With regard to the apparent emphasis on use, rather than the nature of the premises, we noted that this has been qualified by case-law:[78]

> "Devoted to a purpose" in this context has been construed by the courts on several occasions. It is clear that the words are designed to go beyond a mere statement of present actual use or purpose: they import the need to ascertain the intended purpose of the building or structure[79] (although it appears that the building does not have to have been specifically designed for that use or purpose). The use of the premises for the devoted purpose must, however, be one to which they had been deliberately and voluntarily devoted.[80] The purpose itself should not be construed in too narrow a way.[81]

4.49 We accept that it would be desirable for the new provisions to clarify the effect of the case-law, noted above, relating to "devoted to a purpose". We propose to substitute the phrase "adapted and normally used", which is intended to have the same effect as the existing law, as interpreted in the cases.

[78] CP 165, para 5.38.

[79] See *Aston Charities Trust v Stepney Corp* [1952] 2 QB 642, CA where it was held that a temporary interruption of a charitable purpose did not amount to abandonment of that purpose (even though the actual use for that period was as storage). In *Zoar Independent Church Trustees v Rochester Corp* [1975] QB 246 a chapel had to be vacated because of a collapsed roof and the small congregation (who relocated) did not feel justified in effecting repairs with an acquisition pending. It was held that the chapel remained devoted to a public worship purpose (which would have been resumed but for the acquisition). In essence the test is: at the time of notice to treat is there genuine intention to continue the purpose?

[80] *Central Methodist Church, Todmorden (Trustees of) v Todmorden Corp* (1960) 11 P&CR 32.

[81] *Trustees of the Manchester Homeopathic Clinic v Manchester Corp* (1970) 22 P&CR 241: homeopathic clinic held to be for purpose of medical consultation, diagnosis and treatment.

Example[1]

The authority compulsorily acquired a hall, which had been built for the charitable and religious purposes of a trust. During the Second World War the hall ceased to be used for these purposes and was let to a business firm. That was the position at the date of the notice to treat. The trust proposed to build a new hall some 4 miles away. The Tribunal awarded compensation on the equivalent reinstatement basis. The court upheld this decision. The words "devoted to a purpose" introduced a concept of intention, not solely dependent on actual use at the date of the notice to treat. The temporary interruption caused by the war was to be disregarded.

[1] *Aston Charities Trust Ltd v The Metropolitan Borough of Stepney* [1952] 2 QB 642.

4.50 There was general agreement among respondents that there should be a discretion to refuse in some cases, but some difference over how the test should be expressed. One respondent thought that the refusal should be based on whether reinstatement is reasonable and will result in likely benefit to the claimant, not on the cost to the authority. Its costs are relevant to whether the scheme should proceed, but are not a reason for reducing what would otherwise be fair compensation. We agree that the proposal in the Consultation Paper should be amended to show that the issue is whether the cost is disproportionate in relation to the benefit to the claimant, rather than to the burden on the authority.

4.51 A minority of respondents thought there should be some provision to allow for a deduction for "betterment" represented by enhanced premises. However, the majority agreed with our view that this could frustrate the purpose of the provision. No such deduction is normally made in assessing common law damages, in cases where the replacement of premises is held to be the proper measure of the loss.[82] The reference to the "reasonable cost" of equivalent reinstatement should provide sufficient protection against excessive claims.

4.52 Finally, it was suggested that there should be some mechanism to ensure that the payments were used for their intended purpose, for example, by providing for staged payments. We agree that the authority, where necessary, should be able to exercise some control over the matter, and that there should be power to impose conditions for this purpose, whether in the timing of the payments, or by undertaking to repay the excess if the money is not used for the intended purpose.

[82] See *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447, 473, *per* Widgery LJ.

Example[1]

The council made a compulsory purchase order of a property used by the defendants as a unique facility that was integral to their functions as a trade union. The defendants intended to reinstate, using the façade of the original building. The parties agreed two valuations: the first, based on market value and the second (higher) based on cost of reinstatement. The statutory arbitrator (in 1985) made an award for the higher figure. By 1991 no attempt had been made to reinstate the building. The council began court proceedings to recover the excess over market value, on the basis of unjust enrichment. The claim was rejected by Irish Supreme Court. The arbitrator's award was final, and could not be reopened in the absence of a statutory provision to that effect.

[1] *City of Dublin v The Building and Allied Trade Union* (1996) 1 IR 468.

Our attention has not been drawn to any similar cases in this country. This suggests that it is not a frequent problem. It may be that in practice, where compensation is awarded on this basis, arrangements are made for staged payments as the work proceeds. However, we think it desirable that there be specific provision to protect the authority's interest in this respect.

4.53 Accordingly we recommend:

Rule 6 Equivalent reinstatement

(1) Compensation may be claimed on the basis of the reasonable cost of equivalent reinstatement –

(a) in the circumstances, and subject to the rules, defined by section 45 of the 1973 Act (dwellings adapted for the disabled);

(b) if it is shown that –

(i) the subject land is, and but for the compulsory acquisition would continue to be, adapted and normally used for a purpose of such a nature that there is no market or general demand for land or premises for that purpose; and

(ii) reinstatement in some other place is genuinely intended.

(2) Where a claim is made under (1)(b) –

(a) The cost of reinstatement shall be assessed by reference to the date at which reinstatement becomes reasonably practicable.

(b) Compensation on the basis of equivalent reinstatement may be refused, if it is shown that the cost is disproportionate having regard to the likely benefit to the claimant.

(3) Where reinstatement has not been carried out before compensation is determined, the award of compensation under this Rule may be made subject to conditions (including provision for staged payments) to ensure that any payment is used for the intended purpose, or (if not) that any excess over the compensation otherwise due is repaid.

PART V
THE COMPENSATION CODE – GENERAL RULES

INTRODUCTION

5.1 In Part V of CP 165,[1] under the heading "Incidental Rules", we considered various unconnected rules, which form part of the existing law and which we proposed for inclusion in the new Code. They related to:

(a) Prospects of lease renewal

(b) Rehousing obligations

(c) Illegal uses

(d) New interests and enhancements

(e) Consistency

(f) Mitigation

Of these points, only (c) gave rise to any significant controversy in the responses to consultation. However, we have reconsidered each of the points in the context of our overall revision of the Code. As noted below, discussion of some of the issues is postponed to Parts VI and VII, covering matters to be disregarded in the valuation. The remaining matters (that is, items (c), (e), and (f)) will be included in the draft Code as "general rules".

PROSPECTS OF LEASE RENEWAL

5.2 Where an interest is limited in time, such as a lease, the nature of the limitation will clearly affect the market value of the interest, and will therefore be taken into account in assessing compensation based on market value (under head A).[2] It may also be relevant to a claim under other heads. For example, a claim for loss of profits of a business on the acquired land will need to reflect any lack of security in the occupation of the business premises. However, account will also need to be taken of any security given by statute,[3] or any right to renewal under the lease itself. Such prospects are relevant to market value, in so far as they would enhance the interest available to a willing buyer. They are also relevant to the security of the assumed profits of a business on the land.

5.3 Even where there is no enforceable right to security, the circumstances may be such that the prospect of renewal should fairly be taken into account. For example, the known policies of a public authority lessor may be such that renewal of a lease

[1] CP 165, paras 5.55ff.

[2] Paras 3.1 – 3.7 above.

[3] For example, for business premises under the Landlord and Tenant Act 1954, Part II.

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.

> Example[1]
>
> A disused cinema was let by the GLC to the claimant on an eighty year lease that was due to expire in 1984. In 1963 conditional planning permission had been granted for the erection of a supermarket and other shops. In 1968 the council's valuer said he would recommend that the GLC enter into a new long lease with the claimant. The claimant applied in 1970 for planning permission to demolish the cinema and to erect shops on the site, but it was refused on the basis that the site might be needed for future road improvement schemes. The claimant accordingly required the local authority (Southwark) to purchase their leasehold interest and were entitled to compensation on the basis that their interest had been acquired compulsorily. The Tribunal held that, apart from the road scheme, the market would have assumed that planning permission would have been granted for development of the site, and also that the GLC would have been likely to grant a new lease. The Court of Appeal upheld the decision; 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.
>
> 1 *Trocette Property v GLC* (1974) 28 P&CR 408.

5.4 In CP 165, we proposed a rule to cover this point "in the interests of certainty and the avoidance of doubt":

> (1) Where an interest is limited as to time or may be terminated by another person, regard shall be had (in assessing compensation for that or any other interest in the subject land) to the likelihood (in the absence of the relevant project) of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be, or would have been, granted.

5.5 In making this proposal, we noted that, at one time, the prospect of renewal under Part II of the Landlord and Tenant Act 1954 was specifically excluded from consideration;[4] and that it might be desirable to confirm the reversal of that position in the new Code. We also had in mind the parallel of the Australian Commonwealth Code, which provides that, if the interest is limited in time or may be terminated by another person, there is to be taken into account

> 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.[5]

4 Section 39(1) of the Landlord and Tenant Act 1954, which required the right to a new business tenancy under that Act to be excluded in assessing compensation, was repealed by 1973 Act, s 47. Accordingly, the prospect of a renewal can now be taken into account.

5 LAA (Cth), s 55 (2)(d).

5.6 On further consideration, however, we think that such a provision is an unnecessary complication, and may indeed give undue emphasis to this aspect. As indicated above, any genuine prospects of renewal will be taken into account under the ordinary rules, in so far as they affect market value or the assessment of consequential loss. There is no need for an express statement to that effect. Furthermore, the issue is no different in principle from that which may arise in relation to covenants in the lease. The profitability of a use may be affected by covenants restricting the use of the premises.[6] If so, it may be necessary to consider the likelihood of a relaxation,[7] and the terms on which it would be granted.

5.7 Another consideration is that the words in our proposal "(in the absence of the relevant project)" would need further elaboration. As they imply, this aspect raises issues which overlap with those relevant to the issue of "project disregard".[8] The project may affect, not merely the prospects of extension or renewal of the interest, but its actual existence at the valuation date.[9] We propose to deal with this issue as a specific exception to the rules for the valuation date by requiring the effects of compulsory acquisition on the existence and nature of the interests to be disregarded.[10]

5.8 Accordingly, we do not include this proposal in our recommendations.

REHOUSING OBLIGATIONS

5.9 This is considered in Part VI (Rule 12) below.

ILLEGAL USES

The scope of the rule

5.10 Rule (4) in section 5 of the 1961 Act is as follows:

> 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.

6 See eg *Mean Fiddler v Islington LBC* [2003] 44 EG 170 (considered below at para 5.11 under "Illegal uses").

7 For example, the lease may provide that consent to a variation of user "shall not be unreasonably refused".

8 See Part VII below.

9 See the *Rugby Water Board* case (discussed in para 2.4 above; Appx D, paras D.84–86).

10 See Part VI below, Rule 10 (2)(a) proviso. This is intended to reproduce more generally the effect of 1973 Act, s 48 (which reversed the effect of the *Rugby Water Board* case in relation to agricultural holdings).

Although the rule refers in terms to "the value of the land" it has been held to apply also to the assessment of compensation for disturbance.[11] We would expect it also to apply to compensation for severance and injurious affection.[12]

5.11 There is a surprising absence of authority on the interpretation of rule (4). One issue, which has been brought to light since the publication of CP 165,[13] is whether rule (4) is concerned with breaches of *private* law, such as breaches of covenants in a lease. The wording of the rule is clearly wide enough to cover such breaches, since (whatever the precise meaning of "contrary to law") they involve use of the premises in a way "which could be restrained by any court". On the other hand, it is difficult to see any public policy reason for automatically excluding such value, if it could be shown that in practice the lessor had not objected, and would not object, to the use. As in the case of the prospects of a lease extension,[14] one would expect it to be a matter of evidence as to how far the market value would be affected by the contravention.

5.12 We did not address this point in CP 165. We proposed to retain a simplified version of the rule, referring simply to uses "in a manner, or for a purpose, contrary to law".[15] This was intended to give effect to Government policy, already stated, that compensation should not include "the value of any illegal activity".[16]

Consultation

5.13 The main issue raised in consultation was whether there should be any exceptions to the rule, for example for cases where the breach is unintentional, or technical and easily remedied. Responses were evenly divided on this point. Although local authorities and most legal practitioners were opposed to any exception, others favoured a limited exemption subject to the discretion of the Tribunal. For

[11] Disturbance compensation, historically, was treated as part of the "value to the owner" of the land: *Hughes v Doncaster BC* [1991] AC 382.

[12] See CP 165, para 5.3.

[13] In *Mean Fiddler v Islington LBC* [2003] 44 EG 170 the assessment related to the compensation for displacement of a nightclub. The authority argued that the use was in breach of a covenant in the lease, and should therefore be excluded under rule (4). Before the Court of Appeal, the only issue was the proper construction of the covenant in question, and it was unnecessary for the Court to consider the effect of rule (4). However, Carnwath LJ commented:

> …, the authority take a legal point, that any additional value attributable to that use should be excluded under section 5(4) of the Land Compensation Act 1961, as being a use which is unlawful or could be restrained by a court. That question is not before us. At first sight, I find it a surprising submission, in relation to what I understand to be a provision directed to breaches of the general law, such as, for example, of planning restrictions…

[2003] 44 EG 170 para [6].

[14] See paras 5.2 – 5.8 above.

[15] In this respect, we followed the Australian Law Reform Commission, who thought that the other parts of the rule (detriment to health, restraint by a court) were sufficiently encompassed by the term "contrary to law", and therefore otiose: the ALRC Report, para 253.

[16] Policy Statement, Appx, para 3.20. This involved the rejection of a recommendation by CPPRAG: see CP 165, para 5.62.

example, the exemption might apply to a use of land in breach of planning control, where consent might reasonably be expected to be granted. Other suggested exceptions related to private law restrictions, for example restrictive covenants where there is no realistic prospect of enforcement.

5.14 In so far as they refer to private law restrictions, these responses underline the need for a more precise definition of "contrary to law". In our view, the basis of the rule lies in *public* policy considerations, and the scope of the rule should be limited accordingly. We recognise that this poses problems of definition, since there is no precise definition of "public" law suitable for the purpose. However, we think the purpose of the rule will be adequately expressed by confining it to uses which are criminal or otherwise prohibited by statute.

5.15 One respondent suggested that "immoral uses" should also be excluded, citing the example of premises used for prostitution. However, this would be a significant, and ill-defined, extension of the existing rule. Some cases, for example premises used as a brothel would be covered by the "criminal" exclusion.[17] However, where an arguably "immoral" use has not been regarded by Parliament as justifying a criminal sanction, there seems no reason for the compensation code to take a more purist view.[18]

5.16 We are also persuaded, on balance, that there should be a power for the Tribunal to allow exemption, wholly or partially, from the rule in limited cases. The most obvious example is a minor breach of planning control, where permission could reasonably be expected if an application were made. In view of the generous planning assumptions made elsewhere in the Code,[19] it would seem illogical to exclude this possible element of value. We do not think that it is possible or appropriate to define precisely the circumstances in which an exception should be allowed. It should be a matter for the discretion of the Tribunal, having regard to the nature of the breach and the ease of remedy.[20]

5.17 The wording of the proposal also needs to be amended to make clear that it applies to all heads of compensation, including consequential loss and loss to retained land.

5.18 Accordingly we recommend:

Rule 7 Illegality

(1) Subject to (3), in assessing compensation under any head, there shall be disregarded any element of value or loss, which is attributable to a use which is contrary to law.

[17] For example, under s 33 of Sexual Offences Act 1956 it is an offence to keep or manage a brothel or to act or assist in the management of a brothel.

[18] For example, the value attributable to gambling, in premises licensed for the purpose, should not be excluded, merely because some might regard the activity as "immoral".

[19] See Parts VII and VIII below.

[20] The Illegality Defence in Tort, Consultation Paper No 160, paras 6.6 – 6.30.

(2) For this purpose a use is "contrary to law" in so far as it involves a criminal offence, or is otherwise prohibited by statute.

(3) The Tribunal may disapply this rule (wholly or partially) if satisfied that it would not be contrary to the public interest to do so, having regard in particular to the nature of the breach and its ease of remedy.

NEW INTERESTS AND ENHANCEMENTS

5.19 These will be discussed in Part VI.[21]

CONSISTENCY

5.20 It is well-established that the claims under the various heads must be mutually consistent.[22] Thus, for example, if the subject land is valued as having potential for development which would involve displacing the business in any event, no separate claim can be made for disturbance.

> Example[1]
>
> The claimant owned a farm which he used for his horse breeding business. It was compulsorily acquired. The claimant claimed (i) compensation in respect of the farm 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 and (ii) various other sums as compensation for the disturbance of his horse breeding business as a consequence of the compulsory acquisition. The value of the land as building land was far in excess of the value of the land considered as agricultural land. The Court held that these claims were inconsistent with one another, since the claimant could only realise the building value of their land if he was prepared to abandon the horse breeding business. It awarded compensation for the land valued as building land, but refused the claim for compensation for disturbance.
>
> [1] *Horn v Sunderland Corp* [1941] 2 KB 26.

5.21 Likewise with severance: if the land being acquired is valued on some basis which assumes severance from the retained land, for example for some alternative development, that element of severance should not be the subject of compensation.[23]

5.22 This rule is probably implicit in the principle of "fair compensation". However, we proposed that the principle of consistency should be the subject of an express

[21] See paras 6.9 – 6.12 below.

[22] See CP 165, para 4.43.

[23] See CP 165, paras 5.9 – 5.10 and cases cited.

provision as one of the incidental rules of the Code. This proved uncontroversial on consultation.[24]

5.23 Accordingly we recommend:

Rule 8 Consistency

Where the market value of an interest in the subject land is assessed on the basis that the land had potential to be developed or used for a purpose other than the purpose for which it was occupied at the valuation date, compensation shall not be allowed under other heads (consequential loss or injury to retained land) in respect of loss or damage that would necessarily have arisen in realising that potential.

MITIGATION

5.24 Equally well-established is the principle that a claimant must take reasonable steps to mitigate the loss caused by the compulsory acquisition. Our proposal, in line with the Government's Policy Statement, limited the duty to the period from the first notice date, which is also the proposed starting date for potential claims for consequential loss.[25]

5.25 This proposal was uncontroversial. We have, however, reworded it to conform more closely to the common-law rule,[26] and to emphasise that the burden is on the authority to prove failure to mitigate. As explained when discussing Consequential Loss,[27] we think it should be made clear that the personal circumstances of the claimant are relevant in considering what is reasonable by way of mitigation.

5.26 We accordingly recommend:

Rule 9 Duty to mitigate

(1) If it is shown by the authority that the claimant has (since the first notice date) unreasonably failed to take steps that were open to him to mitigate his loss, the compensation otherwise payable shall be reduced by the amount of such loss as could have been avoided by taking such steps when it was reasonable to do so.

(2) For the avoidance of doubt, in deciding what is reasonable under (1) the personal circumstances of the claimant (including age, illness, disability or financial circumstances) shall be taken into account.

[24] One respondent was concerned that our formulation (based on the Australian LAA (Cth), s 57) might exclude some claims for professional fees. However, we do not see why this should be so, if the fees are fairly attributable to the compulsory acquisition. In any event this point can be considered in the detailed drafting.

[25] See para 4.40 above.

[26] *Chitty on Contracts* (28th ed 1999) 27–086 – 27–087, citing *British Westinghouse Electric Co Ltd v Underground Electric Rys* [1912] AC 673, 689.

[27] Paras 4.27 – 4.30 above.

PART VI
VALUATION DATE AND DISREGARDS

FIXING THE VALUATION DATE

Introduction

Valuation of interests in land

6.1 As we explained in CP 165,[1] the *West Midland Baptist* case[2] in 1969 established the general principle that interests are valued as at the date when possession is taken by the authority, or, if earlier, the date when compensation is determined. This displaced the previous understanding that the date of notice to treat was the critical date for valuation purposes. We proposed that the "valuation date" should be defined in the draft Code so as to give effect to that ruling.

6.2 We noted that, following the *West Midland Baptist* case, there had been some uncertainty as to whether the same rule would apply in determining the nature and extent of the interests to be valued.[3] We adopted the following summary of the effect of the cases:

> … the decided cases suggest that a result which accords with the principle of equivalence will normally result from a rule that interests subsisting at the date of the notice to treat should be valued on the basis of their nature or extent at the valuation date… [However] the rule should not be rigidly adhered to if to do so in any particular case would produce a result at odds with that principle…[4]

We proposed accordingly that, subject to the rules relating to new interests and enhancement,[5] and those relating to project disregard and planning assumptions[6], the general principle should be that

> interests will be valued as they stand at the "valuation date", at values prevailing at that date, and in the context of the planning and other circumstances prevailing at that date.[7]

1 CP 165, paras 5.73ff.

2 *Birmingham Corp v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874.

3 The *West Midland Baptist* case made clear that the *physical* state of the land should be taken as it stood at the valuation date; thus, if a building on the land is destroyed by fire between the date of notice to treat and the date of entry, it will not be taken into account in assessing compensation: *West Midland Baptist* case at p 899, disapproving *Phoenix Assurance Co v Spooner* [1905] 2 KB 753. However, the application of the same principle to the identification of interests in land was subject to conflicting decisions in the Lands Tribunal: see *Banham v Hackney LBC* (1970) 22 P&CR 922; *Lyle v Bexley LBC* [1972] RVR 318.

4 Young and Rowan-Robinson, "Compensation for compulsory purchase: equivalence and the date for fixing interests" [1986] JPL 727, 743.

5 Proposal 7(2) in CP 165; now Rule 11.

6 Proposals 9 and 10 in CP 165; now see Rules 13, 14 and 15 .

7 CP 165 Proposal 8(1).

Consequential loss

6.3 In CP 165, we noted that the same rules could not be readily applied to compensation for disturbance. For example, a claim for loss of profits may extend from the first threat of compulsory purchase until the date of effective re-establishment on a new site.[8] Similarly, removal expenses, and other allowable heads of the disturbance claim, may be incurred at different times. We noted that there was no clear guidance or practice as to how such items might be adjusted (upwards or downwards) to represent the equivalent sums at the common valuation date.[9] In the *West Midland Baptist* case, Lord Reid commented that in relation to such items:

> The actual costs or losses following on actual dispossession[10] have been taken, and that appears to be the accepted practice today with regard to claims under rule 6.[11]

6.4 We concluded, however, that there was no need for detailed provision. Under the general principle of "fair compensation", it would be a matter for valuation expertise as to how best to achieve that on the facts of any individual case.[12]

Equivalent reinstatement

6.5 We also followed the *West Midland Baptist* case in proposing that, where compensation is assessed on the basis of equivalent reinstatement, it should be assessed by reference to the date at which reinstatement became reasonably practicable.[13]

Facts known to the tribunal

6.6 In Part III above, we discussed the extent to which, in relation to head (b) (injury to retained land), the Tribunal should be able to take into account its knowledge of changes in circumstances since the valuation date.[14] We do not repeat that discussion, save to note that the definition of the valuation date is intended to be subject to the special rule there proposed. In relation to consequential loss, there is no reason why the Tribunal should not be able to take account of any information up to the date of assessment.[15]

8 An extreme example was *Shun Fung* where the Privy Council upheld a claim for loss of profits was allowed, dating from five years before the valuation date; the relocation claim, as upheld by the Hong Kong Court of Appeal, assumed effective relocation 13 years after the valuation date.

9 CP 165, para 5.82.

10 This was before the *Shun Fung* case had established that losses *before* the dispossession could be claimed, if caused by the threat of acquisition: see CP 165, para 4.39.

11 [1970] AC 874, 896 H – 897A.

12 CP 165, para 5.88.

13 This involved a departure from the Policy Statement: see CP 165, paras 5.89 – 5.91.

14 Paras 3.25 – 3.29 above.

15 This corresponds to the approach to continuing loss under the common law: see eg *Cookson v Knowles* [1979] AC 556 (damages for loss of earnings).

Consultation

6.7 We do not find it necessary to repeat or add to the detailed discussion in CP 165. Our proposals proved generally uncontroversial in consultation. There were some alternative suggestions in relation to equivalent reinstatement. However, the majority of respondents agreed with us in following the existing law. There was more concern about the implication of this proposal for fixing the date or dates from which interest is to run. However, we think they are better addressed in the discussion of our separate proposals relating to interest.[16] Accordingly, we recommend:

Rule 10 Valuation date

(1) "The valuation date" means the date when compensation is agreed or determined or, if earlier, the date when possession is taken by the authority.

(2) Save as otherwise provided in this Code, compensation shall be assessed by reference to the following dates and circumstances:

(a) Under heads A (value of subject land) and B (injury to retained land), and in any other case where the amount depends on the value of land, interests will be valued as they stand at the "valuation date", at values prevailing at that date, and in the circumstances prevailing or reasonably anticipated at that date.

Provided that, where a right to compensation arises in relation to an interest which has ceased to exist, or may be brought to an end, by reason of the compulsory acquisition, that, and any other interest in the same land, will be valued as though at the valuation date there had been and would be no compulsory acquisition.[17]

(b) Under head C (consequential loss), compensation shall be assessed by reference to circumstances prevailing or reasonably anticipated at the date of assessment.

(c) Under head D (equivalent reinstatement), compensation will be assessed by reference to the costs, or estimated costs, at the date when commencement of reinstatement work became, or is expected to become, reasonably practicable.

[16] See paras 10.20 – 10.21 below.

[17] See paras 2.3 – 2.5 above as to the circumstances in which such a right may arise.

DISREGARDS

Introduction

6.8 The general principle will be that, save as specifically provided, the assessment of compensation will be made on the basis of the circumstances prevailing at the valuation date. The most important exceptions to this principle are considered in the next two Parts ("the statutory project" and "planning status"). In this Part we mention two more limited (and uncontroversial) exceptions derived from the existing law.

New interests and enhancements

6.9 In this proposal, we sought to give effect to two existing rules, the first derived from case-law, and the other from statute:

(1) The rule that the burden of compensation cannot be increased after the date of notice to treat, by the creation of new interests on the subject land, or any retained land.[18]

(2) The rule that the Lands Tribunal may not take account of any enhancements of value (whether by creation of interests or by works) if satisfied that they (i) were "not reasonably necessary" and (ii) "were undertaken with a view to obtaining compensation or increased compensation".[19]

6.10 This proposal proved generally uncontroversial on consultation. We think the wording of rule (2) could be simplified. It is not clear what purpose is served by a two-part test. If the works were "reasonably necessary" for other reasons, it is unlikely that they would be held to be "with a view" to improved compensation; and, even if improved compensation were part of the motivation, it would not seem fair to exclude compensation. The purpose of the provision could be better achieved by a single question: were the works undertaken "solely with a view to" improved compensation?

6.11 It was suggested by one respondent that the second rule should have a start-date, for example the first notice date, to tie in with the rules on mitigation.[20] However, the test is already a stringent one; and we think it unnecessary to add a further limitation. In the unlikely event that works before the first notice date satisfy the test, we think it fair to relieve the authority of the extra burden so created.

6.12 Accordingly, we recommend:

Rule 11 New interests and enhancements

In valuing the subject land or the retained land, there shall be disregarded

[18] *Mercer v Liverpool, St Helens and South Lancashire Ry Co* [1903] 1 KB 652; see Butterworths Compulsory Purchase and Compensation Service, para D [369].

[19] 1981 Act, s 4.

[20] See paras 5.24 – 5.26 above.

(1) any new interests created over the subject land, or the retained land, between the date of notice to treat and the valuation date, in so far as they would increase the amount of compensation otherwise payable by the authority;

(2) without prejudice to (1), any enhancements (by creation of interests, or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was undertaken solely with a view to obtaining compensation or increased compensation.

Rehousing obligations

Introduction

6.13 Where the compulsory acquisition results in the displacement of residential occupiers, the authority may have obligations to rehouse.[21] If tenants are rehoused before the valuation date, the property would, in the absence of any rule to the contrary, be valued with vacant possession rather than subject to the tenancies. This could affect the valuation either way.[22]

6.14 Section 50 of the 1973 Act contains a provision designed to ensure that compensation is neither increased nor decreased by the rehousing obligations of the authorities concerned:

> (1) The amount of compensation payable in respect of the compulsory acquisition of an interest in land shall not be subject to any reduction on account of the fact that the acquiring authority have provided, or undertake to provide or arrange for the provision of, or another authority will provide, residential accommodation under any enactment for the person entitled to the compensation.

[21] For example, s 39(1) of the 1973 Act provides:

> Where a person is displaced from residential accommodation on any land in consequence of:
>
> a) the acquisition of the land by the authority possessing compulsory purchase powers;
>
> b) making or acceptance of a housing order or undertaking in respect of a house or building on the land;
>
> c) where the land has been previously acquired by an authority possessing compulsory purchase powers or appropriated by a local authority and is for the time being held by the authority and is for the time being held by the authority for the purposes for which it was acquired or appropriated, the carrying out of any improvement to a house or building on the land or of redevelopment on the land;
>
> and suitable alternative residential accommodation on reasonable terms is not otherwise available to that person, then, subject to the provisions of this section, it shall be the duty of the relevant authority to secure that he will be provided with such other accommodation.

[22] Where the tenancies are rent protected, vacant possession will normally increase the value of the property. In other cases, for example where there is a fixed-term tenancy in a falling market, the existence of the tenancy may add value.

(2) In assessing compensation payable in respect of the compulsory acquisition of an interest in land which on the date of service of the notice[23] to treat is subject to a tenancy, there shall be left out of account any part of the value of that interest which is attributable to, or to the prospect of, the tenant giving up possession after that date in consequence of being provided with other accommodation by virtue of section 39(1) above; and for the purposes of determining the date of reference to which that compensation is to be assessed the acquiring authority shall be deemed, where the tenant gives up possession as aforesaid, to have taken possession on the date on which it is given up by the tenant.

6.15 We proposed that there should be similar provision, in simplified form, in the new Code, to the effect that any increase or reduction in compensation attributable to the fact that an authority has provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant.

Discussion

6.16 There was no disagreement with this proposal. We have considered whether this is a matter which would be adequately covered by other rules, including the project disregard rule. However, we think that it is useful for there to be a specific rule dealing with the treatment of housing obligations.[24]

6.17 This simplified wording of our Proposal[25] was not intended to alter the effect of the present law, but merely to allow for redrafting in accordance with the style of the new Code. However, we note that the term “another authority” (in section 50(1)) is not at present defined. We propose the term “authority acting in the exercise of a statutory function”, to be consistent with our proposed rule in relation to “the statutory project”.[26]

6.18 Accordingly, we recommend:

Rule 12 Rehousing obligations

Where the subject land comprises a dwelling-house, there shall be left out of account any increase or reduction in the compensation otherwise payable, which is attributable to the fact that the acquiring authority (or any other authority acting in the exercise of a statutory function) have provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant (under the 1973 Act, s 39 or otherwise).

[23] This includes “deemed notice to treat” under the vesting declaration procedure: 1973 Act s 50(4).

[24] 1973 Act s 50 is also relevant for the purpose of assessing compensation for closing or demolition orders: Housing Act s 584A, and see *Wells v Bournemouth BC* [2000] RVR 335.

[25] CP 165, Proposal 7(2).

[26] See para 8.6 below. It is to be noted that this definition would probably not include an housing association (see the discussion in our Consultation Paper on Renting Homes (2002) CP 162, para 5.45 – 5.52). This should not cause any problem. Although local authorities frequently perform their rehousing duties through housing associations, the obligations remain those of the authority.

PART VII
THE STATUTORY PROJECT – PROBLEMS AND SOLUTIONS

INTRODUCTION

The no-scheme rule

7.1 In this and the next Part we discuss the most difficult subject we have had to address in this project: the complex and intractable problems arising from the so-called *Pointe Gourde* (or "no-scheme") rule, and the related rules for planning assumptions. In this Part we outline the main areas of difficulty and our responses to them, and consider the results of consultation. In the next Part, we set out in more detail our proposals for the new Code, and provide some illustrations of the intended operation of the new Rules.

7.2 The issues were discussed in detail in the Consultation Paper. We summarised the legal basis of the rule:[1]

> It is an established principle of compensation law that compensation "cannot include an increase in value which is entirely due to the scheme underlying the acquisition." This rule, following the name of the case from which this formulation is taken, is often called the "*Pointe Gourde* rule".[2] The rule requires the disregard of decreases in value caused by the scheme, as well as increases in value.[3] In other words, the value must be assessed "upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition".[4]
>
> Although the rule was developed by the courts, its effect has been reproduced, or reflected, in a number of provisions now contained in the Land Compensation Act 1961. They are sections 5(3) ("special suitability");[5] section 6 (disregard of changes in value due to actual and prospective development);[6] section 9 (depreciation due to

[1] CP 165, paras 6.2 – 6.3.

[2] *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565 PC, 572, *per* Lord MacDermott.

[3] *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426, where the rule was described by the Privy Council as "part of the common law". Cf *Rugby Joint Water Board v Shaw Fox* [1973] AC 202, 214–5, where the rule was said to be, not a common law rule, but one of interpretation of the word "value" in the relevant statutes.

[4] *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 *per* Lord Hope. This hypothetical state of affairs is usually referred to as "the no-scheme world".

[5] This was derived from the 1919 Act, giving effect to recommendations of the Scott Committee: see Appx D, para D.30ff.

[6] This is one of a complex group of provisions (ss 6–8) dealing with the disregard of different categories of development on adjoining land. Sections 7–8 deal with increases in value of adjacent land. The background and general effect of s 6 (formerly, s 9(2) of the 1959 Act) is described in Appx D, para D.58ff.

prospect of acquisition);[7] sections 14-16 (planning assumptions); and section 17ff (certificates of appropriate alternative development).

7.3 The Consultation Paper contained a detailed discussion of the many conceptual and practical problems arising from the "no-scheme rule" under the existing law. It is unnecessary to repeat that discussion. However, an understanding of the historical development of the law, through statute and cases, is important to set our proposals in context. We have therefore reproduced as Appendix D our account of the history.[8]

Clearing the decks

7.4 Two recent cases, one in the Court of Appeal and one in the Lands Tribunal, have required a detailed review of the existing law. In both strong criticism was expressed. In *Waters v Welsh Development Agency*,[9] decided very shortly before the publication of our Consultation Paper,[10] the Court of Appeal said:

> The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case-law, as has been necessary in this case. … The Human Rights Act 1998 does not impinge directly on the issues in this case, but it underlines the importance of coherence and certainty in this area of the law.[11]

7.5 This comment was echoed recently by the President of the Lands Tribunal, in *Pentrehobyn Trustees v National Assembly for Wales*,[12] a decision which we have found of particular assistance. He said:

> The extreme complexity of the issues that I have had to consider, the uncertainty in the law, the obscurity of the statutory provisions, and the difficulties of looking back over a long period of time in order to decide what would have happened in the no-scheme world demonstrate, in my view, that legislation is badly needed in order to produce a simpler and clearer compensation regime. I believe that fairness, both to claimants and to acquiring authorities, requires this.[13]

7.6 The responses to consultation generally supported the retention of the rule in some form. However, it was no surprise to find almost unanimous support for our

7 This also comes from the 1959 Act, although based on a provision in the 1947 Act.

8 Formerly CP 165, Appx 5 "The no-scheme rule – history".

9 [2003] 4 All ER 384. The leading judgment was given by Carnwath LJ (then still Chairman of the Law Commission), and was agreed by Schiemann and Laws LJJ. Permission was given to appeal to the House of Lords; the hearing is awaited.

10 For the Court of Appeal hearing, in May 2002, the court and the parties were supplied with final drafts of Part VI and Appx 5 (history of the no-scheme rule) of CP 165 (Appx D of this report).

11 [2003] 4 All ER 384 para 116.

12 [2003] RVR 140. The case is discussed in more detail in a Postscript to Appx D.

13 Appx D, para D.136ff.

view that we should "clear the decks"; and that, in the new Code, all existing versions of the rule (in case-law or statute) should be replaced by a single set of statutory rules. In what follows, we shall take that proposition as given. As far as possible we shall avoid further discussion of the existing law, which tends to confuse rather than illuminate; and concentrate on seeking to establish a simple framework for the new Code.

The policy rationale

7.7 To set the background, it will be sufficient to repeat the Consultation Paper's summary of the concept underlying the rule, and the policy issues to which it gives rise:[14]

> ***The concept***
>
> The concept is reasonably simple. For example, a railway scheme may cause blight and reduced land values while it is being planned and constructed. Conversely, the prospect of its use once completed will give the land enhanced value to the promoter (as compared to its existing use value), and may also result in higher land values in the area, for example near new stations. The no-scheme rule says that land acquired by the authority for the project should be bought at values which reflect neither the blight nor the enhancement.
>
> The rule was originally developed by the Courts in the 19th century, as part of the principle that compensation should be based on the "value to the owner", rather than its value for the promoter's scheme. This was relatively easy to apply in the early cases where the increased value depended on the use of statutory powers only available to the promoter,[15] and where the enabling statute usually defined the scope of the project. However, this simple model was not readily adapted to the more complex schemes, and more general statutory powers, which became the norm in the last century, particularly following the radical reform of the planning system in 1947. After 150 years of evolution, the present law is a complex mixture of statutory and common law rules, with many unresolved conflicts and inconsistencies.
>
> ***The policy issues – overview***
>
> The apparent simplicity of the concept has meant that the policy reasons for it have rarely been discussed in the cases. Furthermore, although the rule was developed in relation to the disregard of the *increases* in value, it was assumed without discussion that disregard of *decreases* was simply the other side of the same coin. In neither case is it obvious how far, in policy terms, the rule should extend. Before embarking on a detailed discussion, it might be helpful to outline briefly the main issues which will be considered in this Part.

14 CP 165, paras 6.4 – 6.12.

15 See *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37 (where some graveyards were acquired by the authority, for use, with statutory authority, to construct a new street and buildings).

Disregard of *increases* in value is for the protection of the acquiring authority. There seem to be two distinct policy reasons. The first is to protect statutory authorities from having to pay artificially inflated prices to acquire land or rights necessary for their functions. For example, if an essential sewer has to go along a particular route, the landowner should not be able to exploit the public need to extract an inflated price. However, it does not follow that the interest of the authority should be disregarded altogether, so that he only gets existing use value, particularly where the acquisition is for purposes which are partly commercial. Some modern statutes (for example, relating to compulsory wayleaves for telecommunications) acknowledge that, although the landowner cannot be allowed to frustrate the public purpose, he should get a fair value, based on what would be arrived at in negotiations between a willing purchaser and a willing vendor.

The second reason arises typically where an authority is acquiring land as part of a wider redevelopment scheme, in which it is investing public funds by way of improvements to infrastructure (such as roads and sewers). The no-scheme rule ensures that the wider scheme is disregarded, so that the authority is able to acquire the land for the scheme at values which are not inflated by its own investments.

There are two main problems. First, it becomes necessary to construct a hypothetical "no-scheme world", which may involve a speculative exercise of "rewriting history". Second, the wider the "scheme" is drawn, the more the potential for unfairness between those whose land is acquired and those in the same area who retain their land. Under the modern system of planning control, those whose land is not acquired will see the benefits of any local improvements to infrastructure reflected in the enhanced value of their land, without having to pay any special tax or development charge for that enhancement. Should the person whose land is compulsorily acquired be worse off in that respect?

When one turns to *decreases* in value, the object is protection of the landowner, and the policy issues are quite different. It is common that, in the period before the compulsory acquisition, land values in the area will have been "blighted" by the authority's plans. Most people would accept that when the land is acquired it should be at the unblighted value. In this case, the policy reasons would suggest a wide application of the rule, looking beyond the immediate acquisition. Thus, a small corner shop in an area, affected by plans for redevelopment over some years, may have seen its turnover drastically reduced as people have been relocated from the area under the wider scheme. When the corner shop itself comes to be compulsorily acquired, fairness would seem to require that compensation be assessed disregarding the effects of the whole scheme, not just the effects of the threat to the shop itself.

There is another quite distinct problem in relation to the protection of the landowner. This concerns the question of planning permission. Where land has been allocated in the local plan for acquisition for a public scheme, for example a highway, it is likely that permission would be refused for any other form of valuable development on that land. To this extent the owner of the land is disadvantaged as compared to his neighbours, who may have received planning permission for residential or commercial development. The present law acknowledges that disadvantage by allowing the dispossessed owner to claim the value of any permission which would reasonably have been expected to be granted in the absence of the compulsory purchase.

Here the issues are rather different. In the first place, there is a question as to whether he should have the benefit of such assumption. If his land had been allocated as Green Belt, there would have been no question of compensating him for being worse-off than neighbours whose land was allocated for housing. Under modern planning law, such windfall benefits are accepted as part of the system. Arguably, therefore, the planning position should be taken as it is in the real world. Secondly, if one accepts that some such assumptions should be made, what should be their limits? By the time the land is acquired for the road, the adjoining land may have been developed in a way which makes it impossible to develop the reserved strip for any valuable use. In such a case should the valuer be required to imagine what would have happened if there had never been any proposal for a road, which in some cases may force him to re-write history over many years?

7.8 The responses to consultation have not led us to change that view of the policy issues which need to be taken into account in the new Code.

THE NEW CODE – PRINCIPLES

General approach

7.9 Our general approach has been to identify the essential features of the existing law, to get rid of unnecessary complication and confusion, and to put what remains in modern and codified form. In doing so we have had in mind the three objectives identified in the Consultation Paper:

(1) Protection of the acquiring authority from having to pay a price inflated by its own regeneration activities or its own special location requirements;

(2) Protection of the landowner from "blight" connected with the project;

(3) Clarifying the planning status of the relevant land for valuation purposes.[16]

7.10 In the Consultation Paper proposal,[17] these objectives were separately addressed:

(1) The authority would be protected by a provision requiring a disregard of any *increase* in value caused by the relevant project, assessed on the "cancellation assumption".[18]

[16] See CP 165, para 7.7.

[17] CP 165, para 7.7ff.

[18] The "cancellation assumption" was based on *Fletcher Estates v Secretary of State* [2000] 2 AC 307 (see Appx D, para D.104). It requires the Tribunal to imagine circumstances, as if the project had been cancelled at the time of the acquisition (not as if there had never been a project).

(2) The landowner would be protected by a wider rule requiring disregard of any *decreases* in value or reduced profits caused by the relevant project, or by any advance "indication" of the project,[19] or by "blight" as defined in the Town and Country Planning Act 1990.[20]

(3) The "planning status" of the land (that is, the planning permissions to be assumed for compensation purposes) would be governed by separate rules.[21]

7.11 This general approach is reflected in our final recommendations. However, we have revised the formulation of the rule, to take account of our emphasis on the valuation date as the primary focus of the new Code.[22] We think it will be clearer and more logical if the first rule, rather than referring to comparisons of value, is expressed in terms of matters to be left out of account at that date. This is explained further below.

Principal features of the new Code

Key elements retained

7.12 We propose to retain and build on three key elements derived or adapted from the existing law:

(1) The basic case-law principle that in valuing the subject land there is to be disregarded any effect of the project for which the property is compulsorily acquired;

(2) The wider statutory rule which excludes any *decrease* in value due to a prior "indication" of the prospect of compulsory acquisition;[23]

(3) Separate rules governing the planning assumptions to be made in valuing the land.[24]

Main problems of the existing law

7.13 The main difficulties identified by our reports can be summarised under the following heads:

[19] The word "indication" is taken from the 1961 Act, s 9; see para 7.12 below.

[20] Town and Country Planning Act 1990, s 149, Sched 13. Owners of land "blighted" by inclusion within areas allocated for certain categories of public development are, subject to detailed rules, enabled to serve a "blight notice", requiring the relevant authority to purchase their land; compensation is assessed as though the land had been compulsorily acquired: see CP 165, para 7.27.

[21] In this respect, we were following the approach of the 1961 Act, as originally intended, and seeking to avoid the overlap resulting from subsequent case-law: CP 165, paras 7.31ff.

[22] See Part VI above.

[23] 1961 Act, s 9. Although in *Jelson*, Lord Denning treated this rule as the same as the *Pointe Gourde* rule (as did Lord Russell in *Melwood Units v Commissioner of Main Roads* [1979] AC 426, at p 435), that is not correct historically (Appx D para D.82).

[24] 1961 Act, s 14ff.

(1) Piecemeal development of statute and case-law over 150 years, resulting in a bewildering variety of conflicting and confusing sources of the law;[25]

(2) Differing formulations of the basic concepts, leading to uncertainty as to the scope of the "scheme" or "project" to be disregarded;[26]

(3) A complex and almost incomprehensible[27] statutory "two-stage" version of the rule, applied to special planning designations, such as new towns and urban development areas;[28]

(4) The "virtually impossible task"[29] (required by the no-scheme rule, but not by the rules for planning assumptions) of having to "rewrite history", sometimes over a period of decades, in order to construct a fictional "no-scheme world" for valuation purposes;[30]

(5) Different and conflicting disregard rules applying to the determination of planning assumptions, depending on the procedure used;[31]

(6) An appeal procedure, for determining alternative development potential,[32] which may result in the compensating authority (the Secretary of State or the National Assembly for Wales) being judge in its own cause;[33]

(7) Uncertainty over the application of the rule to other heads of compensation, such as injury to retained land.[34]

Main changes

7.14 The main changes we propose to address these problems are:

25 See the critical discussion of the history in Appx D, particularly the conclusions at paras D.128 – D.135.

26 At CP 165, para 6.19 we gave examples of eight different formulations, which we grouped into three categories (narrow, wide and middle): see para 7.16 below.

27 See Appx D, para D.68, where we quote the adverse reactions, in one of the early cases (*Davy v Leeds Corporation* [1964] 3 All ER 390), of three of the most astute legal minds of the day: Harman LJ ("a monstrous legislative morass" or "Slough of Despond"); Diplock LJ (a "labyrinth"); and Lord Denning MR (he had "rarely come across such a mass of obscurity, even in a statute."). Other early critics included Russell LJ: "… calculated to postpone as long as possible comprehension of its purport" (*Camrose v Basingstoke Corporation* [1966] 1 WLR 1100, 1110–1); and Winn LJ: "lamentable language" (*Devotwill v Margate Corp* [1969] 2 All ER 97, 106). More recently, in *Waters v WDA* [2003] 4 All ER 384, the Court of Appeal said: "There can be few stronger candidates on the statute-book for urgent reform, or simple repeal, than section 6 and Schedule 1 of the 1961 Act."

28 1961 Acts s 6 and Sched 1; discussed in Appx D para D.58ff.

29 The term used by the President in *Pentrehobyn* (see Appx D, para D.141 below).

30 See Appx D, paras D.78 – D.81; and the comments of Lord Hope in *Fletcher Estates* (para 7.29 below), D.105.

31 See Appx D, para D.103 describing the different results arrived at on the same facts in the two *Jelson* cases; see also the *Pentrehobyn* case (Appx D, para D.136ff below).

32 Under 1961 Act, ss 17–18.

33 CP 165, para 7.43; *Pentrehobyn* case (Appx D, para D.136ff below).

(1) All existing rules, case-law and statutory, relating to the disregard of the "scheme", will be repealed and replaced by a new set of rules relating to disregard of the "statutory project" ("statutory project rules"), and planning assumptions ("planning status rules").

(2) There will be a new single definition of the "statutory project", based on the "middle version" of the existing formulations.

(3) The two-stage rule for special planning designations will not be reproduced.

(4) The valuation date (as defined in our proposed Rule 10)[35] will be the base date for application of the new rules. It will be assumed that the statutory project was cancelled on that date (with no prospect of a similar statutory project in the future), and that no steps had been taken prior to that date to implement it;[36] but that in all other respects the circumstances are those prevailing at the valuation date.

(5) The rules for determining planning status will be separate from the statutory project rules, but subject to consistent criteria.

(6) A new "alternative development certificate" procedure will replace the existing section 17 procedure, with a right of appeal to the Lands Tribunal; the Tribunal will thus become the final arbiter for all purposes of the planning assumptions to be used for compensation purposes (whether under the certificate procedure or on a reference to determine compensation).

(7) There will be express provision governing the account to be taken of the "statutory project" under other heads of compensation.

CONSULTATION

7.15 We have had many useful comments on this part of our proposals. While there was unanimity as to the need to reform, views differed widely on the details of the replacement. This is not surprising, in view of the complexity of the subject-matter. We have taken account of all these comments in preparing our recommendations. However, in the interests of clarity, we highlight below only the main issues, in relation to the proposed rules, first, for disregarding the statutory project; secondly, for planning status; and, thirdly, for other heads of compensation.

34 CP 165, para 5.14; see para 7.46ff below.

35 Paras 6.1 – 6.8 above.

36 Thus, adopting generally a modified version of the "cancellation assumption", applied by the House of Lords in the context of certificates under 1961 Act s 17: see Appx D, para D.104.

The Statutory Project rule

Preferred version of the rule

7.16 In the Consultation Paper, we noted the variety of formulations of the rule in cases over the last 100 years, and the different terms used (including "scheme", "project", "undertaking", "purpose").[37] Although generally presented as different formulations of the same rule, they seemed to us to embody at least three conflicting views of its scope:

(1) The narrow version:[38] the purpose of the acquisition is not ignored; the valuer simply disregards the fact that the acquisition is compulsory, but he takes account of what the authority would have paid in "friendly negotiations" to acquire the land for the same purpose.

(2) The wide version:[39] the valuer disregards, not only the purpose of the particular acquisition, but also the "underlying scheme", which may extend to the planning history over a much wider area, and dating back many years.

(3) The middle version:[40] the valuer disregards altogether the immediate project for which the acquisition is made (not merely the element of compulsion), but not the underlying planning history.

7.17 We preferred the last. We summarised our thinking in the Overview:

> We propose to discard the word "scheme", as it is too imprecise and it carries too much historical baggage. We take as our starting-point a more precise definition of the "relevant project", which is supported by existing authority. The definition is intended to provide an analogy with the kind of project, which might in the past have been the subject of a special Act. It is intended to direct attention to the particular project, for which the acquisition of the subject land is authorised, and of which the works or uses on the subject land will be an integral part. Such a definition would be a marked improvement over the present mixture of statutory and judicial versions.[41]

7.18 There was general agreement with this approach, which we have accordingly taken as the starting-point for our recommendations.

[37] CP 165, para 6.19.

[38] Exemplified by *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302. (A commonly used shorthand is "the *Indian* case".) In *Waters* at paras 90–96), the *Indian* case was analysed by the Court of Appeal, and explained as turning on its own facts, rather than involving a different formulation of the rule.

[39] Taken from the *Pointe Gourde* case, as interpreted in later cases, starting with *Wilson v Liverpool City Council* [1971] 1 WLR 302.

[40] Eg *Birmingham City DC v Morris & Jacombs* (1977) 33 P&CR 27, 33–34: "project on the part of the authority concerned to acquire the land… for some purpose for which it was authorised to be acquired".

[41] Overview, para 3.16.

Depreciation due to planning blight

7.19 As we explained in the Consultation Paper, section 9 of the 1961 Act, which excludes decreases in value caused by the prospect of compulsory purchase, has a different derivation[42] from, and is wider in scope than the *Pointe Gourde* rule.[43] We proposed to retain this distinction:

> We propose…. that the landowner will be protected by a wide rule requiring disregard of any diminution in value or reduced profits caused by the project itself or any advance "indication" of the project. Furthermore, it seems logical to link this rule, which is in substance concerned with protection against "blight" caused by the authority's plans, to the provisions for "statutory blight" under the Town and Country Planning Act 1990 (or any replacement of those provisions).[44]

7.20 We noted that the Government's Policy Statement expressed an intention to prepare a new regime for statutory blight, to be introduced by statutory instrument.[45] We observed that such a step would provide an opportunity to link the compensation provisions with the statutory blight regime, as part of a coherent set of provisions for protection against loss due to blight.[46] That intention has not yet been put into effect.

7.21 Accordingly, our recommendation (Rule 13(6)) is based on the current law, and excludes any depreciation due to statutory blight, or to any indication of the prospect of compulsory acquisition.

Commercial interests

7.22 We noted that compulsory acquisitions differ widely in the extent to which they are driven by purely public, or mixed public and commercial motives.[47] For example:

(1) Purely public motives: land acquired by a local authority for public open space;

(2) Mixed public and commercial motives: land compulsorily acquired by a local authority under the Planning Acts, with a view to assembling a site to hand over to a commercial developer, who may be funding the costs and taking the bulk of the profit;

(3) Mainly commercial motives: a private industrial undertaking obtaining compulsory powers under the Transport and Works Act, for a link from its factory to a railway. In such a case, there may be a *public interest* sufficient

[42] See Appx D, paras D.48 – D.49, D.82.

[43] It has been widely interpreted in practice: see eg *Hackney LBC v MacFarlane* (1970) 21 P&CR 342.

[44] Town and Country Planning Act 1990, s 149, Sched 13. See n 20 above.

[45] Policy Statement, para 5.1.

[46] CP 165, para 7.27.

[47] CP 165, para 6.47.

to justify compulsory powers (removing heavy traffic from the roads); but the project is motivated by private commercial concerns.

7.23 We commented that the issue had been given added significance by the changing balance between public and private interests in the use of compulsory purchase of privatised utilities, and by the increased emphasis on the use of commercial development to support public projects.[48] The issue is not whether compulsory powers should be available for such purposes, which is not in dispute; but whether the added value resulting from the project should be wholly excluded where the effect of compulsory purchase is to transfer the development potential of land from one private interest to another. We invited views on whether the rule should be qualified in this respect. We also noted a suggestion, made in a recent review for the Scottish Executive,[49] that privatised utilities should be required to obtain a "public interest certificate", if they wish to benefit from the special suitability rule.[50]

7.24 There was some support for the view that, where the purpose of the acquisition was substantially "commercial", that aspect of the project should be taken into account as part of a "friendly negotiations" approach to valuation. However, there was little agreement as to how such a distinction could be drawn in practice,[51] and concern that it would introduce uncertainty. Most were opposed to any attempt to draw such a distinction, both because of the difficulty of finding any firm principle on which to do so, and because of the complexity it would add to the Code.

7.25 On balance, we agree with the view that it is impracticable to distinguish in the basic compensation Code between different categories of compulsory purchase.[52] However, our proposed Rules, including the definition of the "statutory project", are intended to make clear that all that is excluded is added value arising from the carrying out of a statutory function. Added value created by the potential for a similar private project is not excluded.

Defining the project

7.26 In the Consultation Paper, we considered a mechanism whereby the scope of the project could be determined at the time of the confirmation of the compulsory purchase order.[53] There would be presumption that the "project" is confined to the

[48] For example, during the passage of the Channel Tunnel Bill in 1987, there were objections to the application of the ordinary no-scheme rule, where land was acquired for commercial activities, desirable for the financial success of the tunnel but not strictly essential for its construction: Denyer-Green, p 19.

[49] *Review of Compulsory Purchase and Land Compensation*: Scottish Executive Central Research Unit 2001. (The review does not address the problems in the application of the rule, which we have discussed in Appx D.)

[50] CP 165, para 6.46. The special suitability rule (1961 Act, s 5(3)) is discussed in Appx D, para D.93ff.

[51] There was little support for a "public interest certificate" procedure for privatised utilities.

[52] Special compensation provision may be made under statutes dealing with particularly subject-matter: see eg the discussion of the different rules applying to Utility Wayleaves in CP 165, Appx 7.

[53] CP 165, paras 7.13ff.

area of the particular order;[54] and the onus would be put on the authority, if it wished to argue for a wider project, to define it in the order documents. The project so defined might be the subject of objections at the same time as objections to the principle of the order, so that it could be determined by the confirming authority at the same time as the order. We saw advantage in narrowing the issues at an early stage.

7.27 There was considerable support for this suggestion from respondents, provided that it did not disrupt or delay the confirmation procedure, and that any such definition were open to review by the Tribunal at the compensation stage. There was concern, however, that it might have the unwanted effect of increasing the number of objections and slowing rather than speeding up the compulsory purchase process.

7.28 We agree that it would be wrong to allow the definition of the project to become an issue at the confirmation stage. It should be made clear that the definition of the project, in cases of dispute, is a matter of fact to be determined by the Tribunal. However, we think it would provide more certainty if there were a rebuttable presumption that the project is limited to the area of the compulsory purchase order. Further, we see no reason why an acquiring authority, if contending for a wider project, should not be required to state its position at the outset. This would not be binding on the Tribunal. It could be challenged by the claimant; or by the authority, but only with permission of the Tribunal in special circumstances. Our recommendation below gives effect to this balance.

The cancellation assumption

LIMITING GUESSWORK

7.29 "Cancellation assumption" is the shorthand we have used for the approach described by Lord Hope in *Fletcher Estates v Secretary of State*.[55] In considering what alternative development might have been granted in the absence of the compulsory acquisition,[56] the position had to be considered as at the relevant date[57] on the basis that:

> 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*

[54] This was in effect a more flexible version of 1961 Act, Sched 1 Case 1 (as to which, see *Waters* at para 77, per Carnwath LJ).

[55] [2000] 2 AC 307, HL. The case concerned land acquired in 1990 by the Department of Transport for a bypass, on a line which had been defined since 1970. It was held that the s 17 issue should be judged by reference to the time of the proposal to acquire (1986).

[56] Under 1961 Act, s 17.

[57] Under the current law, the relevant date for these purposes differs according to the procedure; it may be the date of the original notice of the order, of the deemed notice to treat, or of an offer in writing by the authority: 1961 Act, s 22(2).

> *cancelled*. No assumption has to be made as to [what] may or may not have happened in the past.[58]

7.30 One of the reasons for adopting this approach was, as Lord Hope explained, the difficulty of:

> …try[ing] 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.[59]

7.31 As we said in the Consultation Paper, this comment might have been equally valid as a criticism of the no-scheme rule generally.[60] Accordingly, in the interests of clarity and consistency, we proposed to apply the cancellation assumption to all aspects of the new statutory project and planning status rules.[61] This proposal was supported by a large majority of respondents.

COMPULSORY PURCHASE FOR A PROJECT ALREADY BEGUN

7.32 Although we stand by the principle of this proposal, our attention has been drawn to a particular problem which could arise, where the compulsory acquisition takes place for the purpose of a project which has already begun. The following imaginary example illustrates the point:

> A local authority owns a substantial part of a brownfield site, for which there are development policy statements in the development plan. On day 1, planning permission in accordance with the development plan is granted for the whole site. The authority takes steps to acquire the remaining land by agreement. Work, including provision of roads and infrastructure, and some built development on parts already owned by the authority, begins on day 100. On day 200, the authority makes and publishes a compulsory purchase order for those parts which it has been unable to acquire by agreement; and,

58 *Fletcher Estates v Secretary of State* [2000] 2 AC 307, HL, at 322H–323A, *per* Lord Hope (emphasis added). (For the background, see Appx D paras D.104 – D.105.) The case concerned land acquired in 1990 by the Department of Transport for a bypass, on a line which had been defined since 1970. It was held that the s 17 issue should be judged on the assumption that the bypass proposal was cancelled at the time of the proposal to acquire (1986) (not by rewriting the planning history of the area since 1970, on the basis that there had never been a bypass scheme).

59 *Ibid*, p 323D. He quoted (p 324A) Phillimore LJ (in the first *Jelson* case, para D.103 below, at p 255) where he said that to look back further "would open up a considerable field for guesswork which would often make it impossible to give firm advice to any member of the public as to his rights." See also the comments of the President in the *Pentrehobyn* case, Appx D, para D.141 .

60 That issue was left open by Lord Hope: *ibid*, p 325C.

61 CP 165, para 7.18.

following confirmation of the order, it enters those parts on day 300.[62]

Applying the cancellation assumption, as originally proposed, the result would be as follows. The "first notice date" would be day 200, when the order is published; the valuation date would be day 300. The valuer would accordingly value the land as at day 300, but would assume that the whole project had been cancelled on day 200. This would have the arbitrary and anomalous consequence that any development which had taken place by day 200 would have to be taken into account; but not any development thereafter. Thus, for example, if roads and sewers had been completed by day 200, the added value would have to be taken into account, even though entirely due to the authority's project. One consequence might be that the owner who held out for longest would obtain the most favourable compensation. This could both create unfairness, and increase delay, by discouraging earlier negotiations. It might also raise awkward and artificial problems of valuation, where work on particular elements had been started but not completed by day 200.

7.33 The problem can be overcome by modifying the definition of the cancellation assumption. The assumption would be, not simply that project was cancelled on the valuation date, but that no action had been taken before that date (whether by physical works or otherwise) in pursuance of the project. This would not reintroduce the very uncertainties which we are seeking to avoid. The valuer would not be required to imagine a hypothetical world in which there never has been a "scheme"; but simply to disregard the implementation of a particular project. Accordingly, our recommended Rule is based on such a "modified cancellation assumption".

Ransom strips

7.34 We sought views on problems caused by so-called "ransom-strips":

> Typically, a builder may own a substantial area of potential development land, but need a small strip of land to secure the necessary access to the public highway. The owner of the strip will expect a substantial premium (or "ransom value") above its existing use value, to unlock the potential of the development area. The Lands Tribunal decision in *Stokes v Cambridge Corporation*[63] has given its name to the valuation practice of treating the premium as equivalent to a proportion (typically one third to one half) of the increased development value so released.[64]

[62] We are grateful to Barry Denyer-Green, both for the idea for the example, and for suggestions to deal with the point.

[63] (1961) 13 P&CR 77. The particular case concerned the valuation of land compulsorily acquired for industrial development, where the authority owned the land needed for access; the issue was the amount of the deduction to represent that interest.

[64] Appx D, para D.106.

7.35 We noted that the law appears to be settled, following *Batchelor v Kent County Council* ,[65] where Mann LJ made it clear that the "ransom" element of value was not to be excluded under the no-scheme rule, unless it was solely attributable to the authority's own proposals for development:

> If a premium value is "entirely due to the scheme underlying the acquisition" then it must be disregarded. If it was *pre-existent to the acquisition* it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would contravene the fundamental principle of equivalence.[66]

However, we thought that this rule could sometimes lead to uncertainty and difficulties of valuation:

> The choice of the appropriate access for a major development will usually be based on both physical and planning factors, and may be the subject of special financing agreements between the developer and the relevant authorities, including provision for compulsory purchase of the necessary land. It may be impossible for the parties to judge in advance the likely cost of the access arrangements.[67]

7.36 We invited views on whether the law should be altered, for example, by providing that in defined circumstances, where land is required solely for access or for provision of services, to serve other new development, the compensation should exclude any element based on the value of the new development. We thought it might be appropriate to "sweeten the pill" for the dispossessed owner, by providing some uplift to compensation based purely on existing use value.[68]

7.37 Responses to this proposal were evenly divided, with most authorities (not surprisingly) favouring some mitigation of the "ransom" element. The opponents pointed to the fact that our proposal would involve a departure from the "equivalence approach". The ransom element is only included where it represents value which is "pre-existent" to the scheme, rather than created by the authority's proposal. We agree that the proposal would involve a departure from the ordinary

[65] (1990) 59 P&CR 357.

[66] *Ibid*, p 361. In a later case it was suggested that the words in italics should have read "pre-existent to the scheme": *Wards Construction v Barclay Bank* (1994) 64 P&CR 391, 396 *per* Nourse LJ.

[67] See now Appx D, para D.109. We illustrated this by reference to the facts of the *Batchelor* case itself. Planning permission had been granted for a substantial residential development, subject to a condition preventing occupation of houses in phase 2, until off-site road works (including a new roundabout) were completed. The County Council, under an agreement with the developer, made a compulsory purchase order for the necessary land (0.86 acres). The value for its existing agricultural use was £3,000. The first tribunal valued it at £500,000; following a successful appeal (on the grounds that the basis of the award had not been explained) a second Tribunal valued it at £2.15m. An appeal against this award was rejected: *Wards Construction Ltd v Barclays Bank* (1994) 68 P&CR 391. Nourse LJ expressed some "mystification" at the range of the figures, but concluded that there was no error of law (p 394).

[68] For example, where the land is agricultural land, a lower limit of twice agricultural value would provide an incentive to sell, and provide certainty, without being likely to add unduly to the overall cost of the project.

principle of "fair compensation".[69] It would therefore need to be justified by clear policy considerations, and carefully defined. On the basis of the responses we have received, we do not make a recommendation for any such change in the law as part of this review.

Special statutory designations

7.38 Particular problems arise in seeking to apply the no-scheme rule where extensive areas are designated, by or under statute, for comprehensive development or treatment by public authorities. If the whole of such an area as treated as within a single scheme or project for valuation purposes, the problems of rewriting history under the no-scheme rule are magnified, as is the potential for unfairness between those whose land is taken and those who retain it.

7.39 Such major initiatives became a central feature of the planning system, as part of the radical changes introduced following the Second World War.[70] However, so long as acquisitions took place at existing use value,[71] this created no special problems for compensation law. On the restoration of market value in 1959, an attempt was made to provide specifically for different types of development scheme.[72] This was the genesis of what is now section 6 and Schedule 1 to the 1961 Act. The original Schedule recognised three categories of special designation (apart from a simple compulsory purchase order): comprehensive development areas, new towns, and town development areas. To them were added urban development areas (1980); and housing action trust areas (1988).[73] Unfortunately, as we explained in the Consultation Paper, the statutory "two-stage" version of the no-scheme rule, which was applied to such areas, was quickly found to be seriously defective in its drafting, and virtually impossible to apply in accordance with its apparent intentions.[74]

69 See paras 2.11 and 2.15 above.

70 The history is summarised in Appx C, para C.7ff.

71 Under the 1947 Act, development value was in effect expropriated (see Appx C, para C.8); and therefore development potential was irrelevant to assessment of compensation for compulsory acquisition.

72 See Appx D, para D.53ff.

73 Appx D, para D.59.

74 See the detailed discussion in Appx D, paras D.58 – D.62, D.68 – D.72. We have already referred to some of the early criticisms: n 27 above. Most recently, the section was subject to critical analysis by the Court of Appeal in *Waters*, whose comment on the need for reform we have already quoted (*ibid*).

7.40 While we were in no doubt that section 6 in its current form should be repealed, we invited views whether it should be replaced in any form in the new Code.[75] This question was complicated by the fact that, at the time of our Consultation Paper, the planning system was undergoing a major review by the Government. It was uncertain to what extent, if at all, any of the statutory designations listed in the 1961 Act were likely to be of any practical relevance in the future.[76] Our understanding of the Planning Green Paper was that the intention was to encourage regeneration by enactment of a new widely defined power of compulsory purchase for planning purposes, rather than through major designations.[77] As we have indicated above, a Planning and Compensation Bill is currently before Parliament, which includes major changes to the planning framework and also contains a general power of compulsory purchase for regeneration purposes.

7.41 Not surprisingly, in view of this uncertainty, the responses to our consultation on this issue were relatively few. In any event, the subject raises intractable questions, going well beyond our terms of reference. They concern the balance between public and private interests in major development proposals, and the ways in which the extra value generated by public promotion and investment is to be shared between the two. This debate has a long history.[78] The compensation rules cannot be isolated from the wider issues, such as taxation and other means of securing shares of "planning gain".[79] So long as development in such areas is not confined to land owned or controlled by the public sector, the compensation code can only make a limited contribution to the resolution of this problem. Furthermore, it is necessary to take account of the need for fairness between those who retain their land and those whose land is compulsorily acquired. As we have said, the more extensive the "project" or "scheme" to be disregarded in assessing compensation, the greater is the impact of such discrimination, and the more difficult to justify.[80]

7.42 For these reasons, we have not attempted to consider how, if at all, the Compensation Code should be adapted for any such special designations as may

[75] CP 165, para 6.67ff.

[76] . We understand, however, that there is the possibility of use of Urban Development Act powers for promoting regeneration in the East London corridor. In July 2003, the ODPM published "A study to establish Urban Development Corporation Boundaries in Thurrock" (by Roger Tym and Partners).

[77] CP 165, para 6.69, referring to the Green Paper "Planning: Delivering a fundamental change" (DTLR 2001).

[78] See CP 165, paras 2.7 – 2.14 where we discuss the history of the three various attempts since the war to solve the related problems of compensation and betterment, starting with the Town and Country Planning Act 1947.

[79] For example, planning obligations under Town and Country Planning Act 1990, s 106. See also the discussion in *Tesco v Secretary of State* [1995] 1 WLR 759, 777ff *per* Lord Hoffmann. The ODPM has recently announced proposals for a new "optional charge", which developers could choose to pay in connection with planning proposals, instead of negotiating a conventional s106 agreement. The charge would be based on a standard tariff set by the local authority. The money would be available for the authority to spend on new community facilities, infrastructure improvements or affordable homes: see ODPM Press Release 6 Nov 2003.

[80] Any such discrimination needs to be proportionate and justifiable under the Human Rights Act 1998: see CP 165, para 2.20.

play a major part in the new planning system. This could, however, become an important issue if the Government intends the new compulsory purchase powers to be used as a major instrument of comprehensive regeneration, and decides for that purpose to use urban development powers (or any other similar comprehensive designations). If there are to be any special compensation rules for such designations, it will be important that the problems in the application of section 6 of the 1961 Act[81] are addressed. In particular, it is important that there should be a time-limit for disregard of the effects of the designation (say, five years from its commencement), so that the task of "rewriting history" does not become insuperable.[82]

7.43 Accordingly, we do not make any recommendation in this respect. We do not see the resolution of these issues as essential to the preparation of the basic Compensation Code. However, we acknowledge that by proposing the repeal of section 6 of the 1961 Act, we are opening the way to the possibility of higher compensation payments for land in such special designations. We recommend strongly that consideration is given to this issue as part of the Government's current review of its policy for the planning and compensation systems.

Blight and purchase notices

7.44 The basic rule needs to be adapted for cases where the acquisition is forced on the authority by a blight notice[83] or purchase notice,[84] served under the Town and Country Planning Act 1990 (sometimes referred to as "reverse" or "deemed" compulsory purchase). In such cases, there is no "project" of acquisition, in the defined sense. In the Consultation Paper, we distinguished between the two types of notice:[85]

(1) *Blight notices* The forced acquisition is directly linked to the blighting effect of an allocation or other proposal of the authority. It seemed reasonable therefore for any reduction in value caused by that allocation or proposal to be disregarded.

(2) *Purchase notices* As we observed in the Consultation Paper, the application of the no-scheme rule in such cases poses a conceptual difficulty, since the rule assumes a scheme or project by the authority to acquire the land, rather than a sale which is forced upon it. We referred to apparently conflicting approaches in the cases.[86] We thought, however, that, since the

[81] Discussed in *Waters* at paras 74–80.

[82] One possibility might be that the effects of the designation should be excluded altogether, by taking values as they were (say) one year before the designation, and indexing them forward to the valuation date.

[83] Town and Country Planning Act 1990, s 149, Sched 13. See n 20 above.

[84] The Town and Country Planning Acts allow service of a purchase notice where land is shown to be "incapable of reasonable beneficial use" following the refusal of a planning permission; where the notice is accepted, the effect is that the authority is "deemed" to have served a notice to treat, and compensation is assessed as though pursuant to a compulsory purchase order: Town and Country Planning Act 1990, ss 137 and 143.

[85] See CP 165, para 7.28.

[86] See Appx D, para D.112.

object of such notices is to relieve the owner of a burden, rather than to give effect to a project of the authority, there was no reason why it should be attributed more value for compensation purposes than it has in reality.[87]

7.45 Responses to consultation have led us to a simpler solution. It has been drawn to our attention that in practice purchase notices often arise out of the same circumstances as blight notices; it is suggested that it would be anomalous to apply different rules.[88] This concern can best be met, by excluding depreciation in value due to statutory blight, under our proposed replacement of 1961 Act, section 9, and making clear that the same principle applies to blight and purchase notices. Our recommended sub-rules 13(6) and (7) apply this approach.[89]

Other heads of compensation

Injury to retained land

7.46 The Consultation Paper drew attention to doubts as to the application of the no-scheme rule to the valuation of retained land, for the purposes of a claim under 1965 Act section 7 (severance and injurious affection),[90] although the issue was not in terms covered by our proposals. After further consideration, we have concluded that the rule has no direct application in this context. Injury to retained land (head B) does not require any hypothetical assumptions; it is a question of causation.

Example (1)[1]

A vacant site adjoined a street which the highway authority proposed to widen. In 1975, agreement was reached with the planning and highway authorities on a development proposal for the bulk of site, excluding a strip of land fronting the street ("the strip") to allow future acquisition for road-widening. The development of the site was completed by 1979. In 1990 the strip was compulsorily acquired for the road. It was argued by the claimant that in the "no-scheme world", assuming it had never been reserved for the road, it would have been available in 1975 for development along with the rest of the site, and that the increased "marriage value" of the two parts of should be apportioned between the claims for acquisition of the strip and for severance of the retained land.[2] The Court of Appeal accepted this argument in relation to the strip, but not the retained land.[3]

[1] *English Property Corp Ltd v Kingston LBC* (1998) 77 P&CR 1, CA

[2] The additional "marriage value" was calculated at £170,000, which the claimants sought to apportion equally between the two parts of the site. The result of the Court of Appeal's decision was that they received £85,000 for the subject land, but nothing for the retained land.

[3] It was held by the Court of Appeal that the *Pointe Gourde* rule had no application to the retained land, because there was no "scheme" of the authority to acquire it. The Tribunal had observed that the loss of development value on the retained land was due, not to severance, but to the threat in 1975 of refusal of planning permission for a larger development (see CA judgment para 25).

87 CP 165, para 7.28(2).

88 For example, land may become "incapable of beneficial use", leading to a purchase notice, when a planning permission is refused because the land is required for some public scheme. (We are grateful to the Planning Inspectorate for drawing this point to our attention.)

89 Para 8.13ff below.

90 CP 165, para 5.14. See paras 3.18–3.19 above.

Example (2)[1]

The claimants owned a site of 37 acres, suitable for development as a shopping centre. The site was divided by the line of a proposed road, leaving a site of 25 acres to the north of the road, for which planning permission for shopping development was granted. The issue was the compensation to be awarded for the strip of land taken for the road, and the severed land to the south (in total 12 acres). It was assumed that, in the absence of the road scheme, permission would have been given for shopping development on the whole site. It was held[2] that compensation was to be assessed by comparing the value of the whole site following severance, with the value it would have had in the no scheme world. (No distinction was drawn for this purpose between the claims for acquisition of the road strip and for severance of the retained land.)

[1] *Melwood Units v Commissioner for Main Roads* [1979] AC 426 PC (Queensland)

[2] Although the decision was made under a specific Queensland statute, the Privy Council treated the no-scheme rule as an application of the common law, not dependent on the terms of the particular statute: *ibid* p 435.

Comment

As respects compensation for severance, the difference between the two cases is explicable without reference to the no-scheme rule.[3] In the former case, the severance caused no loss, because by the date of severance physical development of the whole site was no longer possible. In the latter case, it remained a possibility. Our proposals would preserve this distinction, and achieve the same result in each case.[4]

[3] We should also mention *Clark v Wareham RDC* (1972) 25 P&CR 423, in which the Tribunal apparently applied the no-scheme rule in determining a claim for injurious affection. It rejected a claim for loss of development potential on the retained land, attributable to the proximity of an extended sewage disposal works on the subject land; holding that, in the "no scheme world" there would have remained a smaller works on the authority's own land. In so far as the reasoning depended on the *Pointe Gourde* rule, it cannot stand with the Court of Appeal's decision in the *English Property* case. The case may, however, be defensible on its own (somewhat complicated) facts.

[4] The extent of any injury would be judged by references to the circumstances at the valuation date: see Part VII rule 10(2) above. It is to be noted, however, that in relation to the value of the subject land (head A), our proposals would produce a different result on the facts of the *English Property* case. Compensation would be assessed by reference to the "cancellation assumption" (rather than the "no-scheme world"). This would lead to the conclusion that no development value was payable for the strip, because by the valuation date it could no longer be developed with the rest of the site.

7.47 Accordingly, it is not necessary to apply the statutory project rules, as such, to the assessment of compensation for injury to the retained land. However, our recommendation follows the existing law in making clear that the claimant is entitled to compensation for injury attributable to the *whole of the works* included in the project.[91]

[91] Rule 13A(1). This principle is already established, in relation to compensation for injurious affection, by 1973 Act s 44: see CP 165, para 5.5.

Consequential loss

7.48 We proposed a simple statement that for the purposes of the rule "the value of land" should include "a reference to the profitability of a business on that land".[92] The background was explained in the Consultation Paper:[93]

> In *Director of Buildings and Land v Shun Fung Ironworks*,[94] it was held that the disturbance claim could include losses incurred from the time of the announcement of the proposed acquisition (of the site of a steelworks), even though preceding the formal statutory process of resumption. The Privy Council upheld the Tribunal's award for loss of profits from that date, assessed by comparing the profits (or losses) in the real world with those in the no-scheme world. The "scheme" in that case- was held to be confined to the threat of resumption of the steel works itself, rather than any wider proposal.
>
> The application of the principle may pose more difficulties where the inception of the scheme is less clear-cut, and where its effects are less specific. For example, the declining profits of a corner shop in an area blighted by redevelopment proposals may be attributable to the "scheme", but not necessarily to the acquisition, or threat of acquisition, of the shop itself.[95]

7.49 There was no quarrel with the principle. However, we think it would be clearer and more logical to deal with it by specific reference to the rule defining consequential loss (see Rule 5 above).

Planning status

Consultation Paper

7.50 In the Consultation Paper, we explained the elaborate provisions in the 1961 Act, intended to define the permissions, actual or assumed, to be taken into account in the valuation.[96] We noted three main categories:

(1) regard is to be had to any *actual* permissions for development of any site which includes the subject land;

(2) permission on the subject land is to be *assumed* for the authority's own development;

(3) permission on the subject land is to be *assumed* for developments which would have been permitted in the absence of the proposal for compulsory purchase.

7.51 We noted a possible inconsistency in the fact that the benefit of (1) and (2) (but not of (3)) is allowed, regardless of whether a similar permission would have been

92 CP 165, Proposal 9(2)(f).

93 Appx D, paras D.110 – D.111.

94 The case is discussed in more detail in Part IV.

95 See *Emslie & Simpson Ltd v Aberdeen DC* [1994] 1 EGLR 33, 38, *per* Lord President Hope.

96 See Appx D, para D.98ff.

granted in the no-scheme world. However, we thought that this approach could be defended:

> It seems right in principle to treat the actual planning status of the land as a fixed factor, not subject to the "no-scheme" test. This is consistent with the modern planning system, under which planning permission runs with the land, and, in general, there is no provision for recoupment of planning gains or compensation for planning losses….[97]

7.52 We also thought that this approach restricts the possible area of speculation. We mentioned the *Wilson* case,[98] in which permission was assumed for residential development on the subject land in accordance with the authority's proposal:

> Without that assumption, the Tribunal would have had to embark on a wholly speculative inquiry, to find out what would have happened to the planning of the area, if the authority had not selected it for its own residential scheme.[99] However, the fact that permission was assumed for residential development, did not prevent the disregard (under the *Pointe Gourde* rule) of the added value given to the subject land by the prospect of *implementation* of the permission by the authority (including infrastructure improvements etc)…
>
> On the other hand, at the more detailed level, the section 17 certificate procedure recognises the perceived unfairness of depriving an owner of the value of a potential development site, because it has been selected to meet a public need, such as for a school, as compared to his immediate neighbours who have the advantage of permission for private development.[100]

Responses

7.53 There was general support from respondents for this reasoning, and for our proposal to follow the existing law in relation to planning assumptions, but to do so by means of a separate set of rules for defining planning status.[101]

7.54 We mention three points on which our recommendations differ significantly from the consultation paper:

(1) Area of planning assumptions;

(2) Assumed permission for the authority's development;

(3) Appeal from alternative development certificate.

97 CP 165, para 7.33.

98 *Wilson v Liverpool Corporation* [1971] 1 WLR 302. See CP 165, Appx 6.

99 As we noted, however, there was also an actual permission granted on Mr Wilson's own application (although that had followed from the approval of the authority's proposal).

100 CP 165, paras 7.34 – 7.36.

101 See CP 165, para 7.30ff.

Area of planning assumptions

7.55 There was some concern at our proposal to extend the planning assumptions more widely than under the present law, which limits them to the "relevant land" (that is, the land subject to acquisition).[102] Most respondents agreed that, for the purpose of assessing appropriate alternative development of the subject land, it might be unrealistic to confine consideration to the site selected for acquisition by the authority.[103] However, the inquiry should be kept within bounds. We agree with these comments. Our recommendation confines the assumptions to "the subject land, by itself or together with other land".[104]

Assumed permission for the authority's development

7.56 More controversially, perhaps, a question has been raised whether we should retain the assumption of permission for the authority's own scheme. Although this assumption is well-established and was not criticised by respondents, we have considered whether it is supported by the reasoning set out above.

7.57 Treating planning as "a fixed factor" is a valid approach where one is concerned with a permission which is genuinely available to all. However, this analysis fails to give adequate weight to the fact that, in relation to some forms of public development, the permission under which the authority is enabled to develop the land may not be automatically available to other owners of the land.[105] If it is, then it is reasonable for it to be taken into account. Furthermore, even if the permission does not run with the land, it may be provide a strong indication that a planning permission would have been granted to a private developer for the same or a similar development. However, if there is no prospect of a private developer being granted permission for the same development, it is difficult to see any principled basis for assuming such a planning permission for compensation purposes. An additional assumption to that effect seems therefore to be a needless and unwarranted complication.

7.58 Accordingly, we have omitted the automatic assumption that permission would be available for the authority's development.

Appeal against certificate of alternative development

7.59 In the Consultation Paper we had suggested that it would be more logical for an appeal in respect of a planning status certificate to be dealt with by the Tribunal rather than (as now) the Secretary of State. We saw this as likely to result in greater efficiency:

[102] 1961 Act, s 39(2). See Appx D, para D.98ff.

[103] See CP 165, para 7.37.

[104] Cf CP 165 Proposal 10(1)(c): "the subject land or any other land".

[105] The various statutory provisions relating to development by local authorities, and other statutory corporations are complex, and may result in planned permissions, which are only available to the authority, or particular categories of assignee: see generally Halsbury's Laws Vol 46 *Town and Country Planning* paras 632ff (local authorities), 1129 (new towns), 1303 (urban development corporations).

> At present there is a right of appeal to the Secretary of State, which takes a form similar to a planning appeal. This may result in a duplication of work, since even if the Secretary of State confirms the planning authority's decision to issue a negative certificate, it is not binding on the Tribunal.
>
> There seems to be no real need for the Secretary of State to be involved. It may be useful to retain the role of the Inspectorate, in cases where complex planning issues may arise, together with the possibility of a local inquiry. Regulations could provide (with the agreement of the Chief Planning Inspector) for the actual decision to be made by an inspector under procedure analogous to the present local inquiry (with delegated authority from the Tribunal, instead of the Secretary of State). Alternatively, arrangements could be made (under existing procedures) for the Tribunal to sit with a planning inspector as assessor.[106]

7.60 We also drew attention to possible problems under the Human Rights Act 1998, arising from the Secretary of State's lack of independence:

> Article 6(1) of the Convention [on Human Rights] guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. The Secretary of State is not an independent tribunal in that sense. His apparent lack of independence is particularly noticeable in cases where the acquiring authority is a Government Department. For example, in *Fletcher Estates*[107] where the land had been acquired by the Secretary of State for Transport, the local authority had granted to the owner a certificate for residential development, but this was overruled on appeal by the Secretary of State for the Environment. Thus, the Secretary of State appeared to be judge in his own cause.[108]

7.61 However, we mentioned that, in a recent case,[109] the Court of Appeal had advocated a flexible approach in applying Article 6 to different factual circumstances; and that

> arguably, the procedure for appeal to the Secretary of State can be justified by the objective of replicating "real-life" planning procedures, and the control provided by the High Court on points of law is sufficient protection to satisfy the Convention.[110]

That position has now been confirmed by the House of Lords.[111] Accordingly, we do not think that appeal to the Secretary of State is likely to be held in breach of

[106] CP 165, paras 7.41 – 7.42.

[107] [2000] 2 AC 307.

[108] CP165, para 7.43.

[109] *Begum v Tower Hamlets LBC* [2002] 2 All ER 668. The Court held that review by the housing authority of its own decisions under the homeless persons legislation, subject only to appeal on points of law to the County Court, complied with Article 6.

[110] CP 165, para 7.45.

[111] *Begum v Tower Hamlets LBC* [2003] 2 AC 430.

the Convention. However, the perceived lack of independence, in cases where the authority determining the certificate is also the acquiring authority, is a matter of concern.[112]

7.62 In the responses to consultation, there was an almost equal division of view on this issue. Our considered view, reinforced by the *Pentrehobyn* case, is that the appeal should be to the Tribunal. We think it important that the ultimate responsibility for all matters relevant to the determination of compensation, including definition of the statutory project and any related planning assumptions, should lie with the Tribunal. We recommend accordingly.

7.63 At the same time, we think it desirable that the procedural advantages of a local inquiry held before an inspector are retained, albeit reporting to the Tribunal rather than the Secretary of State. Our proposal provided for the machinery to be established by regulations.[113] It has not been suggested that there would be any insuperable practical difficulty in achieving a workable scheme.

[112] In *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 para 2, the Tribunal noted that it was a case of the kind referred to in CP 165, where "the body that determines the certificate of alternative development, on which the value of the site is likely to depend, is the acquiring authority itself". As can be seen, the Tribunal went on to disagree with the nil certificate issued by the Assembly: see Appx D, paras D. 137 – D.143.

[113] CP 165, para 7.42, Proposal 10(3)(d)(B).

PART VIII
STATUTORY PROJECT AND PLANNING STATUS – THE NEW CODE

INTRODUCTION

8.1 In this Part we set out our recommendations, following consultation, for a new set of rules governing disregard of the statutory project, and planning assumptions, for the purposes of valuation. They are:

13 *The statutory project*

13A *Other heads of compensation*

14 *Planning status*

14A *Alternative development certificates*.

We first set out the rules in complete sequence. The individual sub-rules are then explained by notes with examples.

8.2 We emphasise once again that the "Rules" are indicative only. The structure and detailed drafting will be a matter for Parliamentary Counsel in due course.

8.3 Finally, we confirm our proposal (Rule 15) for the repeal of the provisions relating, respectively, to "third schedule rights", and to compensation for additional permissions after acquisition.

THE NEW RULES

Rule 13 The statutory project and blight

A new Code

(1) All previous rules, statutory or judge-made, relating to disregard of "the scheme" will cease to have effect.

Defining the project

(2) In this Code, "the statutory project" means the project, for a purpose to be carried out in the exercise of a statutory function, for which the authority has been authorised to acquire the subject land.

(3) In cases of dispute, the area of the statutory project shall be determined by the Tribunal as a question of fact, subject to the following:

(a) The statutory project shall be taken to be the implementation of the authorised purpose within the area of the compulsory purchase order, save to the extent that it is shown (by either party) that it is part of a larger project;

(b) Save by agreement or in special circumstances, the Tribunal shall not permit the authority to advance evidence of a larger project, other than one defined in the compulsory purchase order or the documents published with it.

Disregarding the project

(4) In valuing the subject land at the valuation date:

(a) it shall be assumed that the statutory project has been cancelled on that date; and

(b) the following matters shall be disregarded:

(i) the effects of any action previously taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;

(ii) the prospect of the same, 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 powers.

(5) Sub-rule (4) does not require or authorise (save to the extent specified in (b)) consideration of whether events or circumstances at any time (before or after the valuation date) would have been different in the absence of the statutory project.

Depreciation due to blight

(6) Without prejudice to sub-rule (4), no account shall be taken of any depreciation (not attributable to diminished planning prospects) in the value of the relevant interest which is attributable to the land being blighted land, or to any indication (whether by way of particulars in a development plan, or otherwise) that the subject land, or any land in the vicinity, is likely to be acquired by a public authority.

"Blighted land" means land within any category defined by Schedule 13 to the Town and Country Planning Act 1990.

"Planning prospects" mean the prospects of planning permission for valuable development.

Reverse compulsory purchase

(7) For the avoidance of doubt, where land is treated as acquired compulsorily by an authority following a notice served by the claimant, compensation will be assessed:

(a) in any case, in accordance with sub-rule (6); and

(b) where it is blighted land, on the basis that it was acquired for a statutory project corresponding to the public proposal which resulted in it being blighted land.

Rule 13A Other heads of compensation

Injury to retained land

(1) In assessing injury to retained land (head B), reference to the "works" in Rule 4 includes a reference to all the works comprised in the statutory project;

Consequential loss

(2) In assessing compensation for consequential loss (head C):

(a) references in Rule 5 to any consequence of the compulsory acquisition include reference to any consequence of the statutory project;

(b) without prejudice to (a) consequential loss includes any loss of profits of a business (wholly or partly on the subject land) attributable to the matters referred to in sub-rule (6) (depreciation due to blight);

Provided that no claim may be made for consequential loss before the first notice date (save as permitted under Rule 5(1)(d)).

Rule 14 Planning permissions – actual and assumed

Planning permissions and hope value

(1) For the avoidance of doubt, in valuing the land, the circumstances to be taken into account at the valuation date include:

(a) any planning permission for development which is in force at the valuation date (on the subject land or any other land); and

(b) the prospect, in the circumstances known to the market at that date, of any other such planning permission being granted in the future.

Appropriate alternative development

(2) Account shall also be taken of value attributable to appropriate alternative development of the subject land, in accordance with the following rules:

(a) "Appropriate alternative development" means development for which planning permission could reasonably have been expected to be granted on the assumptions set out in paragraph (b) (on the subject land, by itself or together with

other land), on an application considered on the valuation date ("appropriate alternative development");

(b) The assumptions in (a) are that the circumstances are those prevailing at the valuation date, save that:

(i) The statutory project had been cancelled on that date;

(ii) No action has been taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;

(iii) There is no prospect of the same, 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 powers.

(c) Account shall also be taken of the prospect, on the same assumptions, but otherwise in the circumstances known to the market at the valuation date, of any other such planning permission being granted in the future.

Rule 14A Alternative development certificate

Application for certificate

(1) For the purpose of determining the permission or permissions to be assumed under Rule 14(2)(a) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for an "alternative development certificate", in accordance with the following rules (and "procedural regulations" to be made by statutory instrument):

(2) An alternative development certificate is a certificate stating:

(a) the opinion of the local planning authority as to the classes of appropriate alternative development (if any) for which permission is to be assumed on the basis set out in Rule 14(2)(a) (on the subject land by itself or with other land);

(b) a general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject.

Appeal to Lands Tribunal

(3) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to procedural regulations, which shall include:

(a) Power for the Tribunal to determine the timing and scope of the hearing of the appeal, having regard to any related compensation reference;

(b) In particular, power for the Tribunal to direct

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated power to determine the appeal on behalf of the Tribunal.

Conclusive effect

(4) Subject to any such appeal, or any direction of the Tribunal, an alternative development certificate shall be conclusive of the matters stated in it for the purposes of assessing compensation.

Special cases

(5) Regulations may provide for the application of the certificate procedure to special cases, including:

(a) the circumstances specified in 1961 Act section 19 (valuation by a surveyor where claimant absent from the United Kingdom or untraceable);

(b) where the authority is seeking to acquire land by agreement.

THE NEW RULES ANNOTATED –

THE STATUTORY PROJECT

13 The statutory project and blight

A new Code

(1) All previous rules, statutory or judge-made, relating to disregard of "the scheme" will cease to have effect.

8.4 This sub-rule gives effect to our proposal that we should "clear the decks" and start again. As already noted,[1] this recommendation has received almost universal support from consultees. The new Rules will supersede, not only the so-called *Pointe Gourde* rule, as developed in the cases, but also the various statutory versions or reflections of that rule.[2]

[1] Para 7.6 above.

[2] See the provisions cited in para 7.2 above. The proposed repeals are listed in Appx B to this report.

Defining the project

(2) In this Code "the statutory project" means the project, for a purpose to be carried out in the exercise of a statutory function, for which the authority has been authorised to acquire the subject land.

8.5 This definition of the "statutory project" is intended to correspond to our "preferred version" of the common law rule, as explained in the previous Part.[3] Attention is focussed on the particular project for which the acquisition is authorised, and of which the activities on the subject land will be an integral part, rather than on a wider "underlying scheme".[4]

Examples

(1) The Fraserville City Council compulsorily acquired certain river falls ("the Great Falls") under authority of a bye-law of 1909. The authority had in 1907 adopted a bye-law authorising the construction of a reservoir higher up river, which was under construction at the time of the second acquisition.[1]

[1] *Fraser v Fraserville City* [1917] AC 187, PC (a Canadian case). See also Appx D para D.27ff; and *Waters*, Appx D para D.89ff, where the case is discussed in detail.

(2) A railway authority constructed a railway spur line, which gave the adjoining land potential for industrial use. Part of that adjoining land was later compulsorily acquired for an extension to the spur line.[2]

[2] Based on *CNR v Palmer* (a Canadian case) [1965] 2 Ex CR 305 (the summary is a simplified version, taken from Todd, *Law of Expropriation in Canada*, p 150; see CP 165, para 6.25)).

(3) A compulsory purchase order, relating to some 30 acres, was promoted by the Wakefield District Council for the purpose of industrial development. The order land fell within an area of some 770 acres for which the County Council were proposing plans for investment in reclamation and redevelopment, but without any specific proposals for compulsory purchase.[3]

[3] *Bird & Bird v Wakefield MDC* [1978] 2 EGLR 16 (discussed in CP 165, para 6.23).

(4) The Bolton Council compulsorily acquired freehold land on a site in the Tonge Valley on the outskirts of Bolton for leisure development by a selected development partner. The project was related to an earlier regeneration project for the whole Tonge Valley area, begun in 1980, which included public infrastructure and reclamation works carried out in the 1990s at public expense.[4]

[4] *Bolton MBC v Tudor Properties* [2000] RVR 292 (discussed in CP 165, para 6.23).

Comment

In each of these cases, the issue arose whether, in valuing the land subject to acquisition, the additional value given by earlier related schemes should be taken into account. The answers given were: (1) possibly;[5] (2) yes;[6] (3) no; (4) yes. It is difficult to see any rational basis for the differences.

Under our proposals we would expect the answer to be "yes" in each case; only the added value given by the immediate project would be left out of account.

[5] In *Fraser* the Privy Council remitted the matter to the arbitrator to determine, without further guidance (see Appx D, para D.29).

[6] "… the company had to pay more… because it chose to take two bites at the cherry. The first bite increased the market value of the owner's land and accordingly the cost of the second bite was based on that increased value.": Todd, *Law of Expropriation in Canada*, p 150.

[3] Paras 7.16 – 7.18 above.

[4] Para 7.26 above.

8.6 The reference in our proposed definition to "the exercise of a statutory function"[5] is an addition to the previous versions. It is intended to emphasise that the new rules are concerned only with the statutory (or public) aspect of any project. Their purpose is to protect statutory authorities from having to pay prices which are artificially inflated, either by the pressures resulting from their public duties, or by their public contribution to infrastructure or land assembly.[6] It is not to exclude potential value which could be realised though private means.[7]

(3) In cases of dispute, the area of the statutory project shall be determined by the Tribunal as a question of fact, subject to the following:

> ***(a) The statutory project shall be taken to be the implementation of the authorised purpose within the area of the compulsory purchase order, save to the extent that it is shown (by either party) that it is part of a larger project;***
>
> ***(b) Save by agreement or in special circumstances, the Tribunal shall not permit the authority to advance evidence of a larger project, other than one defined in the compulsory purchase order or the documents published with it.***

8.7 Sub-rule (3) makes clear that, as now, the definition of the project in case of dispute is a matter of fact for the Tribunal.

8.8 However, for the reasons already explained in the previous Part,[8] there would be a rebuttable presumption that the project is limited to the area of the compulsory purchase order. If the authority wishes to argue for a wider project, it would be expected to identify it at the time of the making of the order. Otherwise it would not be permitted to rely on such a wider project for valuation purposes, except in special circumstances at the discretion of the Tribunal.

5 We have not thought it necessary to define "statutory function" (cf Local Government Act 1972, s111, referring to the "functions" of a local authority). It is intended to encompass either a specific statutory duty to provide a particular service (e.g. that of a water undertaker) or a more general statutory responsibility (eg that of a housing or planning authority).

6 See para 7.25 above. For example, in *Wilson v Liverpool City Council* [1971] 1 WLR 302 (the facts are summarised under para 8.8 below), the land was compulsorily acquired for public housing; compensation was assessed on the basis of private residential development, but discounting the added value given by the authority's investment in infrastructure.

7 CP 165, paras 7.20 – 7.21. As we noted, the same objective lay behind the Scott Report's recommendation, which led to rule (3) of the 1919 rules: "while we would exclude as a basis of market value any possible competition for the land between statutory undertakers, we would not exclude the competition of those who require the land for any purpose for which statutory powers are not required" (see Appx D, para D.31).

8 Paras 7.26– 7.28 above.

Example[1]

An area of 74 acres was compulsorily acquired for housing development to meet the expanding needs of the City. The council had previously resolved to apply for permission for housing development of an area of 391 acres, but had acquired the remainder by negotiation. It was held that there was a "scheme" for the whole 391 acres, the effect of which was to be disregarded in valuing the subject land under the *Pointe Gourde* rule. The land was valued on the basis of "ripe" development value of £6,700 per acre, subject to a deduction of £1,350 per acre to reflect the acceleration of development in the area, and the investment in roads and sewers, resulting from the Council's scheme.

[1] *Wilson v Liverpool City Council* [1971] 1 WLR 302. The full facts emerge most clearly from the Lands Tribunal decision, reported at [1969] RVR 741. The case was analysed in more detail in CP 165 Appx 6.

Comment

It was logical to regard the 391 acres as representing a single "project", since the area of the compulsory acquisition was governed by ownership considerations, rather than the nature of the council's plans. We would expect the same conclusion to be reached by the Tribunal under our definition. The only difference is that the authority would be expected to have defined the full extent of the project in the compulsory purchase order, or the documents accompanying it.[2]

[2] See para 7.26 above.

Disregarding the project

(4) In valuing the subject land at the valuation date:

> ***(a)*** ***it shall be assumed that the statutory project has been cancelled on that date;***
>
> ***(b)*** ***the following matters shall be disregarded:***
>
> > ***(i)*** ***the effects of any action previously taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;***
> >
> > ***(ii)*** ***the prospect of the same, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function,[9] or by the exercise of compulsory powers.***

[9] Again we have not attempted a definition of "the exercise of a statutory function". There is a parallel with the words "in the exercise of statutory powers", in 1973 Act, s 1(3) (compensation for use of public works). The intention is to exclude the possibility of a similar project by an authority exercising a statutory function; but not one by a private developer, even though necessarily acting under statutory authorisations (such as planning permissions): see *Herts CC v Ozanne* [1991] 1 WLR 101, 110–113 (discussing the similar words "in pursuance of statutory powers" in 1961 Act s 5 rule (3)). The distinction may not always be clear-cut, particularly in relation to privatised utilities: cf *Harwich Dock Co Ltd v IRC* (1978) 76 LGR 238 HL (a rating case, relating to a dock constructed, unusually, under statutory authorisations, rather than a specific Private Act).

8.9 This sub-rule is the main substantive provision giving effect to the *Pointe Gourde* principle in the new Code. There are two main changes to the existing law:

(1) We have followed our general approach under the new Code, which is to require all issues to be determined by reference to the "valuation date",[10] except as otherwise provided.[11]

(2) It is assumed that the project has been cancelled on the valuation date, not that it has never existed. This reflects the "cancellation assumption" approved by the House of Lords as the test to be used when considering appropriate alternative development under 1961 Act, section 17.[12]

8.10 The effect of these changes is best illustrated by reference to the two *Jelson* cases.

> Example
>
> The subject land was a narrow strip which since 1951 had been shown in the development plan as part of a proposed ring road for Leicester. It was accordingly excluded from the development of surrounding land, which took place during the 1950s. The ring road proposal was abandoned in 1962, leaving a strip which could not be developed on its own for housing purposes. The owners served a purchase notice,[1] which was confirmed in 1965, with the effect that the council was treated as having acquired it compulsorily. Two High Court cases followed, both concerned with the issue whether residential value should be assumed for the strip:
>
> [1] Under Town and Country Planning Act 1990, s 137 (land incapable of reasonably beneficial use).
>
> (a) The *first Jelson* case[2] was concerned with a decision by the Secretary of State, refusing a section 17 certificate for residential development. Applying the cancellation assumption, the prospect of alternative development had to be considered in 1965, by which time the housing estates had been built on both sides of the strip of land, and separate development was impossible. A "nil" certificate was therefore upheld;
>
> [2] *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243, CA.
>
> (b) The *second Jelson* case[3] related to the subsequent decision of the Lands Tribunal, assessing compensation for the same strip of land. For that purpose, it was necessary to look further back to 1951, and to imagine a "no scheme world" in which there had never been a ring-road scheme. On that basis, it was held, the strip would have been developed along with the other residential land. Accordingly, the compensation for the land was assessed at residential value.[4]
>
> [3] *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020, CA.
>
> [4] It was held that the same result could be reached, either under the *Pointe Gourde* rule, or under 1961 Act, s 9. In *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 325C, the House of Lords left open the correctness of the second *Jelson* case.

[10] The "valuation date" for valuing the subject land is the date of determination, or if earlier the date when the authority takes possession: see Rule 10, discussed at Part VI above.

[11] See para 2.3 and para 6.2 above.

[12] *Fletcher Estates v Secretary of State* [2000] 2 AC 302, 322H. See para 7.29ff above. In the context of 1961 Act, s 17, the cancellation assumption is applied at the date defined by 1961 Act, s 22(2) (see para 7.29 n 57 above), rather than the "valuation date". In the new Code, the valuation date is used as the base date wherever possible.

> *Comment*
>
> Our proposals follow the approach of the first *Jelson* case. The land would be valued at agricultural value, which represented the true value in the circumstances as they were at the valuation date (by which time residential development was no longer possible).

8.11 Paragraph (b) comprises two modifications to the "cancellation assumption", as applied under section 17:

(1) Under (b)(i), for the reasons explained in the previous Part,[13] the effects of any past steps taken to implement the scheme are disregarded.[14] Thus, if the compulsory purchase order is for the last plot required for the completion of a project which has already begun, the owner gets no advantage from having held out for longer.[15]

(2) Paragraph (b)(ii) is directed to the future. It excludes from consideration any future prospect of the same statutory project being carried out, or of any other statutory project to meet substantially the same need. The first part is probably implicit in the cancellation assumption. The purpose of the assumption would be defeated if, having assumed cancellation of the actual project, the Tribunal was required to consider the possibility of exactly the same project being reactivated in the future.[16] The second part of the sub-rule is a logical extension of the same thinking, and follows the wording of a more limited provision of the existing law.[17]

> Example[1]
>
> The claimants owned a site fronting a busy road. It was allocated in the town map for residential development, but permission was refused because it was required for a by-pass needed to overcome traffic problems in the area. Following service of a purchase notice by the owners, the authority was treated as having acquired the land compulsorily. The Lands Tribunal awarded compensation at residential value, on the basis that, in the "no scheme world", the traffic problems would have been overcome by an alternative by-pass scheme on other land. The House of Lords held that the Tribunal had been wrong to assume that there would necessarily have been an alternative by-pass. It was for the Tribunal to determine on the evidence the likelihood of that, or some other solution, being found for the traffic problems, and, in the light of that, the prospect of permission on the subject land.
>
> [1] *Margate Corporation v Devotwill Investments Ltd* [1970] 3 All ER 864.

[13] See paras 7.29 – 7.30 above.

[14] The words in parenthesis recognise that value may have been added by physical works (such as infrastructure improvements), or by other action, such as land assembly.

[15] A hypothetical example is discussed in para 7.32 above.

[16] See *Grampian Council v Secretary of State* [1983] 1 WLR 1340, 1345.

[17] The exclusion of any other project to meet "substantially the same need" was explained in CP 165, paras 7.20 – 7.21. The wording follows that of 1961 Act, s 14(6), which is directed only to road proposals, and was designed to reverse the effect of the decision of the House of Lords in *Margate Corp v Devotwill Investments* [1970] 3 All ER 864: see Appx D, paras D.80 – D.81 below (the case is summarised in the following example). This also accords with the original intention of 1961 Act, s 5(3) (as proposed in the Scott Report): see Part VII, n 5 above.

8.12 The hypothetical exercise required by the House of Lords, though theoretically defensible, is impossible to apply in practice without resort to pure guess-work. This was recognised by the legislature in a limited amendment to the 1961 Act, which excludes consideration of alternative highway schemes.[18] Our proposed Rule applies that approach generally to all types of project.

(5) Sub-rule (4) does not require or authorise (save to the extent specified in (b)) consideration of whether events or circumstances at any time (before or after the valuation date) would have been different in the absence of the statutory project.

8.13 This sub-rule reinforces the basic principle of the new Code, that circumstances are taken as they are in the real world, except to the limited extent provided by the specific rules. It makes clear that the "no-scheme world", which is a familiar but confusing feature of the current law,[19] has no part in the new Code. However, it also limits the scope for speculation under the cancellation assumption itself.

> Example[1]
>
> Two parcels of land, totalling 5 acres, on either side of an existing road, were compulsorily acquired for a bypass, which was shown as the settlement boundary in the draft local plan. The National Assembly for Wales had issued a "nil" certificate under 1961 Act section 17, on the basis of the cancellation assumption.[2] Assuming that to be the correct approach,[3] the Tribunal held that it was not right simply to disregard the bypass itself, as NAW had done; the consequences of that imaginary state of affairs also had to be taken into account. In the event of cancellation of the bypass, the council would have had to reconsider the settlement boundary in that part of the draft local plan, and other allocations in the plan, as well as the need to "soften the raw edge" of the existing development. These considerations, in the Tribunal's view, would have given the subject land a prospect of being allocated for industrial development in the future.
>
> [1] *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140.
>
> [2] See Appx D Postscript, paras D.136 – D.143.
>
> [3] For the purposes of the "alternative award": see Appx D Postscript, para D.139.
>
> *Comment*
>
> Although the Tribunal's approach was no doubt correct under the existing law,[4] it introduces an element of speculation, which the "cancellation assumption" is intended to avoid. Under our proposed rule, the surrounding circumstances, including the local plan, would be taken as they were at the valuation date.[5] On this basis, it is likely that the NAW's view, excluding any prospect of industrial development, would have been upheld.
>
> [4] Following *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109.
>
> [5] We recognise that this approach may itself lead to anomalies, where the project and the local plan allocations are closely linked. However, we think that is an acceptable price for providing greater certainty and reducing guesswork.

18 1961 Act s 14(6).

19 See Appx D, para D.78 – D.81.

Depreciation due to blight

(6) Without prejudice to sub-rule (4), no account shall be taken of any depreciation (not attributable to diminished planning prospects) in the value of the relevant interest which is attributable to the land being blighted land, or to any indication (whether by way of particulars in a development plan, or otherwise) that the subject land, or any land in the vicinity, is likely to be acquired by a public authority.

"Blighted land" means land within any category defined by Schedule 13 to the Town and Country Planning Act 1990.

"Planning prospects" mean the prospect of planning permission for valuable development.

8.14 This sub-rule gives effect to our proposal for a wider rule for the disregard of *decreases* in value. As explained in the previous Part,[20] this is reflected in the existing law, under which depreciation due to any "indication" of the prospect of compulsory acquisition is excluded.[21] We think it is clearer and more logical to express this as a separate sub-rule, to reflect the fact that it is not simply the "other side of the coin"[22] of the rule for increases, but has a distinct purpose for the protection of property rights.[23]

8.15 We have retained the word "indication", but widened the rule to cover, first, depreciation due to any indication of the prospect of acquisition, not just of the subject land, but of any land in the vicinity; and, secondly, "statutory blight".[24]

8.16 The exclusion (in the parenthesis) of depreciation due to diminished planning prospects is intended to avoid any overlap with the planning status rules, which will be governed exclusively by Rule 14.[25]

Reverse compulsory purchase

(7) For the avoidance of doubt, where land is treated as acquired compulsorily by an authority following a notice served by the claimant, compensation will be assessed:-

(a) in any case, in accordance with sub-rule (6); and

[20] Paras 7.19 – 7.21; Appx D, paras D.82– D.83.

[21] 1961 Act, s 9.

[22] Or "the reverse of the medal" (see Appx D, para D.83 n 157).

[23] See para 7.20 above; CP 165, paras 6.37 – 6.38.

[24] The term "statutory blight" refers to the categories which may give rise to service of a blight notice under the 1990 Act: see paras 7.44 – 7.45 above.

[25] Thus, on the facts of the second *Jelson* case (see para 8.10 above), this sub-rule could not be relied on to secure residential value (as was held to be the effect of the corresponding words of rule 1961 Act, s 9).

> ***(b) where it is blighted land, on the basis that it was acquired for a statutory project corresponding to the public proposal which resulted in it being blighted land.***

8.17 Where the acquisition results from a blight notice or purchase notice served by the owner, there is no statutory project as such, and normally no reason to infer one, since it is the owner's choice to dispose of the land.[26]

> Example[1]
>
> The subject land had been reserved by a planning condition, as part of the access for a new development. A purchase notice[2] was served by the owner, on the basis that the land was incapable of reasonably beneficial use. Its value as an access road was found to be £4,000, while its value for residential development would have been £15,000. The Court of Appeal held that there was no "scheme" of acquisition, the acquisition having been forced on the Council. Accordingly there was no reason to disregard the purpose of the reservation; and the land should be valued at the lower figure.
>
> [1] *Birmingham City DC v Morris & Jacombs* [1977] 33 P&CR 27. See Appx D, para D.112, where we contrast the differing approach of the second *Jelson* case.
>
> [2] Town and Country Planning Act 1990, ss 137.

8.18 However, if the service of the notice is the consequence of blight caused by public proposals, or by indications of such proposals, it is fair that compensation should be assessed on the unblighted basis. This can be generally achieved by making clear that rule (6) applies to such cases of "reverse" compulsory purchase. However, as we have explained, that would not cover depreciation due to loss of any planning prospects. This may cause unfairness, where the land is blighted by public proposals which are likely to result in compulsory acquisition in due course. Accordingly, paragraph (b) ensures that, in respect of proposals recognised by the 1990 Act as giving rise to statutory blight, the owner is able to take advantage of the planning assumptions under Rule 14, as though there were a statutory project for the same purpose.[27]

13A Other heads of compensation

Injury to retained land

> ***(1) In assessing injury to retained land (head B), reference to the "works" in Rule 4 includes a reference to all the works comprised in the statutory project;***

[26] See paras 7.44 – 7.45 above.

[27] In the interests of certainty, we have confined this provision to the statutory categories of blight. As we have explained (para 7.20), the provisions relating to statutory blight are to be subject to review by the Government, in the course of which any anomalies or inadequacies can be addressed.

8.19 Under this head of compensation, the no-scheme rule has no direct application.[28] The issue is whether the compulsory acquisition has caused any diminution in the value of the retained land, whether by severance or by the adverse effect of the works.[29] It is necessary to reproduce the statutory rule that the extent of any injury is to be judged by reference to "the whole of the works".[30] (In our view, although the existing statutory rule does not use the term "statutory project", we think that the effect is identical to our proposed Rule).

Consequential loss

(2) In assessing compensation for consequential loss (head C):

> ***(a) references in Rule 5 to any consequence of the compulsory acquisition include reference to any consequence of the statutory project;***
>
> ***(b) without prejudice to (a) consequential loss includes any loss of profits of a business (wholly or partly on the subject land) attributable to the matters referred to in sub-rule (6) (depreciation due to blight);***
>
> ***Provided that no claim may be made for consequential loss before the first notice date (save as permitted under Rule 5(1)(d)).***

8.20 Where an authority acquires a business site in an area affected by blight, compensation for the land is based on the unblighted value. As we explained in the previous Part,[31] fairness and consistency in our view require that the same principle should apply to assessment of compensation for loss of profits.

Example[1]

A public house was acquired compulsorily. Both parties based their assessments of market value on the turnover of the public house. The claimant argued for a sum of £800,000 and the authority for a figure of £435,000. The difference depended on the expected turnover in the absence of the compulsory purchase order, and the reasons for the decline in trade in the months preceding the compulsory purchase order. The Tribunal held that the pattern of trade had been adversely affected by the prospect of the compulsory acquisition[2] and the decreased value should be disregarded when assessing the property's trading quality and amount of compensation due. Compensation was determined at the higher figure.

[1] *Mercury Taverns Ltd v Coventry City Council* LT 3.6.03 unreported. Although the case is directly relevant to market value (head A), it is no different in principle from a claim for consequential loss based on loss of profits.

[2] The Tribunal found that the most plausible explanation for the decline in trade was that the landlady's attention had been distracted from running the pub, originally by her attempts to prevent the compulsory acquisition; latterly by her preparations to operate a different pub elsewhere.

[28] See para 7.46 above.

[29] See para 3.13 above.

[30] 1973 Act, s 44: see para 3.14 above.

[31] Para 7.48 above.

8.21 It is perhaps immaterial whether this is seen as an aspect of the *Pointe Gourde* rule. It may equally be seen as an extension of the "cause of action" underlying the claim for consequential loss. The claim is for loss caused, not merely by the compulsory acquisition, but also by the project giving rise to the acquisition, and by the associated blight.[32]

8.22 To ensure consistency with the rules for consequential loss, the proviso makes clear that the normal commencement date for loss under this sub-rule is the first notice date.[33]

PLANNING STATUS

Rule 14 Planning permissions – actual and assumed

Planning permissions and hope value

(1) For the avoidance of doubt, in valuing the land, the circumstances to be taken into account at the valuation date include:

(a) any planning permission for development which is in force at the valuation date (on the subject land or any other land); and

(b) the prospect, in the circumstances known to the market at that date, of any other such planning permission being granted in the future.

8.23 Since planning permissions normally run with the land, we see no reason why the benefit of any permissions actually in existence should not be taken into account, whether or not they would have been granted in the absence of the statutory project.

Example[1]

The subject land had been acquired for the M66 motorway. By the time of the notice to treat, the motorway scheme had led to permission being granted on the surrounding land (but not the subject land) for industrial and related development. A section 17 certificate was given for industrial development of the subject land. In valuing the subject land, the hypothetical permission for the subject land was taken into account.[2] However, the actual permission for the surrounding land was ignored, under the no-scheme rule.[3] The highly artificial result was that the subject land was valued with permission for industry, but as though surrounded by agricultural land. Under our proposals the actual permissions on the surrounding land would be taken into account. The subject land would therefore be valued in a more natural "real life" context.

[1] *Stayley Developments Ltd v Secretary of State* LT December 2000 (ACQ/144/1998); [2001] RVR 251.

[2] As required by 1961 Act, s 15(5).

[3] See Appx D, para D.99, where this case is discussed in detail.

[32] This can be seen as a limited extension of the approach of the *Shun Fung* case: see para 7.48 above.

[33] See para 4.40 above.

8.24 This provision is consistent with our general approach that interests should be valued as far as possible by reference to circumstances in the real world as they stand at the valuation date. By the same token, if in the circumstances known to the market at that date there is a genuine prospect of permission in the future, it is an element of value which should in principle be taken into account. Such "hope value" is the subject of sub-rule (1)(b).

Appropriate alternative development

(2) Account shall also be taken of value attributable to appropriate alternative development of the subject land, in accordance with the following rules:

(a) "Appropriate alternative development" means development for which planning permission could reasonably have been expected to be granted on the assumptions set out in paragraph (b) (on the subject land, by itself or together with other land), on an application considered on the valuation date ("appropriate alternative development");

(b) The assumptions in (a) are that the circumstances are those prevailing at the valuation date, save that:

(i) The statutory project had been cancelled on that date;

(ii) No action has been taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;

(iii) There is no prospect of the same, 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 powers.

(c) Account shall also be taken of the prospect, on the same assumptions, but otherwise in the circumstances known to the market at the valuation date, of any other such planning permission being granted in the future.

8.25 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.[34] We do not understand the principle to be controversial.

[34] See paras 7.50– 7.52 above; Appx D, para D.98ff.

8.26 Our proposed criteria, based on the "cancellation assumption", are designed to be consistent with those applied under Rule 13(4). In line with our general approach to the Code,[35] they are applied at the valuation date. For the reasons explained in the previous Part,[36] the rule is related to the subject land "by itself or together with other land". Paragraph (c), which matches sub-rule (1)(b), allows for "assumed" hope value.

Rule 14A Alternative development certificate

Application for certificate

(1) For the purpose of determining the permission or permissions to be assumed under Rule 14(2)(a) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for an "alternative development certificate", in accordance with the following rules (and "procedural regulations" to be made by statutory instrument):

(2) An alternative development certificate is a certificate stating:

(a) the opinion of the local planning authority as to the classes of appropriate alternative development (if any) for which permission is to be assumed on the basis set out in Rule 14(2)(a) (on the subject land by itself or with other land);

(b) A general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject.

8.27 This rule is intended to provide for a certification procedure, corresponding to section 17 of the 1961 Act. Unlike that provision, it is expressly linked to a rule (Rule 14 above) providing for "appropriate alternative development" to be taken into account in valuation.

8.28 We use the terms "appropriate alternative development" and "alternative development certificate", so as to emphasise the continuity with the existing law under 1961 Act, section 17.

Appeal to Lands Tribunal

(3) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to procedural regulations, which shall include:

(a) Power for the Tribunal to determine the timing and scope of the hearing of the appeal, having regard to any related compensation reference;

[35] Part VI above.

[36] Para 7.55 above.

(b) In particular, power for the Tribunal to direct

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated power to determine the appeal on behalf of the Tribunal;

8.29 We have concluded that the right of appeal in respect of the certificate should be to the Tribunal, not to the Secretary of State of any other administrative agency. Our reasons are explained in the previous Part.[37] This will have the logical, and in our view desirable, consequence that the Tribunal is the ultimate arbiter on all matters relevant to the determination of compensation. We recognise, however, the advantages of the certificate procedure, as administered by planning authorities, in providing a flexible method of obtaining a ruling on the planning assumptions at an early stage, including local inquiries at the appeal stage. Our proposal is dependent on the Tribunal being able to develop equally flexible and economic procedures, if necessary in co-operation with the planning inspectorate. On the basis on our discussions with the Tribunal, and other responses, we have no reason to think this will not be possible. We propose that the details should be covered by regulations.

Conclusive effect

(4) Subject to any such appeal, or any direction of the Tribunal, an alternative development certificate shall be conclusive of the matters stated in it for the purposes of assessing compensation.

8.30 On the assumption that either party has the right of appeal against a certificate to the Tribunal, we see no reason why it should not be made conclusive in normal circumstances. We see this as an improvement on the existing position, which makes a certificate conclusive against the authority, but not in its favour, and may therefore lead to extra uncertainty and expense in re-litigating the same issue.[38]

Special cases

(5) Regulations may provide for the application of the certificate procedure to special cases, including:

[37] Para 7.59ff above.

[38] 1961 Act s 14(3)(3A). See the *Pentrehobyn* case (Appx D Postscript), where the Tribunal disagreed with the nil certificate issued on appeal by NAW.

> (a) ***the circumstances specified in 1961 Act section 19 (valuation by a surveyor where claimant absent from the United Kingdom or untraceable);***
>
> (b) ***where the authority is seeking to acquire land by agreement.***

8.31 This sub-rule is uncontroversial, and addresses two distinct issues covered by the 1961 Act:

(1) Section 19 of the 1961 Act provides a procedure for an application for a section 17 certificate to be made by the surveyor who determines compensation where the claimant is absent;[39]

(2) Section 22(2) provides a separate definition of the "proposal" for the purposes of the section 17 certificate, for cases where there is an offer to acquire by the authority, rather than a compulsory purchase order. In such a case it may be assist negotiations if the parties are able to obtain a decision on the planning assumptions to be made.

We think both these matters can be best addressed by regulations, rather than as part of the basic Code.

PROVISIONS NOT REPLACED

Third Schedule rights

8.32 In CP 165, we proposed the repeal of 1961 Act, section 15(3) and (4).[40] They are concerned with planning assumptions to be made, in assessing compensation, based on so-called "Third Schedule rights".[41]

8.33 This concept dates back to the 1947 Act, under which the rights to carry out certain categories of minor development, listed in the Third Schedule to that Act, were treated as falling within the "existing use" of land. They were subject to compensation if the land were compulsorily acquired, and, in some cases, even if permission for such development was merely refused. The concept survived the restoration of market value, and still exists, in much restricted form, in the Town and Country Planning Act 1990.[42]

[39] For the valuation procedure in such cases (under 1965 Act Sched 2) , see CP 169, para 5.38ff

[40] CP 165, para 7.47.

[41] Following the 1991 Act (see below), the only categories which remain relevant, for compensation purposes under the 1961 Act, are para 1 (rebuilding or alteration of existing buildings, subject to no more than 10% increase) and para 2 (use of a single house as two houses). These "rights" are distinct from the actual permissions granted for certain forms of minor development (such as house extensions) granted by development order (under 1990 Act s 58(1)(a)); as actual permissions, they will be reflected in compensation under 1961 Act s 14(2).

[42] Schedule 3 has to be read subject to the conditions specified in Schedule 10. The right to compensation on a refusal of planning permission was repealed by Planning and Compensation Act 1991, s 31, following a Consultation Paper ("Compensation Provisions in the Town and Country Planning Acts" – DoE 1989), which described these provisions as "rarely used and increasingly anachronistic".

8.34 We commented that the survival of these rights in the 1961 Act seems an unnecessary complication. Our provisional proposal was simply to repeal section 15(3) and (4),[43] without replacement. Only one respondent opposed this proposal, largely on the grounds that such rights were a well-established part of the "existing use" value of land. However, we remain of the view that their historical value has been largely superseded, and that they are an unnecessary complication in a modern code.

Subsequent planning permissions

8.35 This proposal was for the repeal of the provisions of Part IV of the 1961 Act, providing for compensation where planning permission for additional development is granted after compulsory acquisition.[44] They apply, in summary, where, within ten years of the completion of purchase by the authority, a planning decision is made granting consent for "additional development" on the subject land. The person to whom compensation was paid is entitled to claim the additional amount that would have been payable with the consent.[45]

8.36 We regarded this right to additional compensation as anomalous. We said:

> 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.[46]

We also considered that, if the provision were to be retained, its detail should be reviewed and updated.[47]

8.37 Most respondents agreed that the provisions of Part IV of the 1961 Act should be repealed. Indeed, although we asked for information about the use of the provisions in practice, none of our respondents was able to refer to any actual examples. It was suggested that this might because the provisions were not well-

[43] Section 15(4) excludes cases where compensation has previously been paid under a removal or discontinuance order.

[44] The provisions have an unusual history. They were first enacted in the 1959 Act (s 18), recast in the 1961 Act, repealed by the Land Commission Act 1967, and then re-enacted with modifications by the Planning and Compensation Act 1991: see now 1991 Act, s 66 and Sched 14.

[45] See CP 165, paras 8.65ff.

[46] CP 165, para 8.72.

[47] For example, we suggested that it should have been redrafted to take account of the *West Midland Baptist* case, which established that values should be taken at the date of entry or determination of compensation ("the valuation date"), rather than the date of *notice to treat*: CP 165, para 8.74.

known, or because the 10 year period was too short. Some thought that the period should be extended to 15 or 25 years.[48] Those who favoured retention acknowledged that market value should reflect the "hope" of future permissions, but thought that fairness required some provision to deal with cases where there are unforeseen changes in the planning framework.

8.38 In the light of these responses, and the lack of evidence of use of the provision, we see no reason to change our proposal for repeal.

8.39 We accordingly recommend:

Rule 15 Provisions not replaced

The following should be repealed without replacement:

(1) 1961 Act section 15(3) and (4) ("Third Schedule rights")

(2) 1961 Act, section 23 (compensation where permission for additional development is granted after acquisition).

48 On the other hand, one respondent thought that it should be reduced to five years.

PART IX
PARTICULAR INTERESTS

ACQUISITION OF NEW RIGHTS

9.1 Apart from special statutory provision, a power to acquire land compulsorily authorises the acquisition of *existing* interests in land, not the creation and acquisition of *new* interests.[1] However, in some cases the authority may require no more than a right over the land, for example a right to lay a pipeline or sewer. Since the right required is unlikely to be identical to any existing interest, this will involve the creation of a new interest over the land. Many statutes confer powers to create and acquire such rights (either as easements or wayleaves), particularly in relation to the needs of utilities.

9.2 As we explained in CP 165, the nature of the powers conferred may vary considerably, as do the associated rights to compensation.[2] (For example, we noted that the Telecommunications Act 1984, which confers rights to lay cables in private land, provides for "consideration" to be such as "it appears to the court would be fair and reasonable if the agreement had been given willingly".)[3] We did not seek to address these issues in detail in the Consultation Paper, which was concerned with establishing a basic Code. We noted that the CPPRAG Review had recommended further work to standardise as far as possible the arrangements for acquisition of rights and assessment of compensation, and that the ODPM was undertaking such a review.

9.3 However, we considered it appropriate that the Code should include specific provision for compensation for acquisition of new rights, where the power is conferred by statute, while recognising that different provision may be made by statutes dealing with particular subjects.[4] For this purpose, we took as a model the Local Government (Miscellaneous Provisions) Act 1976, which applies only to local authorities.[5] It extends existing powers of compulsory purchase to include power to acquire for the same purpose "such new rights as are specified in the order."[6] For this purpose, the Act also makes modifications to the 1965 Act, and other enactments dealing with compensation.[7] The effect of these modifications is that the measure of compensation is the depreciation in value of the land over

1 *Sovmots Investments Ltd v Secretary of State* [1979] AC 144.

2 See CP 165, paras 8.15ff, referring to *Utility wayleaves: a compensation lottery,* by Norman Hutchison and Jeremy Rowan-Robinson [2002] JPIF 159 (reproduced as Appx 7 to CP 165).

3 Telecommunications Act 1984, Sched 2, paras 5, 7. This was discussed in *Mercury Communications Ltd v London & India Dock Investments Ltd* (1995) 69 P&CR 135, 144, 156 (Judge Nigel Hague QC); the facts and the conclusions were summarised in CP 165, Appx 6.

4 CP 165, para 8.11.

5 CP 165, paras 8.12 – 8.14. "Local authorities" for this purpose are defined in s 44 of the Act.

6 *Ibid*, s 13(1).

7 *Ibid*, s 13(3)(c); Sched 1.

which the right is acquired, and any reduction in value of other land of the owner "by reason of injurious affection… by the exercise of the right."[8] It seems that the Act also gives a right to claim for disturbance or other consequential loss (under rule (6) of the 1961 Act).[9]

9.4 On consultation there was a large measure of agreement with this approach. Some favoured a more generous test, based for example on "willingly given agreement to fair and reasonable terms". However, for the reasons stated in CP 165, we think that a decision to widen the scope of compensation for new rights involves political choices going beyond the scope of this project. For the purposes of establishing a standard compensation code, we propose to follow the existing model of the 1976 Act.

9.5 Accordingly, we recommend:

Rule 16 Acquisition of new rights

Where the interest acquired is a new right over land, compensation shall be assessed having regard to:

(1) Any depreciation in the market value of the land over which the right is acquired;

(2) Any depreciation in the market value of other land held with that land, caused by the acquisition of the right;

(3) Any consequential loss (applying the principles of Rule 5, with appropriate modifications).

INTERFERENCE WITH RIGHTS

Introduction

9.6 The land which is compulsorily acquired may be subject to easements, covenants or similar rights, attached to other land.[10] Depending on the nature of the project, it may entail a temporary or permanent interference with such rights. However, under the present law, the authority is not obliged to take specific action to acquire or extinguish the rights.[11] Instead, it may rely on its statutory powers to carry out

[8] CP 165, para 8.13, referring to 1965 Act, s 7, as modified by 1976 Act, Sched 1. See also Denyer-Green, pp 238–9, giving as an illustration *Turris Investments Ltd v CEGB* (1981) 258 EG 1303, LT (similar powers under the electricity Acts). Although the 1976 Act omits any specific reference to "severance", we agree with those respondents who suggested that this was simply because the creation of new rights over land does not cause "severance" in the strict sense.

[9] As one of the "enactments relating to compensation for compulsory purchase", applied by 1976 Act, s 13(3)(c).

[10] In theory, there may also be rights over land not attached to a dominant tenement, for example "profits in gross" (see *Halsbury's Laws Vol 4*). We are not aware of any case in which the issue of compensation for such rights has arisen. However, they are covered by the formulation suggested below.

[11] Although there is no obligation to do so, there seems to be no reason in principle why such rights cannot be compulsorily "acquired" as interests in land, where (as is normal) the relevant statutory definition of "land" includes any interest in land. Some consultees (notably English Partnerships) favoured this course in the interests of certainty.

the project, subject to payment of compensation for any decrease in the value of the land served by the rights.[12]

> Example[1]
>
> The conveyance of part of Wrotham Park Estate contained a covenant by the purchaser that the land could not be developed for building purposes except in compliance with an approved layout plan. The authority compulsorily acquired the land burdened by the restrictive covenant, and proceeded to develop it without such compliance. The claimant sought compensation under section 10, and claimed a proportion of the difference in value of the land developed by the council and its value if it had been developed in accordance with the layout plan, where the maximum density would have been less. The Court of Appeal upheld the decision of the Lands Tribunal that the measure of compensation payable was the diminution in value of the claimant's land, not the price which the claimant could have exacted for allowing the development.
>
> [1] *Wrotham Park Settled Estates v Hertsmere Borough Council* [1993] 2 EGLR 15.

9.7 The right to compensation under the present law is treated as the same as the right to compensation for injurious affection where no land is taken (1965 Act section 10). As we observed in CP 165, this is anomalous:

> Although the right is not acquired or extinguished as such, the effect from the owner's point of view is very similar. He is deprived of the potential value of an interest in the subject land, which, in the absence of statutory intervention, he would have been able to turn to account in negotiations with anyone wanting to develop that land. It seems somewhat anomalous, therefore, to equate him with a person from whom no land is acquired.[13]

9.8 In CP 169, we discussed some associated procedural problems.[14] In particular, we considered the potential problems arising from the fact that, in theory at least, the right is not acquired or extinguished, but may continue to bind the land in the hands of successors.[15] We proposed a new statutory procedure whereby either party could elect to proceed on the basis of "extinguishment" of the rights, rather than simply "overriding" them to the extent required by the project.[16] In our later report on procedural issues, we will be commenting further on that proposal, in the light of the responses to consultation.

[12] See CP 165 para 8.3ff. For a modern discussion of the case law, see *Re Elm Avenue, New Milton* [1984] 1 WLR 1398. The same rules apply whether the servient tenement is acquired compulsorily, or by agreement: *ibid.*

[13] CP 165, para 8.7.

[14] CP 169, para 6.11ff.

[15] *Ibid.* paras 6.15 – 6.16, referring, inter alia, to *Marten v Flight Refuelling Ltd* [1962] Ch 115, and Denyer-Green, p 115.

[16] CP 169, paras 6.22 – 6.25; Proposal 10. We also drew attention to the uncertainty created by the decision in *Thames Water Utilities v Oxford City Council* [1999] 1 EGLR 167, where it was held that an express power to *erect* buildings in breach of a private right (under the 1990 Act, s 237) did not necessarily confer power to *use* the building once erected. There was a strong view among respondents that amending legislation was urgently required.

9.9 In this report, as in CP 165, we have proceeded on the basis of the existing law, but we use the term "overriding" as a convenient shorthand to describe interference, which would be unlawful apart from statutory authority. We are concerned solely with the principles governing compensation. It is settled law that compensation is measured by the diminution in value of the land to which the rights are attached.[17] We noted a possible argument that the compensation should be based on the price which the owner could have negotiated for its release in private negotiations with a developer, as better representing the "market value" of the right.[18] However, we proposed that the new code should reproduce the existing law, but in the form of a separate right to compensation for interference with rights (not linked to compensation for "injurious affection").

Consultation

9.10 We raised two specific questions on consultation: first, whether there should be a separate right to compensation for interference with rights; secondly, whether it should be based (as now) solely on the diminution in the market value of the land to which the right is attached. There was general support for our proposal for a separate right. Opinion was more divided on the basis of compensation, but the majority of consultees agreed that the new code should reflect the existing position.

9.11 We did not in terms raise the issue of consequential loss. For example, the damage caused by interference with a right of way to business premises may not be adequately measured by the diminution in market value, particularly where the interference is temporary.[19] Where there is a loss of profits, or other expense (for example, in temporary relocation) which is not adequately reflected in the loss of market value, we see no reason in principle why it should be excluded. It is difficult to see any valid distinction between such a case, and the ordinary case of consequential loss following the compulsory acquisition of land.[20] In both, the loss is the direct consequence of statutory interference with legal rights.

9.12 Accordingly, we recommend:

Rule 17 Interference with easements etc.

(1) Where, in the carrying out of the purpose for which the subject land is acquired any easement, restrictive covenant or other right affecting the subject land is overridden, compensation shall be payable under this rule.

[17] *Wrotham Park Settled Estates v Hertsmere Borough Council* [1993] 2 EGLR 15 CA. Arguments that the compensation should reflect a share of any development value released on the servient tenement, were rejected.

[18] For example, a percentage of development value as would apply to acquisition of a "ransom strip" under the practice approved in *Stokes v Cambridge CC* (1961) 13 P&CR 77 (see CP 165, Appx 5, para A.106 and para 6.80).

[19] There may be a temporary reduction of profits, and expense may be incurred in temporary relocation.

[20] See Part IV above.

(2) Such a right is overridden where any action takes place which, in the absence of statutory authority, would involve unlawful interference with, or breach of, that right.

(3) Compensation shall be assessed by reference to the reduction (if any) in the market value of any land to which the right was attached, so far as attributable to the overriding of the right, and any consequential loss (applying the principles of Rule 5, with appropriate modifications).

COMPENSATION FOR MINOR TENANCIES

Introduction

9.13 Under the notice to treat procedure, there are special rules for dealing with an occupant of the land "having no greater interest than as tenant for a year or from year to year".[21] Such a person is not entitled to notice to treat, and the authority may simply await the expiry of the contractual term, or serve notice to quit under the contract.[22] Section 20 of the 1965 Act enables possession to be required in advance of the contractual date, by means of a specific demand by the authority and the payment or tender of compensation. The 1965 Act defines the heads of compensation to which a tenant is entitled in such cases –

(1) the value of the unexpired term or interest in the land;

(2) "any just allowance which ought to be made to him by an incoming tenant";

(3) "any loss or injury he may sustain";[23] and

(4) if part only of the holding is taken, compensation for severance or injurious affection.[24]

9.14 The vesting declaration procedure also has special rules for land subject to a "minor tenancy"[25] or "a long tenancy which is about to expire".[26] In respect of such interests, the vesting declaration does not give the authority a right to immediate possession, but requires service of a specific notice to treat in respect of the tenancy, followed by a notice of entry.[27] There are no special rules for compensation.

[21] 1965 Act, s 20. See CP 165, para 8.83ff. The procedure was authoritatively explained in *Newham LBC v Benjamin* [1968] 1 WLR 694, CA.

[22] In that case, there may be a right to a "disturbance payment": 1973 Act, ss 37–8.

[23] 1965 Act, s 20(1).

[24] *Ibid*, s 20(2).

[25] Defined as "a tenancy from year to year or any lesser interest": Vesting Declarations Act 1981, s 2(1).

[26] In summary, a tenancy having at the vesting date such period (longer than a year) as specified in the General Vesting Declaration: *ibid*, s 2(2).

[27] Vesting Declarations Act 1981, s 9.

9.15 In CP 169, we made proposals for modernising and rationalising the two procedures. These attracted a considerable number of comments. Many doubted the need for a separate procedure for minor interests. These procedural issues will be considered in a later report.

9.16 We made no specific proposals in respect of the rules for compensation. We commented that the rules stated in section 20(2) of the 1965 Act,[28] which dated from the 1845 Act, did not appear to differ substantially from the ordinary principles for compensation, and could usefully be updated.[29] On further consideration, we see no need to have a separate set of compensation rules, governing minor tenancies. Whether or not the current procedure for dealing with such interests is retained, the ordinary rules for compensation should be capable (subject to appropriate drafting) of application to any case in which the compulsory acquisition results in the premature termination of an existing interest.

9.17 We accordingly recommend:[30]

Rule 18 Minor tenancies

Compensation for the compulsory acquisition, or the extinguishment by compulsory purchase, of "minor tenancies" (as defined in section 2(1) of the Vesting Declarations Act 1981) will be assessed according to the rules applying to the compulsory acquisition of other interests.

(The special compensation rules in 1965 Act s 20(2) will be repealed.)

[28] Para 9.13 above.

[29] CP 165, para 8.89.

[30] The precise scope of the current rules relating to short/minor tenancies may need amendment if the Commission's proposals for the reform of housing law are accepted by the Government.

PART X
INCIDENTAL MATTERS

ADVANCE PAYMENTS

Introduction

10.1 Before 1973 a dispossessed owner had no right to any payment from the authority until the amount of compensation was agreed or determined, even though possession might have been taken long before. The potential hardship to claimants was recognised by Parliament in the 1973 Act. It gives the dispossessed owner a right to an advance payment from the authority on account of compensation, pending final agreement or determination.[1] The amount of the advance payment is 90% of the authority's estimate (unless an amount has been agreed between the parties). If, when compensation is determined, the advance payment is too high, the excess must be repaid.[2]

10.2 We did not see any need for substantial modification of this provision, which is relatively modern and well-understood.[3] However, we mentioned two points of concern: first, the removal or modification of the right where the property is subject to an outstanding mortgage;[4] and, secondly, the lack of any specific procedure for enforcement. The first has been addressed in the current Planning and Compensation Bill, and accordingly requires no further consideration in this report.

10.3 With regard to enforcement, the main concern was the lack of an effective remedy if the authority either fails to make an estimate, or makes one which is unreasonably low.[5] We noted that the Government had not accepted CPPRAG's suggestion that the Lands Tribunal should have power to determine the advance payment; this was not thought to involve a "sensible use of the Lands Tribunal's resources", since it might be deciding "the same issues twice-over".[6] While it would be possible for a claimant to make an application for judicial review in the High Court, we commented:

> … this may seem unduly elaborate for what is usually a local issue, requiring a local, quick, and economical remedy. Furthermore, where the problem is the authority's failure to make an estimate, either at all, or at a reasonable level, the High Court's powers do not allow it

1 1973 Act, s 52.

2 *Ibid*, s 52(5).

3 See CP 165, paras 8.21ff.

4 By 1973 Act, s 52(6) the authority's obligation to make an advance payment does not apply if there is an outstanding mortgage exceeding 90% of the authority's estimate of compensation; and if the mortgage is less than 90% the authority can reduce the payment by the amount they think will be needed to redeem the mortgage.

5 If the authority has made an estimate, but is simply delaying payment, it seems that an ordinary action could be used to enforce payment: cf *Trustees of Dennis Rye Ltd v Sheffield City Council* [1998] 1 WLR 840 (action to enforce duty to pay improvement grant).

6 CP 165, para 8.24.

> to set the amount. It can only require the authority to make an estimate, or quash an estimate which is found to be wholly unreasonable.[7]

10.4 We proposed that the County Court should be give a limited statutory power of enforcement:

> It would probably not be appropriate for the County Court to take over the task of making an estimate, which would not be a normal role for the Court, and would be likely to require detailed expert evidence. However, it could exercise a supervisory role similar to judicial review, not only to require payment once an estimate had been made, but also to review the "reasonableness" of the estimate. Furthermore, it could adjourn the proceedings to allow a revised estimate to be made. Thus, although it would not be making the estimate itself, it could in practice bring considerable pressure on the authority to comply with its duty under the Act.[8]

Consultation

10.5 There was a wide measure of support for this proposal, as offering an accessible, speedy and cost-effective alternative to judicial review.[9] One respondent emphasised the importance of full information, and proposed that the court should have power to order either party to provide relevant information. We agree with that suggestion. Some suggested that, since the authority' failure to make an advance payment would be likely to add to the interest costs incurred by the claimant, a possible sanction would be through the Tribunal's power to award interest. We shall consider that point when we deal with the question of interest.[10]

10.6 Concern was expressed by one respondent that the issues might involve complex questions, which would be unsuitable for the County Court.[11] That concern seems to us to be based on a misunderstanding of the limited role we proposed for the County Court. An application would only be made where a claimant has a right to an advance payment, but the authority has failed to make an estimate in the time required by the Act, or made one which the claimant can show is manifestly too low. The court would not be required to decide detailed issues of quantification,[12] but would simply ensure that the authority complies with its statutory duty. The advantages of using the County Court are that it is relatively accessible and cost-

[7] CP 165, paras 8.28 – 8.29.

[8] CP 165, para 8.28. We noted that the County Court already exercises forms of judicial review jurisdiction in other areas: eg Housing Act 1996, s 204 (review of decisions relating to accommodation for the homeless).

[9] Reference was made to the County Court's existing experience of property and valuation matters, particularly in the context of Part II of the Landlord and Tenant Act 1954.

[10] Paras 10.25 – 10.26 below.

[11] This comment came from the respondent for the LCD (the Department responsible for the County Court) which mentioned problems such as mortgage arrears, group litigation, human rights issues etc.

[12] As we noted, the County Court may in any event be faced with issues relating to compulsory purchase and compensation under its separate jurisdiction under the Human Rights Act 1998: CP 165, para 8.29.

effective; and that it is well-adapted to give the necessary directions and orders (interim and final) to secure effective enforcement.

10.7 Some thought that we should reconsider the possibility of giving the Lands Tribunal an extended role in relation to advance payments. We accept that a possible alternative would be a procedure using the Lands Tribunal, although this would have a different purpose. The Tribunal, unlike the County Court, would be empowered to substitute its own view of the appropriate estimate of compensation, for the purpose of section 52, in cases where either the authority had failed to make an estimate, or where the claimant considered its estimate too low. The authority would then be under the same statutory obligation to make an advance payment (90% of the estimate), as it would have been in respect of its own estimate.[13] We do not see that this should impose an undue burden on the Tribunal, as the Government's original response to CPPRAG suggested. The Tribunal should be well able to develop a summary procedure, possibly on the basis of written submissions without the need for a hearing, which would enable it to make a reliable estimate. Indeed, such an interim estimate may save costs and time, by assisting the parties to a final settlement.[14] It would need to be made clear that such an interim estimate would not prejudge the Tribunal's determination in the event of a reference, and could not be relied on as a comparable in other cases.

10.8 We recommend that these issues be given further consideration by the relevant Departments in connection with their consideration of the Commission's report on land and valuation tribunals.[15]

10.9 Subject to that review, we confirm our proposal for a new procedure in the County Court, and recommend:

Rule 19 Advance payment

(1) Where the authority takes possession of the land before compensation has been paid, the claimant shall be entitled to an advance payment, in accordance with sections 52 and 52A of the 1973 Act.

(2) Where it is shown that the authority has delayed unreasonably in making such a payment, or that the estimate on which the payment was based was unreasonably low, the County Court may, on the application of the claimant, make such interim or final orders (including orders for disclosure of information, and for imposing time-limits), as are necessary to enforce the authority's obligations under this rule.

[13] The amount of the due payment having been fixed, it could be enforced if necessary by judicial review or by ordinary court action: see n 5 above (referring to the *Dennis Rye* case).

[14] A further possibility might be a role for the Property and Valuation Tribunal under the new arrangements proposed by the Commission in its recent report on the land valuation tribunals: Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, Part VI.

[15] Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281.

LANDS TRIBUNAL JURISDICTION

10.10 There was almost universal support for our proposal that the Lands Tribunal should have extended jurisdiction to deal with common law claims arising out of the same facts as a claim for compensation.[16] This was intended to address the possible overlap between claims for compensation, arising out of the *lawful* use of statutory powers, and related common law claims arising out of *negligence* or *illegality* in the exercise of those powers.[17] As we have explained, the boundary is far from clear,[18] and we considered it undesirable that the claimant should be left uncertain as to the proper forum, or that the same facts should have to be litigated separately.[19] The proposal was limited to claims relating to "damage to land or to the use of land", since these are likely to raise issues similar to those raised by the compensation claim.[20]

10.11 We accordingly recommend:

Rule 20 Lands Tribunal jurisdiction

The Lands Tribunal shall have jurisdiction (subject to procedural rules) to determine any claim (common law or statutory) relating to damage to land or to the use of land, where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal.

INTEREST

Existing law

Date from which interest runs

10.12 Where an acquiring authority takes possession of land before agreeing compensation, there is a statutory right to interest on the compensation ultimately awarded from the date of entry until the date of payment.[21] Under the vesting declaration procedure, interest is payable from the date of vesting.[22]

[16] The only dissentient was concerned at possible expense and inflexibility of Lands Tribunal procedures. This concern does not accord with other evidence. However, the general arrangements in land and valuation tribunals are subject of separate study in our report Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281.

[17] CP 165, para 8.30.

[18] See CP 165, para 9.16 (referring to *Colac (President etc, of) v Summerfield* [1893] AC 187 PC).

[19] This proposal would also meet the concern of one respondent that claims for compensation may be resisted where the damage results from the negligence of a contractor: see para 3.33 above.

[20] We agree with the comment of one respondent that the jurisdiction should not cover other related claims, such as for personal injury or vehicle damage.

[21] 1965 Act, s 11(1). See CP 165, paras 8.33ff. There is provision for the interest to be adjusted to take account of any advance payment: *ibid* para 8.34. Interest on "disturbance payments" under s 37 of the 1973 Act (see CP 165, para 8.81) runs from the date of "displacement": *ibid*, s 37(6).

[22] Vesting Declarations Act, s 10.

10.13 It might be expected that a distinction would be made for this purpose between the different heads of compensation. For items whose value is fixed by reference to the date of possession, it is logical to take that date for the running of interest. Those items include not only the value of the subject land, but also other heads, such as diminution in value of the retained land, and the value of a business on a total extinguishment claim. It seems less logical to take that date for other heads of loss, such as loss of profits or relocation costs. However, the rule arises from the fact that, although divided into separate heads for the purposes of assessment, compensation under the present law is treated as a single, global figure, representing the "value to the owner" of the land at the valuation date.[23] This principle applies, even though some elements of the global figure will represent expenditure or losses incurred at different times, whether before or after the valuation date.

10.14 The same rule as to the running of interest applies on a claim for equivalent reinstatement, as the following example shows:

> Example
>
> The claimant owned two churches that were located within a slum clearance site. Entry was effected in 1974, but works to provide a single replacement church did not commence until 1980. The new church was occupied in 1982. The council made staged compensation payments between 1980 and 1986. The amount of compensation was agreed in November 1985. The parties could not agree what further sum should constitute the interest. The Court of Appeal upheld the Tribunal's decision that interest ran from the date of entry in 1974 until the time compensation was paid. The Court observed that the mission did not receive any windfall, since during the period of dispossession (from 1974 to 1982) it had neither the land nor its value.[1]
>
> [1] *Halstead v Manchester City Council* [1998] 1 EGLR 1, CA. The Australian Federal Court reached a similar conclusion under LAA (Cth) s 58(2): *Hubertus Rifle Club v Commonwealth* (1995) 130 ALR 447.

Amount of interest

10.15 Interest on compensation for compulsory purchase is simple interest, at the rate prescribed under section 32 of the 1961 Act. In the Consultation Paper we summarised the current rule:

> The current interest rate, as so prescribed,[24] is 0.5 per cent per annum below the "standard rate".[25] The "standard rate" is defined in

[23] See para 2.13 above; CP 165, para 3.4.

[24] Acquisition of Land (Rate of Interest after Entry) Regulations 1995, SI 1995, No 2262 (as amended by SI 1998, No 1129).

[25] *Ibid*, reg 2. The "standard rate" is: (a) the base rate quoted by reference banks and effective on the reference day most recently preceding the day on which the entry onto the land has been made or, where that day is a reference day, such reference day; and (b) the base rate quoted by reference banks and effective on each subsequent reference day preceding payment of compensation.

> terms of the base rates quoted by "the reference banks"[26] for the day preceding entry, and each subsequent "reference day" until payment.[27] Thus, a simple rate of interest is imposed, marginally lower than the base rates of the largest banks.[28]

We drew attention to the fact that the same prescribed rate is used in a number of other statutory provisions giving rights to compensation.[29] We contrasted this rate with the higher "commercial court rate" (normally 1% above bank rate[30]), which was applied by the Court of Appeal in a case relating to land compensation not covered by the standard rate.[31]

Commentary in the Consultation Paper

10.16 In the Consultation Paper we made no proposal to change the rule as to the date from which interest runs. We accepted that it was not wholly logical in relation to elements which were not fixed by reference to the date of possession. Furthermore we noted the apparent lack of a consistent practice as to the date by reference to which elements other than the value of land were assessed:

> Typical is compensation for disturbance, which may represent loss of profits, from the first threat of compulsory purchase until the date of effective re-establishment on a new site. The former may be some years before the valuation date, the latter some years afterwards.[32] Similarly, removal expenses, and other allowable heads of the disturbance claim, may be incurred at different times. In theory, one would expect there to be some established mechanism to enable all such items to be adjusted (upwards or downwards)[33] to represent the equivalent sums at the common valuation date. However, there appears to be no clear guidance in the cases, nor any consistent practice among valuers.[34]

[26] Ie the seven largest institutions, as defined by, *ibid*, reg 2(5); where different rates are quoted by different banks, the fourth highest is taken: *ibid*, reg 2(3).

[27] *Ibid* reg 2(2). The "reference days" are the last days of March, June, September, and December. If any of these days is not a business day, the next business day: reg 2(7).

[28] CP 165, para 8.37.

[29] CP 165, para 8.36, referring to Planning and Compensation Act 1991, s 80, Sched 18. The same schedule prescribes the date from which interest is to run (date of claim, date of loss etc).

[30] See *Dubai Aluminium Co Ltd v Salaam* [1999] 1 Lloyd's Rep 415, 465, *per* Rix J.

[31] CP 165, paras 8.39, 8.46, referring to *Aslam v South Bedfordshire DC* [2001] RVR 65.

[32] See eg *Shun Fung* where the Privy Council upheld a claim for loss of profits, dating from five years before the valuation date; the relocation claim, as upheld by the Hong Kong Court of Appeal, assumed effective relocation thirteen years after the valuation date.

[33] We noted that in the *Shun Fung* case [1995] 2 AC 111, 123, the figures for future profits were "discounted back" to the valuation date, and future costs of relocation were "adjusted for inflation" (123D–G) (and, we understood, that the figures for past losses correspondingly adjusted forward): CP 165, para 5.83.

[34] CP 165, paras 5.82 – 5.83. We referred to the *West Midland Baptist* case in which, Lord Reid referred to the "accepted practice" of taking "the actual costs or losses following on actual dispossession": [1970] AC 874, 896H.

10.17 We commented, however, that we had seen no evidence that this theoretical problem caused difficulties in practice:

> Our review of the cases and our discussions with valuers indicate that it is unusual for any specific steps to be taken to adjust figures to a common date.[35] Market value of the subject land is assessed at the valuation date, and the other heads are assessed as they arise. Interest is payable on the global sum as from the date of entry. Any theoretical inconsistencies can be seen as part of the "swings and roundabouts" in what is inherently an imprecise exercise.[36]

10.18 Accordingly, we saw no need for the Code to lay down detailed rules governing the individual heads of claim:

> The valuer will be required to have regard to those detailed rules in arriving at a global figure of "fair compensation". It will be a matter for valuation expertise as to how best to achieve that on the facts of any individual case.[37]

10.19 We noted that CPRRAG had criticised certain aspects of the present rules. They had proposed allowing for the payment of compound interest; bringing the prescribed rate more closely in line with rates which a claimant could have obtained from a deposit in a bank or building society; and providing specifically for interest to be payable on all reasonable professional fees. In its response, the Government had proposed that further consideration of rates of interest should await the Government's consideration of the Commission's recommendations on compound interest. However, it asked the Commission to give separate consideration to the issue of interest on fees and VAT.[38]

Consultation

Date from which interest runs

10.20 Most respondents supported the view that interest should run on the total amount of compensation from a single date. This was principally on the grounds of convenience and simplicity. There was also general agreement that, as now, the starting date should be the date when the interest vests in the authority, or, if earlier, the date of possession. However, a minority noted the potential unfairness of applying this rule inflexibly to heads of compensation, such as disturbance or equivalent reinstatement, where the costs or losses may be incurred significantly before or after that date.

10.21 We think it possible for the rule to cater for both points of view. In so far as the compensation is based on the value of land at the valuation date, there is no reason to depart from the present rule. In other cases, even though logic may suggest a different date, there may often be practical merit, and no significant unfairness to

[35] *Shun Fung* (see n 33 above) was probably exceptional, both in the amounts involved and the length of time over which they had to be assessed.

[36] CP 165, para 5.87.

[37] CP 165, para 5.88.

[38] CP 165, paras 8.40 – 8.45.

either party, in applying the same rule. However, we think that there should be provision for a different date to be taken, either by agreement or in the discretion of the Tribunal, having regard to the date when the loss or expense was incurred. The appropriateness of such an exception will depend on the facts of the particular case, including the valuation methods used. It will be for the Tribunal, in the absence of agreement, to ensure the overall result is fair to both parties.

Amount of interest

10.22 We did not raise any specific questions on the adequacy of existing interest rates, or whether there should be power to award compound interest. As noted above, the Government's response to CPPRAG proposed that this subject should be further reviewed in the light of the Law Commission's separate project, examining the power of the courts to award compound interest. A consultation paper on that subject has since been published, and the responses are currently under consideration.[39]

10.23 There seems to be general agreement that it is desirable to have a prescribed rate of interest, for the sake of certainty. However, if so, the selection of the rate will inevitably involve an element of "rough justice". In practice, rates will differ according to whether it is assumed that the claimant is a borrower (for example, borrowing to finance relocation) or a lender (depositing the compensation in a bank or building society); and according to the circumstances and the status of the borrower.[40] It is unnecessary, for the purpose of the present report, to reach a conclusion on how to resolve these differences. The statutory Code will simply provide for the rate to be "prescribed".

10.24 If and when a policy decision is made to introduce compound interest more generally, specific statutory provision will be needed to apply it in the context of compensation for compulsory purchase. In our Compound Interest Consultation Paper we commented that if it was decided "to extend the power to award compound interest to courts generally, there seems no reason in principle why the same should not apply to compensation awarded by the Lands Tribunal".[41] Responses to that paper indicate that it is not necessarily appropriate for interest to be at a compound rate irrespective of the size of the award, or of the length of time that it is outstanding. However, that issue will have to await further consideration in the light of our final report on that subject and detailed information on the actual impact a change to a compound rate would have on compensation claims for compulsory acquisition.

[39] See Compound Interest (2002) Law Commission Consultation Paper No 167. The final report is expected to be published in early 2004.

[40] Our consultation paper on Compound Interest (see n 39 above) gave examples of rates used in cases or statute, ranging from 1% to 10% above base. At common law there can be interest, simple or compound, on a debt, but only if the contract under which the debt arises, or the usage of the trade, so provides: *London, Chatham and Dover Ry Co, v South Eastern Ry Co* [1893] AC 429. Interest can also be awarded as special damages: *Wadsworth v Lydall* [1981] 1 WLR 598.

[41] Compound Interest (2002) Law Commission Consultation Paper No 167, para 4.58.

Finance costs

10.25 One further point is relevant to this aspect of the Code. A number of respondents commented on the need for the claimant to be adequately compensated for interest costs reasonably incurred as a result of the acquisition. If there is significant delay in the payment of compensation, or if the authority fails to make an adequate advance payment, the claimant may be forced to borrow at relatively high rates of interest. It is difficult in this respect to draw a clear line between payment for consequential loss (Rule 5) and the award of interest on compensation. However interest payable on the whole award of compensation is a separate issue from finance costs, which can be consequential losses. Interest accrued on a loan may be a "cost", distinct from interest on the award of compensation.[42] If interest charges are incurred by the claimant in financing the development of new premises, then these will usually be treated as part of the purchase price of the premises and therefore, subject to a rebuttable presumption that the new premises provide value for money.[43]

10.26 Where finance costs have been aggravated by the conduct of the authority in connection with the compensation procedure, we think it would be a useful sanction for the Tribunal to have power to reflect that extra cost in a higher rate of interest. There would be a corresponding power to reduce interest in the case of unreasonable conduct by the claimant. We have amended our proposal accordingly.

Professional fees

10.27 We asked for information as to particular problems arising out of the award of interest on professional fees, including VAT. The general view, with which we agree, is that professional fees reasonably incurred in dealing with the consequences of compulsory acquisition should normally be recoverable as compensation for consequential loss, and interest payable accordingly. The main anomaly is that, under the present rules, interest is payable from the date of possession, regardless of when the fees are paid. However, our amended proposal in that respect gives the Tribunal the necessary flexibility to fix an appropriate date having regard to the date when the expense is incurred.[44]

10.28 We accordingly recommend:

Rule 21 Interest

The following rules shall apply in relation to interest on compensation:

[42] *Cole v Southwark London Borough Council* [1979] 2 EGLR 162. In this case interest on a bank loan was allowed (partially). The Lands Tribunal held that the bank loan was a reasonable and necessary consequence of the dispossession. However, part of the interest claim was avoidable because the property could have been made ready earlier.

[43] *Service Welding Ltd v Tyne & Wear County Council* (1979) 38 P&CR 352.

[44] Although we asked about the treatment of VAT, we do not think that this raises a separate issue requiring to be addressed in the Code. If VAT on the fees is recoverable by the claimant, then no question of interest should arise. (The period between payment and recovery is simply an ordinary incident of the VAT system.) If, however, VAT on the fees is not recoverable by the claimant, then we would expect it to be treated as part of the claim for consequential loss, and interest to be payable accordingly.

(1) Subject to (2) and (3), interest shall be paid from the date when the subject land vested in the authority, or if earlier, the date when the authority took possession of the land, at such rate as may be prescribed from time to time by the Secretary of State;

(2) Save in respect of compensation heads A and B, the Tribunal may, if it thinks appropriate having regard to the nature and amount of the award, determine that interest on different items of loss or expense shall run from some other date or dates, having regard to the time when the relevant loss or expense has been or is expected to be incurred;

(3) The Tribunal may increase or decrease the rate of interest, where it considers it appropriate to do so, having regard to any unreasonable conduct of either party in relation to the compensation claim (including unreasonable delay by the authority in making an advance payment).

PART XI
COMPENSATION WHERE NO LAND IS ACQUIRED

COMPENSATION FOR DEPRECIATION CAUSED BY PUBLIC WORKS

Introduction

11.1 Limited compensation rights are given by the current law to those in the vicinity of public works from whom no land is acquired, but who may nevertheless be adversely affected and, therefore, suffer loss as a consequence of the works. Such losses are traditionally described as "injurious affection".[1] The existing law distinguishes between damage sustained during the *construction* of public works and damage sustained subsequently as a result of the *use* of the public works.

11.2 Strictly speaking, injurious affection where no land is taken from the claimant is not part of the law of compulsory purchase. The right to compensation is not dependent on compulsory purchase, but on loss in the value of land due to public works. It may arise where the land on which the works are carried out has been acquired by agreement.[2] Historically, however, the rules were derived from the compulsory purchase statutes, and the claims are likely to arise out of the same projects as those giving rise to compulsory purchase.[3] Accordingly, we considered it appropriate to deal with this issue as part of our review of compensation for compulsory purchase.[4]

Existing law

11.3 The history and content of the relevant law was discussed in detail in CP 165.[5] For present purposes, a summary of the present law is sufficient. It has two statutory sources:

(1) Section 10 of the 1965 Act, derived from section 68 of the 1845 Act, gives a right to compensation in respect of injurious affection caused by the "execution of the works". It is settled law that this section only gives a

[1] This term is not defined in statute. The term "injuriously affected" has been interpreted in the context of ss 7 and 10 of the 1965 Act as referring to circumstances where land is affected in such a way that its value is depreciated.

[2] See *Re Elm Avenue, New Milton* [1984] 1 WLR 1398.

[3] See CP 165, para 9.3.

[4] This view was echoed in the Policy Statement, para 3.77:

> Although the right to compensation where no land is taken does not depend on compulsory acquisition, it makes sense to consider it in parallel with the compulsory purchase compensation code. Not only do both types of claim often arise in connection with the same scheme, it is also appropriate to consider the extent to which the compensation payable where no land is taken should be analogous with that payable with regard to the retained land where part of the claimant's land is acquired compulsorily.

[5] This is discussed in CP 165 at paras 9.10ff.

right to claim compensation for injurious affection caused by the *construction* of public works.[6]

(2) Part I of the Land Compensation Act 1973 ("the 1973 Act"), which was introduced to mitigate the perceived defects of the existing law,[7] gives a right to compensation where the value of land is depreciated by "physical factors" caused by the *use* of public works.

Section 10 of the 1965 Act: injurious affection due to the construction of public works

11.4 The wording of section 10 of the 1965 Act[8] is opaque and on the face of it gives little clue to the content of the substantive right. Case-law, based on the equivalent section 68 of the 1845 Act, has established that the right to compensation is subject to four points (sometimes referred to as the "*McCarthy* rules"[9]):

(1) The injurious affection must be the consequence of the lawful exercise of statutory powers, otherwise the remedy is action in the civil courts;

(2) The injurious affection must arise from that which will give rise to a cause of action if done without the statutory authority for the relevant scheme of works;

(3) The damage or injury for which compensation is claimed must be in respect of some loss of value of the land of the claimant;

(4) The loss or damage to the claimant's land must arise from the execution of the works and not from the authorised use of the lands compulsorily acquired following completion of the works.[10]

[6] *Hammersmith and City Railway Co v Brand* (1869) LR 4 HL 171; see CP 165, paras 9.23 – 9.24.

[7] See CP 165, para 9.8 and 9.25ff.

[8] 1965 Act s 10 provides:

> If any person claims compensation in respect of any land, or any interest in land, which has been taken for *or injuriously affected by the execution of the works*, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.

The emphasised words provide the sole statutory basis for compensation where no land is taken. The "works" are defined as "the works… of whatever nature, authorised to be executed by the special Act" (1965 Act s 1(4)); the "special Act" means "the enactment under which the purchase is authorised and the compulsory purchase order": (1965 Act s 1(2)).

[9] After the leading case, *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. Although the principles were established in that case, the House of Lords did not state the "rules" as such, and the formulations vary in the cases.

[10] This formulation is taken from counsel's submissions, adopted by the Court of Appeal in *Clift v Welsh Office* [1999] 1 WLR 796, 801. He added a fifth rule: "(5) The amount of compensation must be ascertainable in accordance with the general principles which apply to damages in tort." However, the rules are more usually expressed as four rules (the fifth, no doubt, being treated as implicit): see eg the CPPRAG Review, para 193.

These principles were recently re-affirmed by the House of Lords (albeit in a slightly different formulation) in *Wildtree Hotels v Harrow London BC*.[11]

11.5 Rules (2) and (4) distinguish compensation under this section from compensation for injurious affection due to a claimant from whom land has been acquired (under section 7 of the 1965 Act).[12] Rule (3) has the effect that compensation must be based on the diminution in the value of land, not personal inconvenience or loss of profits.[13]

11.6 Rule (2) provides the conceptual basis for the claim. It is compensation for the deprivation by statute of the rights protected by the common law. Thus, if there would be no right of action under the common law, then no right has been lost, and no compensation is due. However, at common law there is no general liability for nuisance caused by construction works unless they are carried out without reasonable consideration.[14] By the same token, compensation under section 10 is rarely due for noise and inconvenience caused during the construction period, unless actual damage has been caused to the claimant's building.[15] The difficulty was explained by Lord Hoffmann in the *Wildtree Hotels* case:

> Actionability at common law… depends upon showing that the building works were conducted without reasonable consideration for the neighbours. On the other hand, immunity from liability arising out of the construction of works authorised by statute is subject to a condition that the undertaker will "carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons"…[16]

Thus, if the work is carried out without reasonable consideration, it will be outside the scope of the statute altogether, and any remedy would have to be found, not in section 10, but in the common law.[17]

[11] [2001] 2 AC 1.

[12] See Part III above.

[13] *Argyle Motors (Birkenhead) Ltd v Birkenhead Corp* [1975] AC 99.

[14] *Andreae v Selfridge & Co Limited* [1938] Ch 1 (the "*Andreae* principle").

[15] See *Clift v Welsh Office* [1999] 1 WLR 796, where the claim was allowed in so far as it related to actual damage, as opposed to inconvenience.

[16] *Wildtree Hotels* at p 13C.

[17] This theoretical problem should be mitigated by our proposal to give extended jurisdiction to the Lands Tribunal, to deal with common law claims arising out of the same facts as a statutory claim: see Rule 20 above.

Example (1)[1]

The claimants owned a hotel adjacent to land acquired under compulsory purchase by a local authority for the purposes of a five-year road improvement scheme. They claimed that the obstruction or closure of roads and pavements leading to the hotel, together with the noise, dust and vibration emanating from the site, had "injuriously affected" their land, by causing a diminution in the rental value of the hotel both during the works and for a period of time thereafter. They sought compensation under section 10 of the 1965 Act. It was held by the House of Lords:

(i) The claim based on noise, dust and vibration caused by the construction of the works was rejected. The claimants had not established that they had an actionable common law claim, for which they would have to show that the works were constructed without reasonable consideration for neighbours.[2]

(ii) The obstruction of roads and pavements could be an actionable nuisance at common law, and the fact that it was temporary was not a bar to compensation under section 10. Compensation for temporary interference could be calculated by assessing the reduction in the letting value of the affected land during the period of interference.

[1] *Wildtree Hotels*.

[2] If they had demonstrated unreasonableness, the likely result would have been that the works would not be covered by statutory immunity, and their claim would have been for common law nuisance, rather than under s 10. It was accepted by the House of Lords that the combination of these considerations made it very unlikely that any such claim based on noise, dust and vibration would succeed under s 10 of the 1965 Act.

Example (2)[3]

The Welsh Office undertook a major scheme of improvement of the A55. The claimants made a claim for compensation for the depreciation in value of their property due to the obstruction of their access and disturbance by physical damage (cracks to walls and ceilings due to vibration) caused by the construction of the works. The Lands Tribunal found in favour of the claimants and awarded them damages of £400.

The Court of Appeal upheld the award. It drew a distinction between "the category of private nuisance that consists of interference with one's neighbour in the comfortable and convenient enjoyment of his land" and "the category that consists of causing actual damage to his land". It held that the *Andreae* principle did not extend to a nuisance that caused actual physical damage to the neighbour's land.

[3] *Clift v Welsh Office* [1999] 1 WLR 796.

11.7 This restriction of compensation for nuisance during the construction period has been criticised, as not fairly reflecting the loss which may be caused by major public works. In the CPPRAG Review particular attention was drawn to this requirement:

> The rule may cause particular injustice where the construction of public works (such as a highway) on neighbouring land extends over a prolonged period, causing a landowner to suffer damage or loss from noise, dust and vibration. Such damage may also be significant,

particularly if the landowner's use of his land is for a trade or business which is affected by such disturbance.[18]

Part I of the 1973 Act: injurious affection due to the use *of public works*

11.8 The provisions of Part I are complex. In brief, the right to compensation arises where: (a) the value of the claimant's interest in land has been depreciated; (b) the depreciation is caused by "physical factors"; (c) the physical factors are caused directly by the use of "public works"; (d) the use of the public works is immune from an action in nuisance; (e) the claimant's interest qualifies; (f) the claimant makes his claim at the correct time and in the correct manner; and (g) the compensation claim exceeds £50.[19] It is not necessary to show that the injury would have been actionable apart from statutory authority.

11.9 The basic rules are set out in section 1:

(1) "Physical factors" are defined as "noise, vibration, smell, fumes, smoke, and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance".[20]

(2) The source of the physical factors "must be situated on or in the public works the use of which is alleged to be their cause". Where, however, the physical factors are caused by aircraft arriving at or departing from an aerodrome, the aerodrome is to be treated as their cause (even if the aircraft are outside the aerodrome's boundaries).[21]

(3) "Public works" are defined as "any highway, any aerodrome and any works on land (not being a highway or aerodrome) provided or used in the exercise of statutory powers".[22]

(4) In respect of the use of public works other than highways, compensation is not payable unless immunity from an action in nuisance is conferred on the use of the works (expressly or impliedly) by an enactment relating to those works.[23]

(5) The "relevant date" is defined, in the case of a highway, as the date on which it is first open to public traffic, and in the case of other public works as the date on which they are first used after completion.[24]

18 CPPRAG, para 196.

19 Reproduced from Butterworths Compulsory Purchase and Compensation Service Division F para [302].

20 1973 Act, s 1(2). Physical factors involving vehicles on the highway, or accidents involving aircraft, are excluded: s 1(7).

21 1973 Act, s 1(5).

22 1973 Act, s 1(3).

23 1973 Act, s 1(6).

24 1973 Act, s 1(9).

11.10 The claimant must own a qualifying interest in a dwelling or land before the relevant date. In the instance of land which is a dwelling this is called an 'owner's interest' and defined[25] as the freehold or a tenancy of which not less than three years remain unexpired at the date of claim. There are special provisions for tenants who are entitled to enfranchisement.[26] Where the claimant's land is not a dwelling, the claimant must be an 'owner-occupier'[27] and the land must either be an agricultural unit or have an annual value which is less than the 'prescribed amount', which is the same as that prescribed for the purposes of the blight provisions of the 1990 Act.[28] The current amount prescribed for England and Wales is £24,600.[29]

Consultation proposals

11.11 In CP 165 we discussed the development of the law, including the review which led to the 1973 Act.[30] We also considered comparable provisions in other common law systems, including Australia and Canada.[31] We thought there was justification for the differences in the rules for injurious affection, depending on whether land had been taken from the claimant:

> In the case of the person from whom land is acquired, the issue is the price to be paid for what is taken. The rules are designed to arrive at a fair price, having regard to the value to the owner. In negotiating that price, the owner is entitled to expect the effects on his other land to be taken into account. In the case of the adjoining owner, there is no question of negotiating a price for what is taken. The closest analogy is with the common law rights of any landowner in relation to unreasonable use of his neighbour's land. Thus, the difference of approach represents a genuine difference in the nature of the claim…[32]

We took the view that, by comparison with the other jurisdictions reviewed, the present rules could be regarded as -

[25] 1973 Act, s 2(3)(a).

[26] See the Leasehold Reform Act 1967, Part I and Leasehold Reform, Housing and Urban Development Act 1993, Part I.

[27] 1973 Act, s 2(3)(a), defined by s 2(5).

[28] 1973 Act, s 2(3), (5), (6).

[29] Town and Country Planning (Blight Provisions) (England) Order 2000, SI 2000, No 539; Town and Country Planning (Blight Provisions) (Wales) Order 2000, SI 2000, No 1169.

[30] CP 165, para 9.65ff.

[31] CP 165, para 9.57ff. We included, as Appx 4 to CP 165, the comprehensive discussion of this issue by the Australian Law Reform Commission in 1980, together with extracts from their proposed draft Bill (not in the event adopted); and s 1 of the Ontario Expropriations Act RSO 1990.

[32] CP 165, para 9.71. We disagreed with suggestions that this difference could be regarded as contravening the European Convention on Human Rights: *ibid* para 9.69 – 9.70.

> … in substance (if not form, as regards the 1965 Act) a modern, and relatively generous framework of law, which is reasonably well regarded.[33]

11.12 We concluded:

> The 1973 Act is a modern and reasonably effective code, so far as it goes, but is limited to the effect of "use". The simplest and most logical approach would be to expand it to include provision dealing with the effect of the works, based on section 10 of the 1965 Act, but updated…[34]

11.13 Accordingly, we proposed that the two regimes should in effect be merged on the basis of the provisions in Part I of the 1973 Act with the exception that where the market value of an interest in land is depreciated by "physical factors" caused by the *construction* of "public works",[35] there should only be a right to compensation to the extent that a claim would have arisen at common law apart from the immunity conferred by the statute. Part I of the Land Compensation Act 1973 would, therefore, provide a complete code for compensation for injurious affection where no land is taken.

11.14 We also noted, without detailed discussion, the proposals by CPPRAG[36] for the repeal of certain limits on the scope of Part I of the 1973 Act:

> (i) The rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units;[37]
>
> (ii) The requirement that loss of value is assessed by reference to existing use,[38] and without regard to the prospect of new development.[39]

We commented that the rateable limit was difficult in principle to justify, since the consequences of the scheme "may be equally or more serious for those concerned in large enterprises";[40] and that we saw force in CPPRAG's criticisms of the

33 CP 165, para 9.72.

34 CP 165, para 9.82.

35 "Physical factors" and "public works" will be defined as in 1973 Act, s 1.

36 CP 165, para 9.55.

37 1973 Act, s 2(3), (6).

38 1973 Act, s 4(5).

39 With the exception that planning permission would granted for "third schedule development" (s 5(1), the prospect of any new development (whether under an existing permission or an assumed future permission) is to be disregarded (s 5(4)). If, as we propose the concept of "third schedule development" is abolished (Rule 15), the exception will become redundant.

40 We thought it arguable that such discrimination might breach Article 14 of the European Convention on Human Rights.

"existing use" rule. However, we considered that the potential cost implications raised policy issues which would need to be addressed by Government.[41]

Consultation

11.15 We sought views of consultees on the following issues:

(1) whether the new law should be based substantially on the existing law, as established by the *Wildtree Hotels* case, and Part I of the 1973 Act;

(2) whether or not the provisions in respect of *construction* and *use* should be merged, and if so whether this should be on the basis of Part I of the 1973 Act;

(3) whether compensation should be limited to diminution in the market value of the affected land;

(4) should compensation for the effect of "physical factors" due to construction of the works be restricted to circumstances for which a claim would have arisen at common law?

11.16 There was general support for the proposals that the new law should be based substantially on the existing law, and that it should take the form of an amended version of Part I of the 1973 Act.

11.17 The other two issues proved more controversial. As to whether compensation should be limited to diminution in the market value of the affected land, as we have said, under the present law, compensation is payable only for the depreciation in value of the land, not for business losses or personal suffering or inconvenience. Any expansion of the extent of compensation, for example to include loss of profits, temporary or permanent, would represent a significant change to the current law. The responses of consultees were divided. Predictably, those likely to be undertaking public works were generally opposed to expanding the range of compensatable losses, while those representing the interests of landowners supported it.[42] Some authorities, while acknowledging the fairness of compensating for temporary or permanent losses which could be shown to be directly attributable to the project, were concerned at the likely compensation costs, and the impact that these might have on the financial viability of a project.[43]

11.18 There was a similarly divided response to the question whether compensation for the effect of the construction of the works should continue to be restricted to circumstances for which a claim would have arisen at common law. Those who

[41] CP 165, para 9.81.

[42] As well as support for compensation for business losses, mention was made of the need for compensation for the loss of view, which could significantly affect the valuation of country houses.

[43] We are grateful to the Independent Compensation Surveyors' Association for drawing our attention to a parallel with compensation for pipe-laying works under Water Industry Act, Sched 12, para 2. Compensation is payable for depreciation in the value of the subject land or land held with it (para 2(1)), and for loss which would be subject to a claim for disturbance, if the land had been compulsorily acquired (para 2(2)).

opposed the restriction emphasised the fact that many public works constructions were on a large scale and could last for several years, and, therefore, were different in nature from private projects for which the common law had been designed. Those who supported it were concerned at the difficult of setting clear limits to the right, and the additional costs which would be caused.

Conclusion

11.19 Three clear points emerged from our review:

(1) Compensation for injury to land caused by the *use* of public works should continued to be governed by Part I of the 1973 Act, subject to limited amendment;

(2) Section 10, governing the compensation for injury caused by the *execution* of public works, needs to be recast in modern form;[44]

(3) Since neither right is dependent on compulsory acquisition, it would be logical for the revised section 10 to be enacted by way of insertion into Part I of the 1973 Act, rather than by inclusion in the new compulsory purchase code.

11.20 Our recommendation is designed to preserve the balance of the existing law, which does not give rise to obvious anomaly or unfairness. We are sympathetic to the view expressed by CPPRAG, that the scale of many public works makes it inappropriate to apply to them the same criteria as to private operations. However, if that criterion is removed, the nature of the right changes. It is no longer simply compensation for loss of an existing right, given by the common law, but the creation of a new more extensive right, applicable only to injury caused by public works. That indeed is the effect of the 1973 Act in relation to the use of public works. However, the detailed rules have been designed to produce a workable scheme with defined limits.

11.21 The decision whether to make a similar extension to the rights of those affected by the construction period must be one of policy, taking account of the additional costs which it would entail for public authorities. In order to restrict the multiplicity of claims, it might be appropriate to consider practical limitations (for example, by setting a threshold related to the amount of the claim; or limits by reference to the timescale of the works, or the distance of the claimant's property from the site of the works). It will also be necessary to establish detailed rules for the assessment of the claim. Detailed work of this kind must await a policy decision on the issues of principle.

11.22 We are on firmer ground when considering the extension of compensation beyond loss in the value of land. Although this also would add to the costs imposed on public authorities, there is no reason in principle why the extent of compensation should differ materially from the corresponding common law right which is not so

[44] It needs to be borne in mind that 1965 Act s 10 (or 1845 Act s 68) have been referred to in many local or private Acts. In order to minimise the need for detailed consideration of these Acts (many of which are likely to be obsolete), it may be impracticable to repeal s 10 outright.

limited.[45] It would be consistent with our proposals for compensation for acquisition of land, where such losses would be included as "consequential loss".[46] Furthermore, in view of the limited circumstances in which the right to compensation can arise under the present law,[47] the additional cost is unlikely to be substantial. This approach follows that of the relevant Ontario statute, which has this definition of "injurious affection":

> … where the statutory authority does not acquire part of the land of the owner,
>
> (i) such reduction in the market value of the land of the owner,
>
> (ii) such personal and business damages,
>
> resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute.[48]

Example[1]

The claimants were tenants of premises from which they carried on a car dealing business. The corporation, under the authority of a local Act (which contained a provision equivalent to section 10 of the 1965 Act)[2] undertook redevelopment work in the adjoining area. No land was acquired from the claimants, but access to their premises was interrupted temporarily during the construction period, and permanently by the completed works. They claimed compensation for loss of profits. The claim was rejected by the House of Lords, because compensation could only be recovered for depreciation in the value of the claimant's interest in land. Under the Law Commission's recommendation loss of profits could in principle be recovered as consequential loss, if not adequately reflected in the decrease in the value of land.

[1] *Argyle Motors (Birkenhead) Limited v Birkenhead Corp* [1975] AC 99**.**

[2] For simplicity, we have omitted reference to the particular terms of the local Act, which were a complicating feature of the case.

[45] See eg *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836, 840.

[46] Part IV above.

[47] See para 2.9ff above.

[48] Ontario Expropriations Act RSO 1990 s 1(1)(b): see CP 165, p 277. In CP 165, para 9.77, we proposed to confine the right to damage caused by "physical factors" as defined by the 1973 Act, s 1 (see para 11.9 above). However, this definition may be too narrow, if, as we think, the rule should reproduce the common law position (for example, the list does not include interruption of access: cf *Clift v Welsh Office* [1999] 1 WLR 796 where the court found that the claimants had suffered special damage sufficient to form the basis of an action under section 10 due to the interference with their use of roads and footpaths providing access to their property).

Recommendation

11.23 Our proposals under this Part will not form part of the compulsory purchase code, and they are subject to policy decisions on a number of issues noted above. Accordingly, we make the following provisional recommendations:

Rule 22 Depreciation caused by public works

(1) Compensation will be payable for depreciation caused by the construction or use of public works where no land is taken, in accordance with Part I of the Land Compensation Act 1973 (expanded and amended to provide a complete code of compensation for such depreciation).

(2) The following rules should apply in relation to loss caused by construction:

(a) The claim may be made by any person with a qualifying interest (as defined in section 2 of the 1973 Act) at the date of commencement of the works;

(b) Compensation shall be payable for any depreciation in the market value of the qualifying interest, and any consequential loss (not reflected in the value of land),

(i) which was caused by the construction of the works under statutory authority; and

(ii) for which the statutory authority would have been liable to pay damages if the construction had not been authorised by statute.

(3) The following provisions of the 1973 Act, Part I should be repealed:

(a) sections 2(3) and (6) (rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units);

(b) section 4(5) (existing use only);

(c) section 5 (requirement to assume that no permission would be granted for new development).

PART XII
COMPENSATION FOR COMPULSORY PURCHASE – FRAMEWORK FOR A CODE

The "Code" presented in this report is intended solely as an indicative framework for possible future legislation. Although we use the term "rules" in the recommendations, that is solely for ease of presentation and analysis. They are not intended to be treated as draft legislation, in any sense; nor to prejudge the form and language of the draft Bill as it may emerge, following instructions to Parliamentary Counsel in due course.[1]

COMPENSATION – STANDARD PROVISIONS

1 Right to compensation

This Code confers a right to compensation, assessed in accordance with the following provisions, on an owner of:

(1) any interest in land which is acquired by, or ceases to exist by reason of, compulsory purchase;

(2) any right over land subject to compulsory purchase, which is overridden in the exercise of statutory powers.

2 Basis of compensation

Compensation shall be assessed in accordance with the principle of fair compensation, having regard to the following heads (so far as applicable in the particular case):

A Market value of the land subject to compulsory acquisition ("the subject land");

B Injury to, or betterment of, any other land held with the subject land ("the retained land");

C Consequential loss;

D Equivalent reinstatement.

3 Market value

(1) "Market value" of land means the amount which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

Provided that the market value of the subject land for the purposes of head A shall not be less than nil.

[1] See para 1.36.

(2) Except as otherwise provided, for the purpose of any provisions of the Code which depend on the value of land (including any reduction or increase in the value of land), value means "market value" as so defined.

4 Injury to retained land

(1) Subject to Rules 4(2) and 13A(1), compensation for injury to retained land shall be assessed having regard to the following (so far as applicable), as at the valuation date –

(a) any decrease in the value of any interest of the claimant in any part of the retained land attributable to its severance from the subject land ("severance");

(b) any decrease in the value of any interest of the claimant in any part of the retained land attributable to the nature, carrying out, or expected use of the works for which the land is acquired ("injurious affection");

but off-setting -

(c) any increase in the value of any part of the retained land attributable to the nature of, carrying out, or expected use of, those works ("betterment").

(2) If, in either case, the parties agree or the Tribunal determines:

(a) account shall be taken of changes of circumstances (other than changes in land values) known at the date of assessment;

(b) compensation due under this Rule and Rule 3 may be assessed together, that is, by calculating the difference at the valuation date between:

(i) the value of the subject land and the retained land, taken together, as they were immediately before the acquisition; and

(ii) the value of the retained land, on its own, as it was immediately thereafter.

5 Consequential loss

(1) "Consequential loss" means loss suffered or expense reasonably incurred, so far as it is

(a) the natural and reasonable consequence of the compulsory acquisition;

(b) not too remote;

(c) not reflected in compensation based on the value of land, under Rule 3 or 4;

(d) incurred after the first notice date, save that compensation for earlier losses may be granted:

(i) by agreement;

(ii) if the Tribunal determines that, having regard to the special circumstances of the case, it would be unfair to refuse compensation.

(2) Where compensation is claimed for the displacement of a business:

(a) compensation shall be assessed by reference to either:

(i) the reasonable costs of relocating the business (wholly or partially), loss of profits and any loss or expense incidental to relocation (the "relocation" basis); or

(ii) the value of the business (or part of the business) as a going concern at the valuation date, and any loss or expense incidental to closure (the "total extinguishment" basis); or

(iii) a combination of the two methods.

(b) the claimant will be entitled to claim on the relocation basis, if

(i) it is reasonably practicable to relocate the business (wholly or partially);

(ii) it has been relocated, or the claimant intends to relocate it (or complete its relocation); and

(iii) it is not shown to be unreasonable in all the circumstances for compensation to be paid on that basis.

(c) the claimant will not be entitled to claim on the extinguishment basis, except:

(i) in the circumstances defined by section 46 of the 1973 Act (rights of traders over 60 years of age to claim compensation on the total extinguishment basis);

(ii) if he has not relocated, and does not intend to relocate, the business; and he shows either

(A) that relocation was or is not reasonably practicable; or

(B) that it is reasonable in all the circumstances for him not to relocate.

(d) For the avoidance of doubt, in deciding what is reasonable under (b) or (c):

(i) the personal circumstances of the claimant (including age, illness, disability or financial circumstances) shall be taken into account;

(ii) the fact that higher compensation is payable on the relocation basis than on the extinguishment basis does not of itself make it unreasonable for compensation to be assessed on the relocation basis.

(e) Unless the contrary is shown, where premises acquired for relocation have a greater market value than the premises acquired from the claimant, it shall be presumed that the difference in value reflects advantages for which compensation is not payable.

(3) Without prejudice to the above rules:–

(a) Consequential loss includes the amount of any legal or other professional costs reasonably incurred by the claimant in connection with the acquisition;

(b) Where land on which a business is carried on is severed by the acquisition, compensation shall include costs reasonably incurred in replacing buildings, plant or other installations (whether or not they were on the subject land) if or to the extent that

(i) they are required to enable the business to be continued on the retained land, or other adjacent land acquired for the purpose;

(ii) the need for replacement is caused by the acquisition;

(iii) the cost is not adequately reflected in any other head of compensation; and

(iv) it is not shown to be unreasonable in all the circumstances for compensation to include such costs.

Provided that the compensation may be reduced to such extent (if any) as the Tribunal may determine to reflect any improvement in the facilities so obtained over those replaced.

(c) Where a claimant who was not in occupation of the subject land incurs incidental charges or expenses in acquiring, within one year of the date of entry, an interest in other land in the United Kingdom, those charges and expenses may be claimed as consequential loss.

6 Equivalent reinstatement

(1) Compensation may be claimed on the basis of the reasonable cost of equivalent reinstatement –

(a) in the circumstances, and subject to the rules, defined by section 45 of the 1973 Act (dwellings adapted for the disabled);

(b) if it is shown that –

(i) the subject land is, and but for the compulsory acquisition would continue to be, adapted and normally used for a purpose of such a nature that there is no market or general demand for land or premises for that purpose; and

(ii) reinstatement in some other place is genuinely intended.

(2) Where a claim is made under (1)(b) –

(a) The cost of reinstatement shall be assessed by reference to the date at which reinstatement becomes reasonably practicable.

(b) Compensation on the basis of equivalent reinstatement may be refused, if it is shown that the cost is disproportionate having regard to the likely benefit to the claimant.

(3) Where reinstatement has not been carried out before compensation is determined, the award of compensation under this Rule may be made subject to conditions (including provision for staged payments) to ensure that any payment is used for the intended purpose, or (if not) that any excess over the compensation otherwise due is repaid.

GENERAL RULES

7 Illegality

(1) Subject to (3), in assessing compensation under any head, there shall be disregarded any element of value or loss, which is attributable to a use which is contrary to law.

(2) For this purpose a use is "contrary to law" in so far as it involves a criminal offence, or is otherwise prohibited by statute.

(3) The Tribunal may disapply this rule (wholly or partially) if satisfied that it would not be contrary to the public interest to do so, having regard in particular to the nature of the breach and its ease of remedy.

8 Consistency

Where the market value of an interest in the subject land is assessed on the basis that the land had potential to be developed or used for a purpose other than the purpose for which it was occupied at the valuation date, compensation shall not be allowed under other heads (consequential loss or injury to retained land) in respect of loss or damage that would necessarily have arisen in realising that potential.

9 Duty to mitigate

(1) If it is shown by the authority that the claimant has (since the first notice date) unreasonably failed to take steps that were open to him to mitigate his loss, the compensation otherwise payable shall be reduced by the amount of such loss as could have been avoided by taking such steps when it was reasonable to do so.

(2) For the avoidance of doubt, in deciding what is reasonable under (1) the personal circumstances of the claimant (including age, illness, disability or financial circumstances) shall be taken into account.

VALUATION DATE

10 Valuation date

(1) "The valuation date" means the date when compensation is agreed or determined or, if earlier, the date when possession is taken by the authority.

(2) Save as otherwise provided in this Code, compensation shall be assessed by reference to the following dates and circumstances:

(a) Under heads A (value of subject land) and B (injury to retained land), and in any other case where the amount depends on the value of land, interests will be valued as they stand at the "valuation date", at values prevailing at that date, and in the circumstances prevailing or reasonably anticipated at that date.

Provided that, where a right to compensation arises in relation to an interest which has ceased to exist, or may be brought to an end, by reason of the compulsory acquisition that, and any other interest in the same land, will be valued as though at the valuation date, there had been and would be no compulsory acquisition.

(b) Under head C (consequential loss), compensation shall be assessed by reference to circumstances prevailing or reasonably anticipated at the date of assessment.

(c) Under head D (equivalent reinstatement), compensation will be assessed by reference to the costs, or estimated costs, at the date when commencement of reinstatement work became, or is expected to become, reasonably practicable.

MATTERS TO BE DISREGARDED

11 New interests and enhancements

In valuing the subject land or the retained land, there shall be disregarded

(1) any new interests created over the subject land, or the retained land, between the date of notice to treat and the valuation date, in so far as they would increase the amount of compensation otherwise payable by the authority;

(2) without prejudice to (1), any enhancements (by creation of interests, or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was undertaken solely with a view to obtaining compensation or increased compensation.

12 Rehousing obligations

Where the subject land comprises a dwelling-house, there shall be left out of account any increase or reduction in the compensation otherwise payable, which is attributable to the fact that the acquiring authority (or any other authority acting in the exercise of a statutory function) have provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant (under the 1973 Act, s 39 or otherwise).

13 The statutory project and blight

A new Code

(1) All previous rules, statutory or judge-made, relating to disregard of "the scheme" will cease to have effect.

Defining the project

(2) In this Code, "the statutory project" means the project, for a purpose to be carried out in the exercise of a statutory function, for which the authority has been authorised to acquire the subject land.

(3) In cases of dispute, the area of the statutory project shall be determined by the Tribunal as a question of fact, subject to the following:

(a) The statutory project shall be taken to be the implementation of the authorised purpose within the area of the compulsory purchase order, save to the extent that it is shown (by either party) that it is part of a larger project;

(b) Save by agreement or in special circumstances, the Tribunal shall not permit the authority to advance evidence of a larger project, other than one defined in the compulsory purchase order or the documents published with it.

Disregarding the project

(4) In valuing the subject land at the valuation date:

(a) it shall be assumed that the statutory project has been cancelled on that date; and

(b) the following matters shall be disregarded:

(i) the effects of any action previously taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;

(ii) the prospect of the same, 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 powers.

(5) Sub-rule (4) does not require or authorise (save to the extent specified in (b)) consideration of whether events or circumstances at any time (before or after the valuation date) would have been different in the absence of the statutory project.

Depreciation due to blight

(6) Without prejudice to sub-rule (4), no account shall be taken of any depreciation (not attributable to diminished planning prospects) in the value of the relevant interest which is attributable to the land being blighted land, or to any indication (whether by way of particulars in a development plan, or otherwise) that the subject land, or any land in the vicinity, is likely to be acquired by a public authority.

> "Blighted land" means land within any category defined by Schedule 13 to the Town and Country Planning Act 1990.
>
> "Planning prospects" means the prospects of planning permission for valuable development.

Reverse compulsory purchase

(7) For the avoidance of doubt, where land is treated as acquired compulsorily by an authority following a notice served by the claimant compensation will be assessed:

- (a) in any case, in accordance with sub-rule (6); and
- (b) where it is blighted land, on the basis that it was acquired for a statutory project corresponding to the public proposal which resulted in it being blighted land.

Rule 13A Other heads of compensation

Injury to retained land

(1) In assessing injury to retained land (head B), reference to the "works" in Rule 4 includes a reference to all the works comprised in the statutory project;

Consequential loss

(2) In assessing compensation for consequential loss (head C):

- (a) references in Rule 5 to any consequence of the compulsory acquisition includes reference to any consequence of the statutory project;
- (b) without prejudice to (a) consequential loss includes any loss of profits of a business (wholly or partly on the subject land) attributable to the matters referred to in sub-rule (6) (depreciation due to blight)

Provided that no claim may be made for consequential loss before the first notice date (save as permitted under Rule 5(1)(d)).

PLANNING STATUS

14 Planning permissions –actual and assumed

Planning permissions and hope value

(1) For the avoidance of doubt, in valuing the land, the circumstances to be taken into account at the valuation date include:

(a) any planning permission for development which is in force at the valuation date (on the subject land or any other land); and

(b) the prospect, in the circumstances known to the market at that date, of any other such planning permission being granted in the future.

Appropriate alternative development

(2) Account shall also be taken of value attributable to appropriate alternative development of the subject land, in accordance with the following rules:

(a) "Appropriate alternative development" means development for which planning permission could reasonably have been expected to be granted on the assumptions set out in paragraph (b) (on the subject land, by itself or together with other land), on an application considered on the valuation date ("appropriate alternative development");

(b) The assumptions in (a) are that the circumstances are those prevailing at the valuation date, save that:

(i) The statutory project had been cancelled on that date;

(ii) No action has been taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;

(iii) There is no prospect of the same, 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 powers.

(c) Account shall also be taken of the prospect, on the same assumptions, but otherwise in the circumstances known to the market at the valuation date, of any other such planning permission being granted in the future.

14A Alternative development certificate

Application for certificate

(1) For the purpose of determining the permission or permissions to be assumed under Rule 14(2)(a) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for an "alternative development certificate", in accordance with the following rules (and "procedural regulations" to be made by statutory instrument):

(2) An alternative development certificate is a certificate stating:

(a) the opinion of the local planning authority as to the classes of appropriate alternative development (if any) for which permission is to be assumed on the basis set out in Rule 14(2)(a) (on the subject land by itself or with other land);

(b) a general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject.

Appeal to Lands Tribunal

(3) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to procedural regulations, which shall include:

(a) Power for the Tribunal to determine the timing and scope of the hearing of the appeal, having regard to any related compensation reference;

(b) In particular, power for the Tribunal to direct

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated power to determine the appeal on behalf of the Tribunal.

Conclusive effect

(4) Subject to any such appeal, or any direction of the Tribunal, an alternative development certificate shall be conclusive of the matters stated in it for the purposes of assessing compensation.

Special cases

(5) Regulations may provide for the application of the certificate procedure to special cases, including:

(a) the circumstances specified in 1961 Act section 19 (valuation by a surveyor where claimant absent from the United Kingdom or untraceable);

(b) where the authority is seeking to acquire land by agreement.

15 Provisions not replaced

The following should be repealed without replacement:

(1) 1961 Act, section 15(3) and (4) ("Third Schedule rights")

(2) 1961 Act, section 23 (compensation where permission for additional development is granted after acquisition).

PARTICULAR INTERESTS

16 Acquisition of new rights

Where the interest acquired is a new right over land, compensation shall be assessed having regard to:

(1) Any depreciation in the market value of the land over which the right is acquired;

(2) Any depreciation in the market value of other land held with that land, caused by the acquisition of the right;

(3) Any consequential loss (applying the principles of Rule 5, with appropriate modifications).

17 Interference with easements etc

(1) Where, in the carrying out of the purpose for which the subject land is acquired any easement, restrictive covenant or other right affecting the subject land is overridden, compensation shall be payable under this rule.

(2) Such a right is overridden where any action takes place which, in the absence of statutory authority, would involve unlawful interference with, or breach of, that right.

(3) Compensation shall be assessed by reference to the reduction (if any) in the market value of any land to which the right was attached, so far as attributable to the overriding of the right, and any consequential loss (applying the principles of Rule 5, with appropriate modifications).

18 Minor tenancies

Compensation for the compulsory acquisition, or the extinguishment by compulsory purchase, of "minor tenancies" (as defined in section 2(1) of the Vesting Declarations Act 1981) will be assessed according to the rules applying to the compulsory acquisition of other interests.

(The special compensation rules in 1965 Act s 20(2) will be repealed.)

INCIDENTAL MATTERS

19 Advance payment

(1) Where the authority takes possession of the land before compensation has been paid, the claimant shall be entitled to an advance payment, in accordance with sections 52 and 52A of the 1973 Act.

(2) Where it is shown that the authority has delayed unreasonably in making such a payment, or that the estimate on which the payment was based was unreasonably low, the County Court may, on the application of the

claimant, make such interim or final orders (including orders for disclosure of information, and for imposing time-limits), as are necessary to enforce the authority's obligations under this Rule.

20 Lands Tribunal jurisdiction

The Lands Tribunal shall have jurisdiction (subject to procedural rules) to determine any claim (common law or statutory) relating to damage to land or to the use of land, where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal.

21 Interest

The following rules shall apply in relation to interest on compensation:

(1) Subject to (2) and (3), interest shall be paid from the date when the subject land vested in the authority, or if earlier, the date when the authority took possession of the land, at such rate as may be prescribed from time to time by the Secretary of State;

(2) Save in respect of compensation heads A and B, the Tribunal may, if it thinks appropriate having regard to the nature and amount of the award, determine that interest on different items of loss or expense shall run from some other date or dates, having regard to the time when the relevant loss or expense has been or is expected to be incurred;

(3) The Tribunal may increase or decrease the rate of interest, where it considers it appropriate to do so, having regard to any unreasonable conduct of either party in relation to the compensation claim (including unreasonable delay by the authority in making an advance payment).

COMPENSATION WHERE NO LAND IS ACQUIRED

22 Depreciation caused by public works

(1) Compensation will be payable for depreciation caused by the construction or use of public works where no land is taken, in accordance with Part I of the Land Compensation Act 1973 (expanded and amended to provide a complete code for compensation for such depreciation).

(2) The following rules should apply in relation to loss caused by construction:

(a) The claim may be made by any person with a qualifying interest (as defined in section 2 of the 1973 Act) at the date of commencement of the works;

(b) Compensation shall be payable for any depreciation in the market value of the qualifying interest, and any consequential loss (not reflected in the value of land),

(i) which was caused by the construction of the works under statutory authority; and

(ii) for which the statutory authority would have been liable to pay damages if the construction had not been authorised by statute.

(3) The following provisions of the 1973 Act, Part I should be repealed:

(a) sections 2(3) and (6) (rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units);

(b) section 4(5) (existing use only);

(c) section 5 (requirement to assume that no permission would be granted for new development).

(*Signed*) ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE
ROBERT CARNWATH
(Consultant and former Chairman)

MICHAEL SAYERS, *Chief Executive*
5 November 2003

APPENDIX A
THE IMPACT OF OUR RECOMMENDATIONS

A.1 At each stage of this project we have borne in mind the likely effects of our proposals. In addition to the proposals and consultation questions put forward in CP 165, we invited comment on the likely impacts of our proposals.[1] We are very grateful to those who responded, and we have taken account of the responses received in formulating the recommendations in this report.

A.2 The Government asked us to have particular regard to the following:

(1) Construction of a single Compensation Code which will achieve the principle that "in all cases, a claimant should [be] properly compensated for all the losses incurred as a direct result of the compulsory purchase order". That approach will not differentiate between particular CPO powers used, implementation or lack of it, and whether or not land has been taken.

(2) Clarification of the extent to which CPO valuations should take account of (or disregard) the effects of the scheme underlying the proposal, and whether valuations should take account of development potential of the subject land.

(3) Clarification of the rules relating to compensation for severance/injurious affection (where land is taken) and the ensuring of parity of treatment between those from whom some land is taken and those from whom none is taken.

(4) Clarification of the principles relating to payment of compensation for disturbance (including, for business activities, the determining of the need for relocation or extinguishment), which principles will ensure reimbursement for all costs and losses genuinely incurred as a direct consequence of the dispossession.

(5) Provision of a mechanism whereby eligible claimants can require acquiring authorities to make advance payments without delay where an estimate has been made.

(6) Consideration of the issue of the award of compound interest on late compensation payments (linked to our separate examination of the power of the courts to award such interest) and, more particularly, clarification of the basis for interest payments on fees and taxes.

(7) Provision for compensation for losses incurred where (after the first notice date) compulsory purchase orders are abandoned, withdrawn, quashed or not confirmed.

[1] CP 165, para 13.9.

A.3 We indicate below in broad terms the likely consequences of reform.

THE BENEFITS OF A CODE

A.4 We recommend a Compensation Code which should operate as a single and self-contained mechanism. We believe that if Parliament were to enact such a Code it would make the rules relating to identification of interests and assessment of compensation sums far more accessible and comprehensible. That will benefit professional advisers, acquiring authorities, businesses and individuals.

A.5 A number of the rules we recommend are intended to bring greater clarity to the law. Clarity and lack of ambiguity should reduce time expended on interpretation, facilitate and expedite negotiated settlements and reduce the number of contentious matters to be resolved by the Lands Tribunal.

A.6 The overriding principle is that of fair compensation, and the rules that we recommend are aimed at dealing fairly as between the authority and the landowner in determining who should bear what loss.

A.7 A more equitable and transparent set of rules should provide claimants (both businesses and individual citizens) with compensation solutions which feel fairer and are delivered more efficiently.

A.8 A large number of the recommended rules are designed to make the law clearer, but we would pick out particularly Rules 13, 13A, 14 and 14A which are a new set of rules relating to disregard of the "statutory project" and to the planning assumptions to be made in assessing compensation payable. Clarification of what matters are to be disregarded (both as to increases and decreases in value) should assist valuers in the computation of global compensation packages by reducing the complexity of the formulae and the range of variables which need to be addressed. Clarification of the rules relating to planning assumptions will simplify the certification process for local planning authorities and for the Lands Tribunal.

A.9 Many of the recommended rules incorporate changes to make the law fairer, but we would highlight:

Rule 2: Dispensing with the requirement to treat compensation as a single sum will allow fairer and more convenient calculations.

Rule 5: This rule would make the law fairer because:

it is in our view wide enough to cover any losses properly flowing from the acquisition;

it spells out the circumstances in which a claim for relocation or extinguishment should be permitted, and replaces the "reasonable businessman" test;

it allows a claimant who may not be able to relocate a business due to personal circumstances to be adequately compensated; and

it allows for consequential loss to be awarded by the Lands Tribunal where, exceptionally, losses were reasonably incurred before the first notice date as a result of the compulsory purchase order.

Rule 19: This rule provides an effective remedy where the authority fails to make an estimate of compensation due, or makes one which is unreasonably low, by providing the County Court with power of enforcement. It should be read with the rule on interest, which allows the Lands Tribunal to award interest in recognition of unreasonable delay by the authority.

Rule 20: Additional benefits should accrue because only one forum will be needed for litigation where two are needed under the current law.

Rule 21: Under this rule compensation would usually run from a single date (the valuation date), but could run from different dates as appropriate to the cost or loss which is compensatable. This rule also allows the Lands Tribunal to award interest in respect of any unreasonable conduct by the authority.

Rule 22: This rule would reduce (though not eliminate) the differential between an owner from whom land is taken and an owner from whom no land is taken.

APPENDIX B
REPEALS

B.1 We list here those provisions which would be repealed or replaced under our recommended Code. The footnotes refer to the proposed replacements (where applicable), or relevant discussion in the text.[1]

LAND COMPENSATION ACT 1961

B.2 The proposed Code would result in the replacement of the bulk of Parts II to IV of the 1961 Act:

Provisions to be repealed or replaced

s 5(1) – (6)[2] (rules for assessing compensation)

s 6, and Schedule 1 (disregard of actual and prospective development)[3]

s 7 (development of adjacent land)[4]

s 8 (subsequent acquisition of adjacent land)[5]

s 9 (disregard of depreciation)[6]

s 10A (expenses of owners not in occupation)[7]

ss 14–16 (assumptions as to planning permission)[8]

ss 17–22 (certificates of appropriate alternative development)[9]

ss 23–30, Sched 3 (compensation for additional development)[10]

s 32 (rate of interest after entry)[11]

[1] The word "replaced" indicates that the effect of the former provision would be substantially reproduced (with or without modifications) in the new Code. The word "reflected" indicates that the former provision has influenced the new Code in some respect.

[2] Subsections 5 (2) (market value), (4) (unlawful uses), (5) (equivalent reinstatement), and (6) (disturbance etc) would be replaced (respectively) by proposed Rules 3 (Market value), 7 (Illegality), 6 (Equivalent reinstatement), and 5 (Consequential loss). Subsection 5(3) (special suitability), so far as still relevant (see Appx D, paras D.93 – D.97), is reflected in Rule 13 (The statutory project and blight) (see paras 8.6 and 8.11(2) above).

[3] Not replaced (save that Schedule 1 Case 1 is reflected in Rule 13(3)(a): see para 7.26 above).

[4] Reflected in Rule 4 (Injury to retained land), as an off-set for "betterment" (Rule 4(1)(c)) (see paras 3.16 – 3.17 above).

[5] Not replaced.

[6] Replaced by Rule 13((6) (Depreciation due to blight).

[7] Replaced by Rule 5(3)(c).

[8] Replaced by Rule 14 (Planning permissions – actual and assumed).

[9] Replaced by Rule 14A (Alternative development certificate).

[10] Not replaced (see Rule 15).

[11] Replaced by Rule 21.

Provisions of 1961 Act not considered in this report

ss 1–4 (determination of disputed compensation)[12]

s 11 (land of statutory undertakers)[13]

s 12 (outstanding right to compensation for refusal of permission)[14]

s 31 (withdrawal of notices to treat)[15]

ss 33–42 (miscellaneous and interpretation)[16]

OTHER STATUTORY REPEALS

B.3 The effect on other statutes is more limited. Provisions to be repealed or replaced are:

Compulsory Purchase Act 1965

s 7 (compensation for severance etc)[17]

s 10 (injurious affection where no land is taken)[18]

s 20(2) (special compensation rules – minor tenancies)[19]

Land Compensation Act 1973

s 2(3) and (6) (rateable value limit of £24,600)[20]

s 4(5) (existing use only)[21]

s 5 (no permission for new development)[22]

s 44 (injurious affection by the whole of the works)[23]

s 45 (disturbance provisions for the disabled)[24]

[12] The President of the Lands Tribunal has proposed that ss 2–4 should be repealed and replaced (so far as necessary) by rules and practice directions: see Law Commission Scoping Paper (March 2001), paras 46–7.

[13] Our terms of reference were directed to provisions of general application. We have not been asked to consider special cases, such as statutory undertakers.

[14] This section, which is related to obsolete provisions for compensation under the Town and Country Planning Act 1947, can probably be repealed.

[15] This is considered in the discussion of our proposals in relation to "Abortive orders": see CP 169, para 8.11.

[16] To be considered at the stage of detailed drafting.

[17] Replaced by Rule 4 (Injury to retained land).

[18] Replaced by Rule 22 (Depreciation caused by public works).

[19] Replaced by Rule 18 (Minor tenancies).

[20] Repealed by Rule 22(3)(a).

[21] Repealed by Rule 22(3)(b).

[22] Repealed by Rule 22(3)(c).

[23] Replaced by Rule 4(1), 13A(1).

[24] Replaced by Rule 6(1)(a).

s 46 (rights of traders over 60 years)[25]

s 47 (land subject to business tenancy)[26]

s 49 (agricultural holdings)[27]

s 50 (compensation where occupier is rehoused)[28]

s 51 (land in new town designated for public development)[29]

ss 52, 52A (advance payment)[30]

Acquisition of Land Act 1981

s 4 (disregard of enhancements)[31]

25 Replaced by Rule 5(2)(c)(i).

26 Not replaced (see paras 5.2 – 5.8 above).

27 Reflected in Rule 2(1) and 10(2)(a) proviso (see paras 2.3 – 2.4 above).

28 Replaced by Rule 12 (Rehousing obligations).

29 Repealed without replacement (this provision is linked to 1961 Act s 6, which is to be repealed: see n 4 above).

30 Preserved by Rule 19(1).

31 Replaced by Rule 11(2).

APPENDIX C
THE DEVELOPMENT OF COMPULSORY PURCHASE LAW

INTRODUCTION

C.1 In this Appendix we explain briefly the historical background against which the present law has developed, and the derivation and scope of the principal enactments. Although this Report is concerned particularly with compensation issues, it is important to see them against the development of compulsory purchase law generally. The history of the "no-scheme" rule is discussed in more detail in Appendix D.

HISTORICAL CONTEXT

The 1845 Act

C.2 The origins of the modern law are to be found in numerous private Acts, passed in the late 18th and early 19th centuries, authorising the construction of canals, railways and harbours.[1] These normally contained powers of compulsory acquisition, and provided procedures for implementation and determining compensation. Standard clauses were developed which were consolidated in the Land Clauses Consolidation Act 1845.[2] This did not itself confer the power of compulsory acquisition, which was derived from the private Act authorising the specific project ("the special Act"). However, after 1845, any Act authorising compulsory purchase was treated (unless otherwise provided) as incorporating the 1845 Act.[3]

C.3 The framework provided by the 1845 Act remained in place for most of the 19th century. A typical acquisition would be for the purposes of a utility (for example, a railway or water company) under powers contained in a private Act, usually promoted by a limited company. The cases established that compensation should be paid on the basis of "the value to the owner".[4] Compensation was usually assessed by a jury. The fact that the schemes were promoted for profit, rather than purely public motives, was reflected in the sympathetic treatment of dispossessed owners:

> Compulsory acquisition of land to any great extent first took place in connection with the Railway development in the first half of the 19th

[1] For a concise account of the early history, see K Davies, *Law of Compulsory Purchase and Compensation*, (5th ed 1994) ch 1.

[2] The 1845 Act was also exported throughout the former British Empire, and accordingly provided the basis for the development of the law in most common law countries. In some cases the principles of the cases were codified at an early stage (see eg the Indian Land Acquisition Act 1870). Decisions of the courts of other common law jurisdictions (notably Canada and Australia), as well as those of the Judicial Committee of the Privy Council, have made a vital and continuing contribution to the development of the law.

[3] 1845 Act, s 1.

[4] See Appx D, paras D.6 – D.12.

century, and public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise undertaken for profit rather than the interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventurers, led to sympathetic treatment by the tribunal which assessed the compensation payable to the owner…[5]

C.4 By the end of the 19th century and in the period up to the First World War, the role of public authorities became much more important. Local authorities had greatly extended functions in provision of public services, including housing, highways, and public health.[6] To facilitate acquisitions for such purposes, and to avoid the need for a special Act for each project, compulsory powers were conferred by general Acts. Initially, authorisation of particular schemes was still subject to Parliamentary approval, by means of a "provisional order" procedure. But this was gradually replaced by the modern procedure, involving a compulsory purchase order confirmed by the relevant Minister.[7] Implementation of the order and assessment of compensation continued to be governed by the 1845 Act.

The Scott Committee and the 1919 Act

C.5 The Scott Committee[8] was established in 1918 to carry out an urgent review of the compensation laws in anticipation of the end of the war, and the likely need for acquisition by public authorities of large quantities of land "in the early stages of the Reconstruction period".[9] By this time the emphasis was on acquisition for public purposes, and the overriding rights of "the community":

> It ought to be recognised, and we believe is today 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, &c

C.6 The Committee was concerned that the "value to the owner" concept had allowed "highly speculative elements of value" to be included.[10] The Committee made a

[5] Scott Report, para 8 (see para C.5 below).

[6] See eg Public Health Act 1875.

[7] See eg Housing, Town Planning etc Act 1909. K Davies, *op cit*, paras 1.32 – 1.34.

[8] See *Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes* (L. Scott QC, Chairman), Cd 9229 (1918) ("the Scott Report"). His judgment (as Scott LJ) in *Horn v Sunderland BC* [1941] 2 KB 26 contains an illuminating discussion of the background to the 1919 Act.

[9] Scott Report, para 5.

[10] *Ibid*, para 8.

number of specific recommendations relating to compensation,[11] which were enacted as a set of six "rules" in section 2 of the Acquisition of Land Act 1919 ("the 1919 rules"), later replaced by section 5 of the Land Compensation Act 1961. The most significant was the introduction of the "market value" principle (rule (2)): compensation for the land taken should be based on "the market value as between a willing seller and a willing buyer", with no special allowance for compulsory acquisition.[12] The 1919 Act also established a panel of official arbitrators to determine compensation disputes.[13]

From 1945 to 1961

C.7 The next significant developments came in the immediate aftermath of the Second World War. The dominance of the public sector in relation to the use of compulsory purchase powers was confirmed by the wide powers conferred on public authorities for post-war reconstruction, and the nationalisation of the public service providers (such as the railways). There were some limited procedural reforms. The Acquisition of Land (Authorisation Procedure) Act 1946 enacted a uniform procedure for making and confirmation of compulsory purchase orders. The Lands Tribunal Act 1949 established the modern Lands Tribunal, which took over the jurisdiction of the panel of official arbitrators.

C.8 The most dramatic change of policy was represented by the Town and Country Planning Act 1947 ("the 1947 Act"), under which planning control was extended to the whole country,[14] and local authorities were given extensive powers to acquire land for comprehensive redevelopment.[15] At the same time, all development value was expropriated by the state, resulting in land acquisitions being made at existing use value.[16] A succinct summary was given by the Lord Chancellor in 1959:[17]

[11] The Committee's first recommendation (not unlike that of the CPPRAG Review, 80 years later) was that "the Lands Clauses Acts are out of date… and should be repealed and replaced by a fresh Code": *ibid*, para 6. Unfortunately, this was not implemented; most of the 1845 Act remains in force, and its extant provisions were re-enacted, with some re-wording, in the Compulsory Purchase Act 1965, which forms the basis for most modern acquisitions.

[12] Scott Report, paras 8–9, given effect respectively by rules (2) and (1) of the 1919 rules. This did not affect the rules for compensation for disturbance or "any other matter not directly based on the value of land": rule (6). Rule (3), requiring the disregard of value due to "special suitability", is discussed in Appx D, paras D.8 – D.12.

[13] 1919 Act, s 1. This procedure took the place of the various procedures under the 1845 Act, under-which, depending on the amount and the choice of the claimant, compensation might be determined by two justices, by an arbitrator, or by a jury: 1845 Act, ss 22, 68.

[14] Under pre-war planning legislation (see Town and Country Planning Act 1932), there was provision for the preparation by councils of planning schemes, under which land became subject to planning restrictions. The landowner whose land was injuriously affected by a planning scheme had a right to compensation for the diminution in value. Since the introduction of general planning control by the 1947 Act (even following the restoration of market-value compensation in 1959), the landowner is not entitled to compensation for such planning restrictions.

[15] Similarly, the New Towns Act 1946 and the Town Development Act 1952 envisaged a central role for public authorities in promoting, and acquiring land for, development.

[16] This scheme followed the recommendations of the *Uthwatt Committee on Compensation and Betterment* (Final Report, Cmd 6386, 1942). Its terms of reference had been "to make an objective analysis of the subject compensation and recovery of betterment in respect of

> … the 1947 Act set up a new financial system, designed to solve once and for all the problems of compensation and betterment that prevented effective planning in the pre-war years. The State took over all development rights. Before anybody could carry out development, he had to buy back the right to develop by paying a development charge. Owners were to be compensated for the loss of the development values existing in 1947 out of a £300 million fund, and machinery was set up for the making and establishment of claims on the fund. It was assumed that, in these circumstances, land would be bought and sold in the market at existing use value. As a logical consequence of this it was provided that compensation for land bought compulsorily should be limited to existing use value.

C.9 This system was not a success. Continuing the same summary:

> As is well known, the system did not work well in practice. The public found it difficult to understand and the development charge was regarded simply as a tax on development. The Conservative Government in the Town and Country Planning Acts of 1953 and 1954, therefore abolished development charge, so leaving owners of land free to realise the development value of their land provided that they could get planning permission… [18]

Even after abolition of development charge in 1954, compulsory acquisitions continued to take place at existing use value, plus a share of the 1947 compensation fund. Since this was based on 1947 development values, there was an ever-widening gap between compensation payments and prices at which land was being sold in the market.[19]

C.10 The market value principle for compensation was not fully re-established until 1959. The Town and Country Planning Act 1959 restored the principles established by the 1919 Act, but supplemented them with an elaborate set of provisions relating to disregard of associated development, and to planning assumptions, intended to take account of the comprehensive system of planning control introduced in 1947. The relevant provisions were in sections 2–9 of the Act.[20]

C.11 The Land Compensation Act 1961 was a consolidation of the relevant parts of the 1919 Act and the 1959 Act. It became (as it remains today) the principal statute governing the assessment of compensation. However, significant aspects of compensation (notably, compensation for disturbance, and for severance or

public control and use of land", with a view to making recommendations for action before the end of the war "to prevent the work of reconstruction thereafter being prejudiced": see F Corfield and R Carnwath, *Compulsory Acquisition and Compensation* (1st ed 1978) pp 4–7.

17 Viscount Kilmuir LC: *Hansard* (HL) 14 April 1959, vol 215, col 578 (introducing the 1959 Bill, which restored market value).

18 *Ibid*, col 579.

19 See F Corfield and R Carnwath, *op cit*, p 13; also pp 28–9 (a historical summary of changes in the basis of compensation and fiscal impositions from 1845 to 1977).

20 See Appx D, paras D.53 – D.54.

injurious affection) were not covered by the 1961 Act, and continued to be governed by the 1845 Act and cases under it.

From 1961 until today

Towards privatisation

C.12 The following 15 years saw two further attempts[21] by Labour Governments to take direct control of land development and deal with the perceived problem of betterment, but neither survived a change of Government. In one respect, however, the legacy of the 1947 Act survived. Development potential had ceased to be seen as an intrinsic right of land-ownership, the restriction or removal of which would attract compensation.[22] Thus, even in cases where restriction would formerly have carried a right to compensation, the right could in effect be nullified by planning controls.[23]

C.13 The first two terms of the Conservative Administration (from 1979) opened a new phase. The role of public authorities as direct providers of services or initiators of development was drastically reduced. Even where development schemes were initiated by public authorities they were usually in partnership with private developers.[24] Land acquisition powers were exercised with a view to handing the land over to the private developer, who might indemnify the authority against the cost. Privatisation resulted eventually in most of the major utilities passing into the hands of companies owned by private shareholders, and operated for profit (albeit subject to regulatory control). The Transport and Works Act 1992, which replaced the private Bill procedure for railway and other transport works, enabled any undertaking (public or private) to apply for compulsory powers for such projects.

C.14 The change of Government in 1997 did not result (uniquely in the post-war period) in a radical change of direction in terms of land or development policy. There are currently no proposals to take greater public control of development, or to tax development gains as such. The utilities remain privatised. Developments involving public authorities are likely to be carried out through some form of public/private partnership or private finance initiative. As in the 19th century, many compulsory purchase projects are likely to be financed, directly or indirectly, by private organisations, with a view to profit for their shareholders. From the public point of view, development appears to be seen as a desirable end in itself, without the need to secure direct public control, or to recoup the resulting betterment.

Legislative change

C.15 At the end of this period, most of the rules governing procedure and compensation remain as they were in 1961. The Compulsory Purchase Act 1965 re-enacted,

[21] The Land Commission Act 1967 (introducing Betterment Levy) and the Community Land Act 1974 (allied with Development Land Tax).

[22] See *Belfast Corp v OC Cars Ltd* [1960] AC 49.

[23] *Westminster Bank Ltd v MHLG* [1971] AC 508 (highway widening); *Hoveringham Gravels Ltd v Secretary of State* [1975] QB 764 (ancient monument protection).

[24] Such schemes had become more common from the early 1970s: see the *Report of the Working Party on Local Authority/Private Enterprise Partnership Schemes* (HMSO, 1972).

without material change, the main extant provisions of the 1845 Act, but did not repeal that Act.[25] It is the principal Act governing the implementation of compulsory purchase orders. It was supplemented in 1981 by the Compulsory Purchase (Vesting Declarations) Act 1981, which enabled orders to be implemented by a vesting declaration, as an alternative to the traditional notice to treat procedure.[26] The Acquisition of Land Act 1981 reproduced (again without substantive change) the 1946 Act and subsequent legislation, relating to the making and authorisation of orders.

C.16 The most substantial changes in this period were made by the Land Compensation Act 1973. This followed a "full scale review of the compensation code".[27] In addition to numerous detailed amendments, there were some major innovations, including:

(1) A new right to compensation for depreciation in the value of land due to "physical factors caused by the use of public works";[28]

(2) A new category of payments for those displaced from land, including "home loss payments" and "farm loss payments"; and "disturbance payments" for those without compensatable interests;[29]

(3) A right to advance payment of 90% of the authority's estimate of compensation;[30]

(4) Substantial extension of the rights of those affected by planning blight.[31]

C.17 Less significant amendments and additions, of a piecemeal nature, have been made by other Acts, including:

(1) Local Government (Miscellaneous Provisions) Act 1976 (including provisions for compulsory acquisition of rights over land);

(2) Local Government, Planning and Land Act 1980;

(3) Planning and Compensation Act 1991.[32]

25 The "Lands Clauses Acts" are incorporated into some public statutes still in force and may also still be relevant to pre-1965 local and private Acts, so far as still operative.

26 See paras C.31 – C.32 below.

27 *Development and Compensation – Putting People First* (1972), Cmnd 5124, para 4.

28 Land Compensation Act 1973, Pt I. See para C.35 below.

29 *Ibid*, Pt III. See para C.35 below.

30 *Ibid*, s 52. See para C.35 below.

31 *Ibid*, Pt V. These are now incorporated in the Town and Country Planning Act 1990, ss 149ff, Sched 13. The Government proposes a new statutory power to enable that revised provision governing blight to be defined in regulations: Policy Statement, para 5.2. This issue is not within our current terms of reference.

32 This reflected in part proposals made in a report by the Royal Institution of Chartered Surveyors: *Compensation for Compulsory Acquisition* (RICS, 1989).

The Human Rights Act

C.18 The Human Rights Act 1998 requires existing compensation law to be interpreted and applied, as far as possible, in conformity with the European Convention on Human Rights.[33] Article 1 of the First Protocol provides:

> Every natural and legal person is entitled to the 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 the general principles of public international law.

C.19 As hitherto interpreted, this provision does not impose any specific standard of compensation. The general principle is that the property taken should be compensated by payment of an amount "reasonably related to its value"; but this does not "guarantee full compensation in all circumstances", since "legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value".[34]

C.20 It is implicit in this statement, and in general principles of Convention law, that any departure from "full compensation" needs to be adequately justified by considerations of public interest, such as those mentioned, and must be reasonably proportionate to the aim pursued.[35] Further, the law must not discriminate unfairly as between different groups of property owner affected by the interference.[36]

C.21 Also relevant is Article 6(1), which guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. In the recent *Alconbury* case, the House of Lords held that the role of the Secretary of State in confirming compulsory purchase orders does not breach this principle, in view of the policy

[33] Human Rights Act 1998, s 3.

[34] *Lithgow v UK* (1986) 3 EHRR 329, 371. See also *James v UK* (1986) 8 EHRR 123 (an unsuccessful attempt to challenge the valuation provisions of the Leasehold Reform Act 1967, as contrary to Art 1 of Protocol 1).

[35] See *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35, para 69 ("a fair balance"). See also Clayton and Tomlinson, *The Law of Human Rights* (1st ed 2000) para 18.82ff, for a review of Convention cases relating to the UK prior to the Human Rights Act. The term "full compensation" does not appear to be used in any precise sense; the term "full market value" is also used. Generally, the case law of the European Court of Human Rights on damages adopts the principle of equivalence (or *restitutio in integrum*), but does not lay down any consistent principles for assessment (see the Law Commission's Report on *Damages under the Human Rights Act 1998*, Law Com No 266/Scot Law Com No 180). To give effect to the Art 1 of the First Protocol the rules governing compensation must allow a genuine inquiry into the individual circumstances of a claim: *Efstathiou v Greece* judgment 10 July 2003 App No 55794/00; *Katikaridis v Greece* Reports 1996–V, para 49.

[36] Article 14 prohibits discrimination in the enjoyment of Convention rights. In *Pine Valley Developments Ltd v Ireland* (1992) 14 EHRR 319, substantial damages were awarded for a breach of this Article, where remedial legislation, designed to correct a misapplication of planning law, excluded the applicant property owners, while applying to others in the same category.

content of the issues involved, and the supervisory role of the High Court.[37] Lord Hoffmann explained the balance between democratic and legal accountability:

> Importantly, the question of what the public interest requires for the purposes of article 1 of the First Protocol can, and in my opinion should, be determined according to the democratic principle – by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.
>
> There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in article 1 of the First Protocol that a taking of property must be "subject to the conditions provided for by law". The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.[38]

C.22 This decision leaves some issues unresolved. Thus, there may be doubts over the Secretary of State's role in determining appeals in respect of "certificates of appropriate alternative development", which might be said to have no policy relevance in the real world, sufficient to satisfy the Secretary of State's involvement.[39]

C.23 Article 6 may also be breached if determination of compensation is unreasonably delayed.[40]

THE LAW TODAY

C.24 The previous section outlined the historical development of the law. It will be helpful to conclude this Appendix by summarising the main sources of the law as it stands, and to give an indication of the extent and nature of its use in practice.

Sources of the current law

C.25 The sources of the current law are most conveniently considered under separate heads:

(1) Powers of compulsory purchase;

(2) Making and authorisation;

[37] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

[38] *Ibid*, 324–325.

[39] Land Compensation Act 1961, ss 17–18. The planning authority (or an appeal to the Secretary of State) determines for compensation purposes the development that would have been appropriate in the absence of compulsory purchase.

[40] See eg *Guillemin v France* (1997) 25 EHRR 435.

(3) Implementation;

(4) Determination of compensation;

(5) Compensation rules.

(1) Powers of compulsory purchase

C.26 The vast majority of compulsory acquisitions are made under powers granted by numerous general Acts, for the purposes of functions of public authorities or utilities.[41] It is not part of our terms of reference to review these powers. The Government has announced its intention to supplement them by new powers which would:

> enable local planning authorities to exercise compulsory purchase powers for a full range of planning and regeneration purposes, including halting the physical, economic and/or social deterioration of an area.[42]

C.27 Until recently it was common practice for transport and other similar undertakings to promote Private or Local Bills to authorise particular projects.[43] However, their use has become less important, since the Transport and Works Act 1992 enabled compulsory powers to be obtained without recourse to Parliament in most cases.

C.28 There appear to be no detailed, up to date statistics of the numbers of orders promoted under different powers. A 1995 study for the DETR showed an annual average of 255 orders over the preceding three and a half years, broken down between Housing, Planning, Local Roads, Trunk Roads and Motorways, and Public Utilities.[44] The figures relate solely to acquisition of land, as such. Thus, for example, the figures for public utilities do not include powers obtained for the acquisition of rights in land, such as wayleaves for electricity lines or easements for pipelines.[45]

41 A list of statutes conferring compulsory powers, taken from Butterworth's Compulsory Purchase and Compensation Service Division B, Chapter 1F, was reproduced as Appx 2 to CP 165.

42 Policy Statement, para 2.10. See further the current Planning and Compulsory Purchase Bill 2002/03 and paras 1.18 – 1.25 above.

43 For example: the Channel Tunnel Act 1987, the London Underground (Victoria) Act 1991, the London Docklands Railway Act 1991, the Croydon Tramlink Act 1994.

44 City University Business School, *The Operation of Compulsory Purchase Orders* (DETR 1997) para 1.21. The figures show the following annual average proportions, based on the annual average of 255 orders, between the categories: Housing (86); Planning (58); Local Roads (94); Trunk Roads and Motorways (13); and Public Utilities (3).

45 *Ibid*, para 1.5. CPPRAG commented on the "inconsistencies caused by the wide variations in the powers available to the different suppliers" and recommended further work to standardise them: *op cit*, para 209, 218. This issue has been examined in detail by Norman Hutchison and Jeremy Rowan-Robinson in two recent articles: "Utility wayleaves: time for reform" [2001] JPEL 1247; "Utility wayleaves: a compensation lottery?" [2002] JPIF 159. The latter article was reproduced, with kind permission, in Appx 7 to CP 165.

(2) Making and authorisation

C.29 The law relating to the making and confirmation of compulsory purchase orders is in the Acquisition of Land Act 1981, and regulations made under it.[46] The Act contains separate (but substantially similar) sets of rules for orders promoted respectively by ministerial and non-ministerial authorities. It contains special rules for particular categories of land, such as land of local authorities or statutory undertakers, National Trust land or commons. It also contains an exclusive procedure for court challenges to the validity of orders.

C.30 The procedure in outline is as follows:

(1) Authorisation of compulsory purchase is conferred by a compulsory purchase order, which is *made* by the acquiring authority and *confirmed* by the relevant Minister ("the confirming authority").[47] The order must be in the prescribed form, including a description of the land by reference to a map, and a statement of the purpose for which the land is required.[48] Notices of the making of the order must be published in local newspapers, and served on owners and occupiers (other than tenants for less than a month).[49]

(2) All those served with, or entitled to service of, a notice ("statutory objectors") have the right to object or make representations within the time specified by the notice. Other objections or representations may be received by agreement with the acquiring authority or at the discretion of the confirming authority. Objections may be disregarded if they relate exclusively to issues of compensation.[50] A public inquiry or hearing must be held for objections by statutory objectors, but is discretionary in other cases.[51]

(3) After consideration of the objections, and the report of the inquiry or hearing, the order may be confirmed by the confirming authority, with or without modifications (but not, except by agreement, so as to extend the area of land taken).[52] Notices of confirmation must be published, and served as under (1).[53]

[46] Compulsory Purchase of Land Regulations 1994, SI 1994, No 2145. Procedure at inquiries held under the Act is governed by rules made under the Tribunals and Inquiries Act 1971; see eg the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990, SI 1990, No 512.

[47] Acquisition Act, s 2. Ministerial orders follow a similar procedure, save that (instead of being "made" and then "confirmed"), they are initially "prepared in draft" and then (following publication and objections) "made": *ibid*, Sched 1, para 1.

[48] The standard prescribed form is Form 1 in the Schedule to Compulsory Purchase of Land Regulations 1994, SI 1994, No 2154 (as amended by SI 1996, No 1008).

[49] Acquisition Act, ss 11, 12.

[50] *Ibid*, s 13(4).

[51] *Ibid*, ss 13(2), 13(3).

[52] *Ibid*, ss 13, 14.

[53] *Ibid*, s 15.

(4) There is a statutory right to challenge the order on legal grounds in the courts within six weeks of publication of the notice of confirmation.[54] Otherwise, the validity of the order is immune from challenge in legal proceedings.[55]

(3) Implementation

C.31 The procedures for implementing compulsory purchase orders following confirmation are largely contained in the Compulsory Purchase Act 1965. In particular, this reproduces the equivalent provisions of the 1845 Act, with more recent amendments, relating to the notice to treat procedure and entry on land in advance of the determination of compensation. The alternative vesting declaration procedure is covered by the Compulsory Purchase (Vesting Declarations) Act 1981.

C.32 In the result, there are two alternative ways by which an acquiring authority may secure title to land, once the CPO has ministerial confirmation: by *notice to treat* and by *vesting declaration*:[56]

(1) The *notice to treat* procedure involves service of a statutory notice on each affected landowner to initiate the process of agreeing or determining compensation. Title does not pass to the authority until compensation (both eligibility and amount) has been settled, but the authority may take possession in the meantime by serving notice of entry.[57] The land is valued at the date of entry (or the date of determination of compensation if earlier) and interest runs from that date.

(2) The more recent *vesting declaration* procedure enables the authority, after confirmation, to make a declaration, vesting in itself title and authorisation to enter after expiry of a defined period (not less than 28 days) from the service of a notice on those affected. Title passes on the date so fixed, whether or not compensation has been settled. [58]

C.33 The 1965 Act also contains provisions enabling the owner of land partly included within an order, to compel the purchase of the whole.[59] These have been supplemented by provisions of the Land Compensation Act 1973.[60]

(4) Determination of compensation

C.34 The Land Compensation Act 1961 requires unresolved issues of compensation to be referred to the Lands Tribunal.[61] The constitution and jurisdiction of the

[54] *Ibid*, s 23.

[55] *Ibid*, s 25.

[56] The Policy Statement has accepted the CPPRAG recommendation that, in the interests of flexibility, both procedures should be retained: Policy Statement, Appx, para 2.28.

[57] 1965 Act, s 11(1).

[58] Compulsory Purchase (Vesting Declarations) Act 1981, s 4.

[59] 1965 Act, s 8.

[60] 1973 Act, s 53ff.

Tribunal, and procedures before it, are governed by the Lands Tribunal Act 1949, and rules made under it.[62]

(5) Compensation rules

C.35 As indicated in the historical review, the law relating to compensation, as it exists today, represents a complex amalgam of statute law and judicial interpretation. The principal statutory sources are:

(1) Land Compensation Act 1961:

(a) "1919 rules" (including market value principle, rules for compensation based on equivalent reinstatement etc);

(b) Disregard of value attributable to associated development on adjoining land;

(c) Planning assumptions, including provision for certificates of appropriate alternative development.

(2) Compulsory Purchase Act 1965:[63]

(a) Compensation for severance or injurious affection relating to land held with the land taken (section 7);

(b) Compensation for injurious affection caused by the works, where no land is taken, and compensation for interference with easements or restrictive covenants (section 10);[64]

(c) Treatment of short tenancies (section 20).

(3) Land Compensation Act 1973:

(a) Compensation for depreciation caused by the use of public works (Part I);

(b) Extra payments for displacement from land (Home or Farm Loss Payments, Disturbance Payments (Part III));

(c) Advance payment of compensation (section 52).

(4) Acquisition of Land Act 1981:

Disregard of new interests or works intended to enhance compensation (section 4(2)).

[61] 1961 Act, s 1.

[62] See Lands Tribunal Rules 1996, SI 1996, No 1022.

[63] Or, where it applies, the equivalent provisions of the 1845 Act (ss 63, 68, 121).

[64] The law in this respect is largely the result of judicial interpretation, which bears little relation to the words of s 10: see *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1: para 11.4 above.

APPENDIX D
THE NO-SCHEME RULE – HISTORY

INTRODUCTION

The "no-scheme rule"

D.1 It is an established principle of compensation law that compensation "cannot include an increase in value which is entirely due to the scheme underlying the acquisition." This rule, following the name of the case from which this formulation is taken, is often called the "*Pointe Gourde* rule".[1] The rule requires the disregard of decreases in value caused by the scheme, as well as increases in value.[2] In other words, the value must be assessed in the "no scheme world", that is "upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition".[3]

D.2 Although the rule was developed by the Courts, its effect has been reproduced, or reflected, in a number of provisions now contained in the Land Compensation Act 1961. They are section 5(3) ("special suitability");[4] section 6 (disregard of changes in value arising from actual and prospective development);[5]section 9 (depreciation due to prospect of acquisition);[6] sections 14-16 (planning assumptions); section 17ff (certificates of appropriate alternative development).

D.3 Strictly speaking the *Pointe Gourde* rule refers only to the judicial (or "common law"[7]) version of the rule, as opposed to the various statutory versions. Furthermore, as will be seen, there is room for debate whether the *Pointe Gourde* formulation is, or should be taken as, an accurate statement even of the judicial rule. Accordingly, we have preferred to use the term "no-scheme rule", as a convenient shorthand for all the various manifestations of the rule, both statutory and non-statutory.

[1] *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565, PC, 572, *per* Lord MacDermott.

[2] *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426.

[3] *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 *per* Lord Hope. This hypothetical state of affairs is usually referred to as "the no-scheme world".

[4] This is derived from the 1991 Act, giving effect to recommendations of the Scott Committee: see para D.30 below.

[5] This is one of a complex group of provisions (ss 6–8) dealing with the disregard of different categories of development on adjoining land. Sections 7–8 deal with increases in value of adjacent land. The background and general effect of section 6 (formerly, s 9(2) of the 1959 Act) is described in Parts II and VI of CP 165.

[6] This also comes from the 1959 Act, although based on a provision in the 1947 Act: see Parts II and VI of CP 165.

[7] The term "common law rule" is sometimes used to describe the principle developed in the cases. However, since compensation is an entirely statutory creation, it is perhaps more accurate to treat the rule as one of interpretation of the word "value" in the relevant statutes: see *Rugby Water Board v Shaw-Fox* [1973] AC 202, 214, *per* Lord Pearson. To maintain the distinction, therefore, we shall refer to the "judicial" and "statutory" versions of the rule.

D.4 An understanding of the history is important, both to understand the present law, including the genesis of the present statutory rules, and to provide a firm basis for the new Code. We examine that history, and draw some conclusions as to the present state of the law. We also discuss the issues which need to be addressed by the new Code and make our proposals.

Three phases of evolution

D.5 The evolution of the rule can conveniently be divided into three phases, the first from 1845 Act, through to the changes made by the 1919 Act, following the recommendations of the Scott Committee; the second, covering the so-called *Indian* case (1939) and the *Pointe Gourde* case itself (1947), up to and including the 1947 Act; and the third, from 1959 to today, covering the modern development of the rule, beginning with the restoration of the market value principle in what became the 1961 Act.

PHASE (1): FROM 1845 TO 1919

The early cases

Value to the owner

D.6 The 1845 Act provided limited guidance as to the basis on which compensation was to be assessed. Section 63 simply required "regard to be had… to the value of the land" (as well as loss to the owner due to severance or injurious affection). It was established in the early cases that this meant the value to the owner, not the value to the acquiring authority.[8] The cases up to 1919 were directed to working out this principle.

D.7 One aspect of the "value to the owner" test was that any enhancement of value which could only be enjoyed by the acquiring authority was implicitly excluded. This is illustrated by a case in 1870, in which the authority was acquiring three graveyards and converting them to secular use (a new street and building sites). The Court rejected an argument that the owner should get the value of their use for secular purposes, since this change could not have been achieved without statutory powers:

> When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom the property is taken, 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.[9]

Special adaptability

D.8 Thus it was established that added value given by the existence of the undertaker's statutory powers had to be left out of account. On the other hand, if the land had intrinsic advantages, which gave it special suitability of adaptability[10] for the

[8] See eg *Penny v Penny* (1868) LR 5 EQ 277.

[9] *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42 *per* Cockburn CJ.

[10] Although different expressions are used in the earlier cases, the term "special adaptability" seems to have become the most popular in the period leading up to the 1919 Act (see para

proposed use, quite apart from the undertaker's scheme, that could be taken into account in the valuation. Although the word "scheme" was sometimes used, it was interchangeable with words such as "purpose" or "undertaking".

D.9 A number of the early cases on the rule concerned land acquired by water companies for reservoirs. *Re Ossalinsky and Manchester Corporation* (1883)[11] confirmed that the valuer should disregard any enhancement due to the use of statutory powers;[12] but this, it was held, did not mean that he should ignore the intrinsic suitability of the land for use as a reservoir:

> You must not look at *the particular purpose* which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it *as an illustration* to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary (sic), but are schemes with certain probability in them. I do not see any objection to that being used as an argument.[13]

D.10 This approach was followed in 1904 in another reservoir case.[14] If the site had "peculiar advantages for supplying water"[15] apart from any scheme "for appropriating the water to a particular water authority", they could be taken into account:

> It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the particular scheme or Act of Parliament, or, in other words, there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters.[16]

D.19 below, referring to the comments of Shearman J in 1914), and it was used by the Scott Committee (paras D.30 – D.33 below). The 1919 Act itself (in rule (3)) refers to "special suitability or adaptability": see para D.32 below. But, as it appears from the cases referred to below, other terms are also used (eg "peculiar advantages", "natural value", "special value").

11 Reported in *Browne and Allan's Law of Compensation* (2nd ed 1903) p 659, and cited (as the earliest reported example of the principle) by Lord Hodson in *Rugby Joint Water Board v Foottit* [1973] AC 202, 219.

12 "When a railway company, or any other person who takes land under compulsory power, is to pay for that land, you are not to make them, as it were, buy it from themselves; you are not to take the value which, in their hands, it would acquire, and make them pay for it as if they had no compulsory power…" (*ibid, per* Stephen J).

13 *Per* Grove J; quoted by Buckley LJ in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, 36 (emphasis added). (The words after "special purpose" were omitted from Lord Hodson's quotation from the same passage in the *Rugby Water Board* case.)

14 *In re Gough and Apatria, Silloth and District Joint Water Board* [1904] 1 KB 417. This seems to be the first use of the word "scheme" in this context.

15 "If there is a site which has peculiar advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation – if the site has peculiar advantages for supplying in that sense": *ibid, per* Lord Alverstone CJ, at 422.

16 *Ibid.*

Special purchaser

D.11 Although not directly relevant to the no-scheme rule, it is useful to note another valuation principle, established by the Court of Appeal in 1914, which was part of the background to rule (3) in the 1919 Act.[17] The case concerned the valuation of a house for tax purposes.[18] As a house on its own it was worth £750, but to an adjoining nursing-home it had an added value of £250 for the purpose of extending the home. It was held that this "special purchaser" addition was not to be excluded. Furthermore, this did not mean that the valuer allowed simply "one extra bid". As Swinfen Eady LJ said:

> Such an assumption would ordinarily be quite erroneous. The knowledge of the special bid would affect market price, and others would join in competing for the property with a view to obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase.[19]

D.12 As will be seen, rule (3) in the 1919 Act required such special purchaser value to be excluded in assessing compensation for compulsory purchase, but this part of the rule was eventually repealed in 1991.[20]

From *Lucas* to *Fraser*

D.13 The effect of the no-scheme rule was discussed in four important cases, in the decade before the Scott Committee, two English cases (one in the Court of Appeal and one in the Divisional Court) and two Canadian cases (in the Privy Council).

The English cases

D.14 In *re Lucas and Chesterfield Gas and Water Board* (1909)[21] is often taken as the leading authority for the rule. The case again concerned the acquisition of land for a reservoir, and the issue was whether the suitability of the claimant's land for the purpose of constructing a reservoir could be taken into account. In a classic[22] statement of the rule, Fletcher Moulton LJ said:

[17] *IRC v Clay & Buchanan* [1914] 3 KB 466 The case was cited with approval by the Privy Council in the *Indian* case (see para D.34 below).

[18] The question was the amount which it would realise "if sold… in the open market by a willing seller…": Finance Act 1910, s 25(1).

[19] [1914] 3 KB 466, 476. For a modern application of this approach, see *Mercury Communications Ltd v London & India Dock Investments Ltd* (1993) 69 P&CR 135, 158 (Judge Hague QC). He criticised the decision in *BP Petroleum v Ryder* [1987] RVR 211 (Peter Gibson J) for having "resurrected the 'one more bid' argument".

[20] See para D.93 below.

[21] [1909] 1 KB 16. The powers were conferred under a local Act (Chesterfield Gas and Water Board Act 1904): pp 18–19.

[22] It was relied on by both majority and minority in the leading modern House of Lords authority, *Rugby Water Board v Shaw-Fox* [1973] AC 202, at p 214 (Lord Pearson), p 243 (Lord Simon) See also (in Australia) *Crompton v Commissioner of Highways* (1973) 5 SASR 301, *per* Wells J: "[f]undamentally, the law is founded on the classic formulation by Fletcher-Moulton LJ *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, at 29–30."

> The owner receives for the lands he gives up their equivalent, ie that which they were worth to him in money…But the equivalent is estimated to be the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule that this value is to be estimated *as it stood before the grant of the compulsory powers*. The owner is only to receive compensation based upon the market value of his lands *as they stood before the scheme was authorised by which they are put to public uses*. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.[23] (emphasis added)

This passage confirms the no-scheme rule as one aspect of the "value to the owner" principle. It also implies a relatively narrow approach, under which the scope of the "scheme" is limited to that whereby the subject land is "put to public uses", and there is no looking back beyond the time of authorisation.[24]

D.15 The other significant feature of the case related to the precise limits of the "special adaptability" principle. On this aspect, there was a significant difference between the two leading judgments. Fletcher Moulton LJ considered that, where the land had special value only for the purpose of the acquiring authority, it must be disregarded. However, if that value also existed for other purchasers, it could be taken into account, even if those purchasers would themselves require statutory powers to realise that potential.[25] Thus, it was essential that there should be evidence of *some* market, apart from the interest of the acquiring undertaker,[26] even if that market might be limited to those having, or able to get, statutory powers.[27]

D.16 Vaughan Williams LJ, however, went further. He agreed that the market should be treated as including others who might be able to obtain statutory powers. But he considered that the acquiring authority itself should also be considered as a potential buyer:

> I agree… that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable… also on the ground that *the fact that the board itself might become possible purchasers who*

[23] *Ibid*, p 29.

[24] Vaughan Williams LJ also thought that the matter should be looked at "as it existed before the promoters had obtained their powers": p 28.

[25] *Ibid*, p 31. The arbitrator had found that the site had "particular natural advantages" for a reservoir": p 19.

[26] He had in mind that "in a densely populated country like England" a particular tract suitable for a reservoir might be "useful in this way to more than one locality, and may thus be the subject of competition between them": *ibid*.

[27] *Ibid*, p 31–2: "In the case of waterworks for public supply promoters must always arm themselves with parliamentary powers, since distribution would otherwise be impracticable. But if by its prudence and foresight a public authority had by private negotiation secured a desirable site for a reservoir for the water supply of its own district, it would not be in accordance with the practice of Parliament to refuse to it the powers necessary to its effective use for that purpose."

would give a special price for the land ought to be considered.[28] (emphasis added)

However, the valuer had erred in treating the "probability and the realised probability as identical". What had to be valued was, not the "realised" potential of the land for the acquiring authority's purpose, following the actual grant of statutory powers, but simply "the possibility" of the site going into the market for that purpose.[29]

D.17 On this aspect, the third member of the Court, Buckley LJ appears to have agreed with the approach of Vaughan Williams LJ. He could see no reason why the answer should depend on the number of potential competitors.[30] However, since the result of the case was not affected by the difference on this point,[31] the existence of a majority for this view was not treated as conclusive in later cases.

D.18 In *Sidney v North Eastern Railway Company* (1914),[32] the Divisional Court preferred the approach of Fletcher Moulton LJ. The facts were unusual. The railway company had taken over a stretch of line used as a private colliery railway and incorporated it into their main lines, overlooking the fact that their wayleave was limited in time. They subsequently obtained statutory powers to acquire the freehold. It was held that the valuer should take into account the possible market from adjoining colliery owners, but not the special need of the railway company itself:

> … the umpire should have regard to the special adaptability of the land for railway purposes but not to the fact of the existence on it of an integral part of a public railway, or to the fact of such railway forming part of the main line.[33]

D.19 Shearman J noted problems caused by the concept of "special adaptability", which he traced to *Ossalinsky's case* (see above):

28 *Ibid*, p 25.

29 *Ibid*, p 28.

30 *Ibid*, pp 35–6: "The appellants admit… that, if there be three persons whose combined properties offer special adaptability for some person, each is in compensation under the Act entitled to receive the fair value of his land having regard to its special adaptability…But if one of the three is desirous of buying out the other two, then, if their argument is right, the element of special adaptability is removed, because he as one of the three can prevent the user for the special purpose… This appears to me to be a suicidal argument."

31 On the facts of the case, the difference between Vaughan Williams LJ and Fletcher Moulton LJ was not material to the decision, because the arbitrator was held to have erred in law on either view (see p 32).

32 [1914] 3 KB 629.

33 *Ibid*, p 635, *per* Avory J. The owners were claiming "… an enhanced value… on the sole ground that the railway company are placed in great difficulty from the fact that if the wayleave expired they would be left, not with a main line on the premises, but with a bit of the mainline ending at one place and another bit beginning at another place…" (p 639, *per* Shearman J).

> … the ingenuity of claimants has been largely exercised in discovering or attempting to discover special adaptability of some sort in any kind of land compulsorily taken. [34]

In his view "special adaptability was nothing more than an element in market value".[35] Following the approach of Fletcher Moulton LJ in *Lucas*, he thought that the suitability for railway purposes could be taken into account, but not "the exigencies of the N E Railway Company".[36]

D.20 Rowlatt J summarised the general principle as then understood:

> It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give it as a marketable commodity, provided that the existence of the scheme is not allowed to add to the value.[37]

D.21 Another useful summary of the perceived effect of the English cases, shortly before the intervention of the Scott Committee, was given in *South Eastern Railway Company v LCC*.[38] This concerned a strip of land taken from the railway company for the widening of the Strand. The main issue was whether compensation for the land taken should be reduced to reflect the enhanced value of the adjoining land retained by the company. The answer was no (in the absence of statutory provision to that effect). Eve J set out six principles:

> (1) The value to be ascertained is the value to the vendor, not its value to the purchaser, (2) In fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3) market price is not a conclusive test of real value; (4) *increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded;* (5) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6) the true contractual position of the parties – that of purchaser and vendor – is not to be obscured by endeavouring to construe it as another contractual relation altogether – that of indemnifier and indemnified.[39]

34 *Ibid*, p 640.

35 *Ibid*, p 640. He gave as an example the "adaptability" of land bordering a river for the purposes of potential purchasers wanting to establish a wharf.

36 *Ibid*, p 640.

37 *Ibid*, p 636. Rowlatt J's judgment on the facts seems to be affected by the "one extra bid" argument, which was rejected by the Court of Appeal in the *Clay* case, decided a few weeks later (see para D.11 above).

38 [1915] 2 Ch 252.

39 [1915] 2 Ch 252, 259 (emphasis added).

D.22 Proposition (4) is particularly important because it was cited as authority for the rule in the *Pointe Gourde* case itself. In requiring disregard of *any* value attributable to the acquiring authority's undertaking, Eve J seems implicitly to have been adopting the view of Fletcher Moulton LJ in *Lucas,* rather than that of Vaughan Williams LJ. In that respect, as we have seen, he was consistent with the Divisional Court in *Sidney*.

The Canadian cases

D.23 The judgments in *Lucas* (without distinction) were cited with approval by the Privy Council in two Canadian cases, both involving the acquisition of river land for hydro-electric projects.

D.24 In *Cedars Rapids Manufacturing and Power Co v Lacoste* (1914),[40] two separate pieces of land ("the three subjects") in the St Lawrence river were acquired in connection with a power generation scheme. The acquiring company had been granted powers under a Canadian statute to develop water powers on a stretch of the river, and had obtained a lease of the river bed and the right to abstract water.[41] The arbitrators' award had been based on agricultural value; the Supreme Court of Canada had adopted a figure based on a proportion of the value to the undertakers.[42] The Privy Council rejected both approaches:

> Where… 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 whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects[43] which made the undertaking a realised possibility… [44]

D.25 The valuation evidence had proceeded on the wrong basis. The witnesses had treated the "three subjects as forming parts of a completed whole", thus wrongly treating the scheme as "a realised probability", contrary to the statement of Vaughan Williams LJ in *Lucas* (see above). The error went further than *Lucas*:

[40] [1914] AC 569. "The law… has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board,* where Vaughan Williams and Fletcher Moulton LJJ deal with the whole subject exhaustively and accurately." (p 576, *per* Lord Dunedin).

[41] "The scheme" was to construct a dyke in the river bed between the three pieces of land, which would impound all the waters in the river north of the dyke: *ibid*, p 575.

[42] *Ibid*, p 578: "All the witnesses persist in looking at the three subjects as forming parts of a completed whole and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers".

[43] As far as one can see from the report, the reference to "the other subjects" (in the words emphasised) was intended to include such things as the lease of the river-bed, and the water-abstraction rights: *ibid*, p 575.

[44] *Ibid*, p 576.

> For in that case there was only one subject. Here there are three subjects detached, and the value which all the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated. The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but *with the possibility of that or any other company coming into existence and obtaining powers…*[45]

D.26 Thus, the valuer was required to ignore, not merely the compulsory powers granted for the acquisition of the three islands, but all the powers granted to the power company for its scheme. However, although the existence of the *actual* statutory powers was to be ignored, the *possibility* of such powers being granted in the future, to that or another company, was to be taken into account. This exercise in "possibilities" was similar to that envisaged by Vaughan Williams LJ,[46] but neither he nor the Privy Council gave any guidance as to how it was to be carried out in practice.[47]

D.27 In the other Canadian case, *Fraser v City of Fraserville* (1917),[48] river falls ("the Great Falls") were expropriated by an electric light undertaking, which had previously expropriated lands higher up the river and was in the course of constructing a reservoir to increase the power of the falls.[49] The arbitrator had arrived at his award by taking a proportion of the capitalised profits to the undertakers, including, apparently, those due to the extra power, which would result from the reservoir.[50]

45 *Ibid*, p 579 (emphasis added).

46 See para D.16 above.

47 As the ALRC commented (*op cit*, para 234): "The Privy Council gave no guidance as to how the Canadian court was to assess this possibility and ascribe a value nor did it explain why it was right in principle to allow the owner to take some part of the value to the hypothetical statutory authority but no part of the value to the actual statutory authority."

48 [1917] AC 187.

49 The falls had been used for electricity generation for some years before the lease and business were sold (voluntarily) to the municipality in 1905; in 1907, the municipality adopted a bye-law authorising the construction of a reservoir higher up the river, with powers of expropriation; the bye-law authorising acquisition of the Great Falls was passed in 1909: *ibid*, pp 189–90.

50 This seems to be the effect of the judgment below (cited in French by the Privy Council):

> Ils ont, comme dans la cause citée plus haute, commis l'erreur de faire participer l'expropriée aux bénéfices de la plus-value, donnée à la propriété, par la réalisation de l'objet pour lequel acquistion en était faite. Ils font payer à la ville, non pas la valeur d'un pouvoir d'eau pouvant développer 300 hp, qui est ce que les propriétaires vendent, mais moitié de la valeur d'un pouvoir additionnel de 1200 hp, qui est ce que la ville doit réaliser par l'exécution des travaux qu'elle a en vue ou en voie d'exécution.

Ibid, p 193.

D.28 The Privy Council agreed with the Court below that the award was erroneous. Lord Buckmaster, summarised "the substance" of the earlier cases, including *Lucas, Sidney* and *Cedar Rapids*:

> … the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, *excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired*, the question of what is the scheme being a question of fact for the arbitrator in each case.[51]

D.29 This passage is significant, in that its use of the word "scheme" was echoed in *Pointe Gourde* itself.[52] Also, it establishes that the identification of the scheme is a "question of fact" for the arbitrator, rather than one of law for the courts. This is stated as a simple proposition, without further reasoning or citation. Nor does the Privy Council give any specific guidance as to the scope of the "scheme" on the facts of the case, or whether it included the reservoir, which was under construction at the same time, but under a separate bye-law. However, it was the respondent's submission that "the reservoir and the works upon the appellant's land were all one scheme, and not two separate schemes".[53] At the very least, the Privy Council did not reject this as a possible view of the facts.[54]

The Scott Committee

D.30 The establishment of the Scott Committee, at the end of the First World War, is described in CP 165.[55] One of the issues it sought to address was the problem of speculative values, arising from the need to take account of "special adaptability", as highlighted in the *Sidney* case. Since the Committee's reasoning provides the background to what became rule (3) in the 1919 Act, it deserves full citation:

> The [Courts'] own decisions have quite logically said that all "potential" as well as actual value should be included under the head of "value to the owner." But under the cloak of this criterion merely theoretical and often highly speculative elements of value which had no real existence have crept into awards as if they were actual; while elements of remote future value have all too often been discounted, and valued as if there were a readily available market.[56]
>
> …the special adaptability of land for a particular purpose may be taken into account in assessing the price to be paid for land, even where that purpose is the very purpose for which the land is taken,

51 *Ibid*, p 194 (emphasis added).

52 See para D.42 below; but the words "for which" (rather than "underlying") more clearly direct attention to the future, rather than the past.

53 *Ibid*, p 188.

54 In *Sprinz v Kingston upon Hull City Council* [1975] RVR 178, 183 (n 126 below), *Fraser* was cited by counsel for the authority without dissent from the claimant, for the proposition that: "the fact that the proposals involved separate acquisitions, by instruments or time, does not prevent the joint proposals constituting one scheme".

55 CP 165, para 2.5.

56 The Scott Report, para 8.

> and even although it is not used, or at the time intended to be used, and even although without getting neighbouring owners to agree upon a joint scheme of development it could not be used for that purpose, provided its adaptability is such that as to render it available for sale to other persons than the promoters. And it is not necessary for the owner to show that at any given moment there are actual competitors for the land, if by reason of the situation and character of the land there are what may be called natural customers for it.[57]

D.31 The Committee considered that potential competition from statutory undertakers should not be taken into account:-

> 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. In our view, any competition between Public Authorities or any other statutory undertakers for the same land should be determined by the decision of the Sanctioning Authority… But, while we would exclude as a basis of market value any possible competition for the land between statutory undertakers, we would not exclude the competition of those who require the land for any purpose for which statutory powers are not required.

D.32 They recommended that:

> … the owner should not be entitled to any increased value for his land which can only arise, or could only have arisen by reason of the suitability of the land for a purpose to which it could only be applied under statutory powers.

This was the genesis of the main part of what became rule (3) in the 1919 Act:[58]

> 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*[59]*]* the requirements of any Government Department or any local or public authority.[60]

57 *Ibid*, para. 10. Similar observations had been made in the *Sidney* case itself (see para D.18 above).

58 The Acquisition of Land Act 1919, s 2(3), replaced (with amendments) by the Land Compensation Act 1961, s 5(3).

59 These words, which followed a separate recommendation of the Scott Committee, designed to counter the effect of the decision in *IRC v Clay & Buchanan* [1914] 3 KB 466 (see para D.11 above), are not relevant to the discussion of the no-scheme rule; they were repealed by the Planning and Compensation Act 1991.

60 The Act applied initially to compulsory acquisition by "any Government Department or any local or public authority" (s 1(1)); "public authority" was defined as "any body of persons, not trading for profit, authorised by or under any Act to carry on a railway, canal, dock or other public undertaking". It was subsequently extended to cover most bodies exercising compulsory purchase powers. See para D.96 below.

D.33 As appears from the above extracts from the report, the Committee's intention in this rule was to exclude *any* value attributable to the needs of statutory bodies, whether of the acquiring authority itself or of possible competing authorities (a possibility which it attributed to "an imperfect system for the granting of statutory powers"). The only relevant market was one consisting of "those who require the land for any purpose for which statutory powers are not required". Thus the intended effect was to go further, in disregarding the potential demands of statutory authorities, than either of the leading judgments in *Lucas*.

PHASE (2): FROM 1919 TO 1959

The *Indian* case (1939)[61]

D.34 The Privy Council's judgment in this case contains the most detailed analysis of the relevant principles at this level. However, the relevant Indian statute contained no equivalent of rule (3) of the 1919 Act. Accordingly, the relationship of that rule to the principles explained by the Privy Council was left uncertain.

D.35 A Harbour Authority had compulsorily acquired land from the claimant, containing fresh water springs, for the purpose of providing a water supply to the harbour (then under construction) and its hinterland. The harbour scheme had begun years before. The need for a fresh water supply arose from the discovery that existing supplies were affected by malaria. In practice the only possible purchaser of the land as a water supply was the Harbour Authority.[62] The Court of Appeal had held (following Fletcher Moulton LJ in *Lucas*) that, because the value of the Spring as a source of drinking water arose entirely from the scheme carried out by the Harbour Authority, the value for that purpose should be ignored.[63]

D.36 The Privy Council disagreed. Unlike the judges in *Cedars Rapids* and *Fraser*,[64] Lord Romer recognised the significant differences between the two main judgments in *Lucas*[65] ("diametrically opposed to one another"), and preferred that of Vaughan Williams LJ.[66] Even where the special value existed only for the acquiring authority, that should be taken into account in considering what a willing purchaser would pay:

[61] *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 ("the *Indian* case" is a convenient, and frequently used, shorthand).

[62] *Ibid*, p 327.

[63] *Ibid*, pp 326–7. Before the Privy Council, the authority maintained the position that the "purpose of the acquisition (here the harbour or malarial schemes) must be excluded"; the claimant argued that since the land was "left out in the original scheme", the value resulting from it should be taken into account: pp 306–7.

[64] Lord Romer referred to Lord Buckmaster's formulation of the rule in *Fraser*, but observed that it "makes no reference whatever to the present question": *ibid*, p 321. Lord Romer does, however, appear to go further than the Canadian cases, in apparently requiring the authority's *actual* proposals for the site to be taken into account, rather than merely the *possibility* of such proposals: see para D.37 below, and cf paras D.16 and D.25 above.

[65] See paras D.15 – D.16 above.

[66] [1939] AC 301, 320–1. He criticised the decision in *Sidney v NE Ry Co* (see above) for similar reasons: pp 321–3.

> … if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it…
>
> … even where the only possible purchaser of the 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 way that he would ascertain it in a case where there are several possible purchasers…[67]

D.37 Lord Romer also commented on the use of the term "scheme" by Fletcher Moulton LJ in *Lucas*. He thought it correct to speak of disregarding the "scheme", if by that was meant simply "the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality". But that would not justify entirely excluding the acquiring authority as a potential purchaser:

> The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value.

On the other hand, he expressly rejected an interpretation of the "scheme" which equated it with (and required disregard of) "the intention formed by the acquiring authority of exploiting the potentiality of the land". Thus, it seems, their actual proposals for the land, as willing purchasers without compulsory powers, were to be taken into account in the valuation.[68]

D.38 The *Indian* case, therefore, apparently gave approval to a version of the no-scheme rule which was significantly narrower than that which had been adopted in the English cases before 1919, as summarised by Eve J in the *SE Railway* case.[69] This may not at the time[70] have been seen as particularly important in the English context, since by then those cases had apparently been overtaken by rule (3) of the 1919 Act.

67 *Ibid*, pp 316–7, 322.

68 *Ibid*, pp 319–20.

69 See para D.21 above. Eve J's formulation of the rule was not apparently cited, in argument or in the judgments, in the *Indian* case.

70 In any event, at the time of this case (1939), the precise scope of the no-scheme rule was probably not seen as a very live issue.

The *Pointe Gourde* case

D.39 It was not until 1947, in the *Point Gourde* case[71] itself, that the relationship between the no-scheme rule and the rule (3) was considered by the higher courts. Unfortunately, the reasoning given by the Privy Council, in relation either to the earlier cases or to the statute, was limited.

D.40 A quarry in Trinidad was acquired in connection with the establishment of a US naval base.[72] As the stated case showed, the land had "a special suitability or adaptability" for producing quarry products, and had a market value as quarry land before the acquisition. The quarry business of the owners was totally extinguished by the acquisition, and in assessing compensation the tribunal "was largely guided by the estimate it formed of the prospective profits". Of the total award of $101,000, the sum of $86,000, which was not challenged, included the value of the quarry as a going concern, and made allowance for its "special suitability or adaptability" for that purpose. The issue concerned an additional sum of $15,000, explained in the case as follows:

> The tribunal considered that the market value of the quarry land and business would be increased if the United States needs were supplied from this quarry land on a commercial basis as greater prospective profits might be expected.

As it was put in the "facts taken from the judgment of the Judicial Committee", the sum of $15,000 was "evidently awarded as the measure of the loss of that element of prospective extra profit".[73]

D.41 The sole issue[74] raised by the local court was whether this item was excluded by rule (3) (which was reproduced in the relevant statute[75]). It was held by the Privy Council that rule (3) had no application, because it was concerned with the *use* of the land itself, not of the *products* of the land. The use of the quarried stone in construction of the naval base, though of particular importance to the United States on account of their special needs, did not constitute a special adaptability *of the land* for any purpose.[76]

D.42 However, in the Privy Council it was argued, in the alternative, that the $15,000 should be disallowed under the no-scheme rule. This argument succeeded. Lord MacDermott stated the rule as follows:

[71] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

[72] The UK Government had agreed with the US Government in March 1941 to lease land required for naval bases. Certain land belonging to the claimant, at Pointe Gourde in Trinidad, was required for the establishment of one such base. It was acquired compulsorily in April 1941, under powers conferred by the Land Acquisition Ordinance 1941: *ibid*, p 566.

[73] *Ibid*, pp 566–8.

[74] See *ibid*, p 568. Although this was stated as the issue for determination, the judgment of the Full Court, as Lord MacDermott observed, appeared to be based on the no-scheme principle: *ibid*, pp 572–3.

[75] Section 11(2) of the Land Acquisition Ordinance, No 14 of 1941.

[76] [1947] AC 565, 572.

> 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.[77]

He rejected an argument that the relevant scheme was the acquisition of the quarry land, not the construction of the naval base, because there was a specific finding in the case that the land acquired was "required by the United States for the establishment of a naval base in Trinidad."[78]

The importance of Pointe Gourde

D.43 Lord MacDermott's statement of the principle has formed the starting point for subsequent discussion, and the case has given its name to the rule. However, for a leading case, the judgment is surprisingly short of legal reasoning.

D.44 The result itself is not unexpected, but the reasoning seems the wrong way round. The interpretation of rule (3) was curiously narrow. As we have seen, the reference to "special adaptability" in rule (3) was related to the use of that, and similar terms, in earlier cases. As Shearman J had said in *Sidney*, special adaptability was "nothing more than an element in market value".[79] The Scott Committee might have been surprised to learn that the special locational suitability of a quarry to provide materials for construction of a naval dock was not within the rule.[80]

D.45 By contrast, the application of the judicial rule was unexpectedly wide. The *Indian* case, although the most recent consideration of the subject by the Privy Council,[81] was ignored in Lord MacDermott's judgment. The word "scheme" was applied without any reference to Lord Romer's discussion of its correct use, and misuse.[82] Instead, reliance was placed on a first instance summary (Eve J in *SE Railway*) of English authorities that had been expressly disapproved by the Privy Council. Under the *Indian* case, the only "scheme" to be disregarded would have been the fact of compulsory purchase. The special interest of the US Navy in the products of the quarry would not have been left out of account; compensation would have

[77] *Ibid*, at p 572. He cited with approval Eve J's formulation of the rule in *SE Railway v LCC* (see above). The only other case cited in the judgment was *Fraser v Fraserville* (see above). It is to be noted that Eve J did not use the term "scheme", but referred to an increase in value "consequent upon the execution of the undertaking for or in connection with which the purchase is made…" (see above).

[78] *Ibid*, p 573.

[79] See para D.19 above.

[80] On this interpretation, even if rule (3) had been applicable in the *Indian* case, it would have had no effect; again, it was the special suitability of a *product* of the land (the water from the springs), rather than of the land itself, which gave the added value. However, it is difficult to see that as a significant distinction from, eg, the reservoir cases (see paras D.14– D.29 above), where the special suitability lay in the topography of the land, allowing it to be used for a reservoir, rather than in the existence of a water-supply on site.

[81] It was cited in argument: *ibid*, at p 569.

[82] See para D.37 above. In *Waters*, the Court of Appeal suggested that the difference between the two cases turned on their particular facts: in the *Indian* case the acquisition of the water supply arose from a separate decision, some years after the start of the harbour project; in the *Pointe Gourde* case, the quarrying and the land for the naval base was acquired as part of the same order.

included the amount which the Navy would have been willing to pay, in friendly negotiations, for that extra value.[83]

D.46 Right or wrong, however, the *Pointe Gourde* case established the conventional form of the modern rule. Two particular features of the case were to become important in the subsequent development of the rule. First, Lord MacDermott's formulation referred to the scheme *underlying* the acquisition, rather than (as in *Fraser*)[84] the scheme *for which* the acquisition was authorised. There is no suggestion that this was thought to be a significant difference. Indeed, the relevant finding as to the scheme (see above) used the word "for", and was expressed in terms appropriate to the *Fraser* test. However, as will be seen, the change of terminology was to lead, in subsequent cases, to a wider interpretation of the scope of the "scheme", both spatially and temporally.

D.47 Secondly, the no-scheme rule was used to exclude value attributable to use of land other than the subject of the valuation.[85] Previous cases had been concerned principally with the special suitability of the subject land for development on *that* land. As Denyer-Green notes, the proximity of the naval base would have given the quarry added value, even if it had not been compulsorily acquired. He comments:

> … the latter value was betterment and for the first time it was excluded from the compensation. Hence the significance of the case to present day acquisitions where market value may well be enhanced by acquiring authority schemes.[86]

FROM 1947 TO 1959

The 1947 Act

D.48 The *Pointe-Gourde* case (1947) was decided by the Privy Council at almost the same time as the planning system of this country was being radically altered by the Town and Country Planning Act 1947. The general features of the 1947 Act were outlined in Part II of CP 165.[87] The most durable aspect was the imposition of universal planning control, under a system the main elements of which have

[83] It is to be noted that the stated case did not in terms raise the *Indian* case issue. The extra sum was expressed in the stated case as the additional profitability of the quarry business arising from the navy project, not (as under the *Indian* case) an additional sum which the navy would have paid for the land in friendly negotiations. Cf Keith Davies in *Law of Compulsory Purchase and Compensation* (5th ed 1994), at pp 130–2; he suggests that the tribunal's real error was in awarding the value of the products in addition to the value of the land: "(it)… is rather like saying that the market price of a farm as a going concern includes not only the land, the goodwill and the equipment, but also the retail value of all the produce into the bargain." However, this interpretation seems doubtful; as far as one can judge from the report, the $15,000 was the increase in the going concern value of the quarry undertaking, not the value of the products as such.

[84] See para D.28 above.

[85] Although the quarry seems to have been included in the same compulsory acquisition as the land needed for the actual naval base ([1947] AC 565, 566, referred to at n 72 above), it appears to have been treated it as a separate item for valuation purposes (*ibid* p 567).

[86] Denyer-Green, p 217–8. *Fraser* (para D.27 above) might be an earlier example.

[87] See CP 165, para 2.8.

survived until today. The other main element, which did not survive, was the expropriation by the state of all development value.

D.49 The assumption was that most development would be promoted by public authorities, using compulsory powers where necessary, on land designated for that purpose in a statutory plan. Where land was developed privately, a development charge was payable. Where land was compulsorily acquired, compensation was based on existing use value, which would normally exclude any potential value for other uses, including the authority's own scheme. Thus the "no-scheme rule" had little relevance.[88] There was however a statutory rule to ensure that, in valuing land, any depreciation caused by its designation for compulsory purchase, was disregarded.[89]

Case law

D.50 In the following period, in so far as the no-scheme rule was mentioned, it was not by reference to the *Pointe Gourde* case.[90] That case was referred to in a number of Lands Tribunal decisions as authority on rule (3) of the 1919 rules.[91]

D.51 The only relevant higher authority, from the years before 1959, appears to be *Lambe v Secretary of State for War* in the Court of Appeal.[92] In that case, the Secretary of State had purchased the freehold of a territorial army headquarters building, over which the territorial army already had a lease. The Court of Appeal accepted that the special interest of the Secretary of State in marrying the two interests could be taken into account. It approved the Tribunal's valuation described as being "assessed in conformity with the judgment in the *Indian* case…" In doing so, it adopted Lord Romer's definition of the "scheme", and rejected the argument of the acquiring authority that *Pointe Gourde* required the Tribunal to disregard the price which the authority would be prepared to pay in friendly negotiations. Parker LJ adopted Lord Romer's words:

> The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.[93]

D.52 The restoration, in 1959, of the market value principle opened a new chapter in the development of the no-scheme rule; which we consider in the next section.

88 See the discussion in *Kaye v Basingstoke Corp* (1969) 20 P& CR 417, 453.

89 Town and Country Planning Act 1947, s 51(3). An expanded version of this became s 9 of the 1961 Act (see below).

90 It is of interest that, even in 1962, in the last edition of the then standard work on compensation (Cripps, *Compulsory Acquisition of Land* (11th ed)), the *Pointe Gourde* case is referred to (para 4–114) as an authority on rule (3), rather than for the judicial rule which later took its name. That rule is explained by reference to *Lucas*, *Fraser*, and the *Indian* case: Cripps, paras 4–014, 015, 111.

91 *Lester v Secretary of State for War* (1951) 2 P &CR 74; *London Investment and Mortgage Co Ltd v Middlesex County Council* (1952) 2 P & CR 331; *Glover v Edmonton Corp* (1953) 3 P&CR 451; *Lambe v Secretary of State for War* (1954) 4 P & CR 230. In one Lands Tribunal case, it was cited as affirming the "well-settled principle" stated by Eve J in the *S E Ry* case: *Cooper v Smallburgh RDC* (1958) 9 P & CR 396.

92 [1955] 2 QB 612. The case is discussed further below at paras D.87 – D.91.

PHASE (3): MODERN DEVELOPMENT

The Town and Country Planning Act 1959

D.53 The 1959 Act was intended to restore the market value principle of compensation as it applied before the 1947 Act. Its main provisions were reproduced in the 1961 Act, in which it was consolidated with (inter alia) the extant provisions of the 1919 Act (including rule 3). In that form, with some later amendments, they remain part of the current law. In restoring market value, it was thought necessary to make specific provision to take account of the advent of universal planning control.[94] The solution of the 1959 Act was to make specific provision for the planning assumptions to be made in the valuation of the subject land (ss 2-8). These rules became sections 14ff of the 1961 Act.[95]

D.54 Separate provision (section 9) was made for the disregard of increases or decreases in value attributable to actual or prospective development of other land within the authority's scheme. One significant innovation in section 9 was the attempt to prescribe, by way of a Table, the application of the principle to different categories of project, such as new towns, and areas of comprehensive development. This became section 6 of, and Schedule 1 to, the 1961 Act.[96] Section 9 also retained the 1947 rule, relating to disregard of depreciation due to designation for compulsory acquisition, but extended it to depreciation due to any "indication" (in the development plan or otherwise) of the likelihood of compulsory acquisition. This became section 9 of the 1961 Act.

Government explanations

D.55 The general purpose of the new rules was explained by the Lord Chancellor introducing the Bill:

> The new basis of compensation under the Bill is founded on the principle that the owner of the land acquired should receive the value which he could expect to get for his land in a private sale in the open market if there were no proposal by any public authority to buy the land…
>
> But nowadays… the value of land depends very much upon planning permissions. We need therefore to know the answer to the question: "With what planning permissions could the land be expected to be

93 *Ibid*, at 622.

94 The background was explained by Lord Denning in *Myers v Milton Keynes Development Corp* [1974] 1 WLR 696, 702. It is doubtful whether such elaborate provision was in fact needed; in jurisdictions unaffected by the 1961 Act, the no-scheme rule has been able to take account of any appropriate planning assumptions, without statutory assistance: see eg *Melwood Units v Commissioner of Main Roads* [1979] AC 426 PC (Queensland) (Compensation, following severance of a development site by a new road, was assessed on the basis that, but for the road scheme, planning permission would have been granted for the whole site).

95 See paras D.63 – D.65 below.

96 See para D.58 below.

> sold in the open market if it were not wanted by a public authority?" [Sections 2 to 8][97] seek to provide the answer to this question…
>
> [Section 9] seeks to protect acquiring authorities from paying for value clearly created by the very scheme for which they are buying the land. It *enunciates and extends* the well-established principle in compensation that "value due to the scheme" must be ignored. The same clause protects owners whose land is being bought from depreciation caused by the threat of a public acquisition.[98] (emphasis added)

D.56 Thus it is clear that the purpose of the new provision was to give statutory effect to, but also to extend, the no-scheme rule as developed judicially, taking account of the modern system of planning control. The use of the word "enunciates" suggests that it was seen as replacing the judicial versions of the rule. The difference between the wider (*Pointe Gourde*) and narrower (*Indian* case) versions does not seem to have been noticed.

The Land Compensation Act 1961

D.57 The 1961 Act was a consolidation, and was not intended to change the law. However, it had the effect of bringing together in one statute two sets of rules based on the no-scheme principle (section 5(3) from the 1919 Act; and sections 6ff from the 1959 Act), without any real attempt to co-ordinate them.[99]

Section 6 and the no-scheme rule

D.58 As will be seen, section 6 (with the First Schedule) has been subject to particular criticism: the convoluted wording was difficult to interpret;[100] the section applied to "other land", but made no equivalent provision for the subject land;[101] and the statute failed to indicate whether or not the new rules were intended as a complete no-scheme code, or simply as a supplement to the judicial rule.[102]

D.59 However, if one ignores these problems, the general approach was reasonably clear. The legislature attempted to take account of the different circumstances in which compulsory purchase orders might be made, under the post-war planning regime. Some would be for single, self-contained projects; others would be related to much

[97] These are the section numbers as they became in the 1959 Act. In the 1961 Act, ss 2–8 became ss 14–18; s 9 became ss 6–9.

[98] *Hansard* (HL) 14 April 1959, col 578.

[99] We have referred elsewhere to the uncertainty about which rules apply only to the subject (or "relevant") land: CP 165, para 5.14. There was also a confusing change of the order of the provisions. In the 1959 Act, the provisions for planning assumptions on the *subject* land, were followed logically by the provisions relating to disregard of development on *other land* within the same CPO or designation. In the 1961 Act, the order was reversed. Sections 9(2) to (5) of the 1959 (dealing with "*other* land"), became ss 6 to 8 of the 1961 Act, in a group headed "General Provisions" (immediately following the 1919 rules, reproduced in s 5). The rules for planning assumptions on the *subject* land are in ss 14 ff, under a separate heading: "Assumptions as to planning permission".

[100] See para D.68 below.

[101] See para D.69 below.

[102] See para D.68 below.

more extensive designations, such as comprehensive development areas or new towns. Thus, different rules were laid down for disregarding the value attributable to development on associated land, depending on whether the associated land was: within the same compulsory purchase order (case 1); within the same comprehensive development area (case 2); within an area designated under the New Towns Act (case 3); within a town development area (case 4); within an urban development area (case 4A); or within a housing action trust area (case 4B) (The last two were added in 1980 and 1988 respectively, by the Acts which introduced those designations[103]).

D.60 On a compulsory purchase order for the purposes of a self-contained project (case 1), there was to be a one-stage application of the no-scheme rule. Changes in the value of the subject land, attributable to development (or the prospect of it) for the same purposes on other land within the same order, was 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.[104]

Thus, under this head only the value effects of the particular proposal to acquire were to be disregarded.

D.61 Where, however, the order was for land within one of the designations specified in the Schedule, there would be a two-stage application of the rule. Thus, for example, where the order was for land within an area designated for a new town (case 3), there were to be disregarded, not only changes of value attributable to development for the purposes of the particular proposal (as above); but also changes in value attributable to development "in the course of the development of the new town", in so far as that development "would not have been likely to be carried … if the [new town] area… had not been [so] designated…".[105] Thus, under this head both the value effects of the particular proposal, and also those of the original designation as a new town, were to be left out of account.[106]

D.62 This analysis shows why the new rules were rightly described to Parliament as "extending" the existing rule. The one-stage test for case 1, taken on its own, was a reasonably close representation of the rule as stated, for example, by Eve J.[107] It required one to look no further than the purpose or "undertaking" for which the particular compulsory purchase order was made. However, the two-stage test for the other cases went much further than any application of the rule in the previous

[103] Local Government, Planning and Land Act 1980, s 134; Housing Act 1988, Part III.

[104] 1961 Act, s 6(1)(a), Sched 1, case 1.

[105] *Ibid* s 6(1)(b), Sched 1, case 3.

[106] In relation to an Urban Development Area (case 4A), there is a further qualification: it is specifically provided that development is not excluded from being left out of account, if it is (a) development carried out before designation of the UDA, (b) development outside the UDA, or (c) development by an authority other than the acquiring authority. This refinement was added by 1980 Act, s 145(2).

[107] "(4) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded": *S E Railway v LCC* [1915] 2 Ch 252, 259 (para D.21 above).

authorities. It required the valuer to look back, beyond the inception of the particular acquisition, to the original designation, however far back in time and however more extensive in area than the immediate proposal.

Planning assumptions

D.63 The new rules in relation to planning assumptions were also, apparently, modelled on the no-scheme rule, but taking account of the modern planning system. The purpose, as the Lord Chancellor said (see above), was to answer the question:

> With what planning permissions could the land be expected to be sold in the open market if it were not wanted by a public authority?

D.64 This was achieved by specifying the assumptions to be made, broadly in three categories:

(1) Permission was to be assumed for development of the subject land in accordance with the acquiring authority's own proposals (s 15);[108]

(2) If the subject land was allocated in the development plan for some form of valuable development (e.g. residential or commercial), permission was to be assumed for such development in accordance with the allocation as would have been given in the absence of the compulsory purchase proposal (s 16);

(3) If it was not so allocated,[109] a certificate could be obtained as to the permission which would have been granted in the absence of the compulsory purchase proposal (s 17).

These were to be in addition to any actual permissions in force at the date of notice to treat.[110]

D.65 The link to the no-scheme rule can be seen in the form in which the questions were posed. For example, section 17 required the authority to certify its opinion:

> … regarding the planning permission that might reasonably have been expected to be granted in respect of the land in question, if it

[108] As an apparent exception to the no-scheme rule, this applied whether or not the permission would have been granted in the absence of the authority's proposal: see para D.100 below.

[109] In 1991 the restriction to land not allocated for valuable development was removed, so that the section 17 certificate procedure was extended to any land subject to compulsory acquisition: 1991 Act, s 65(1).

[110] 1961 Act, s 14(2). The reference to the date of "notice to treat" may reflect the fact that, before the *West Midland* case in 1968 (see CP 165, paras 5.71 – 5.74) this was thought to be the valuation date.

> were not proposed to be acquired[111] by any authority possessing compulsory purchase powers.[112]

Permission in accordance with the certificate was to be assumed for valuation purposes.[113] On the other hand, lack of such a certificate, or even a negative certificate, was not to lead to the assumption that permission would necessarily be refused for any development;[114] but was a matter to be taken into account:

> … in determining whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land, regard shall be had to any contrary opinion expressed in relation to that land in [the certificate][115]

The no-scheme rule in the Courts

D.66 In the early cases under the new statutes, the Courts readily assumed that the new statutory rules were intended to reflect the judicial rule. In the first case to reach the higher courts, *Davy v Leeds Corporation* (1964), Lord Dilhorne referred to the *Pointe Gourde* case, and observed that section 9(2) of the 1959 Act (section 6 of the 1961 Act) had "given statutory expression to the principle which Lord MacDermott stated was well settled".[116] None of the earlier cases on the no-scheme rule were cited.[117] It seems to have been from this time that the rule first became commonly referred to by reference to the *Pointe Gourde* case.[118] The *Indian*

[111] Land was "proposed to be acquired…" in the circumstances defined by 1961 Act, s 22(2): that is, in the case of an ordinary compulsory purchase order, the date of the statutory notice of the making of the order.

[112] 1961 Act, s 17(4), This was amended by the 1991 Act, s 65 to refer to permission which "would have been granted" rather than "might reasonably have been expected to be granted". The change was presumably intended to reduce the scope for speculation. It is not clear, however, why the same change was not made to s 14, as part of the amendments made by the same Act (see n 192 below).

[113] 1961 Act, s 15(3).

[114] *Ibid*, s 14(3).

[115] *Ibid*, s 14(3) (s 14(3A), following the 1991 amendments: 1991 Act Sched 15, para 15(2)).

[116] *Davy v Leeds Corp* [1965] 1 WLR 445, 453 The case concerned some houses owned by the claimants, within one of 13 slum clearance areas. A compulsory purchase order was made, covering the 13 slum clearance areas and other adjoining land required to form a suitable re-development area. The owners argued that their houses should be valued as though the whole CPO area were cleared and ripe for development. This was rejected (applying s 6, case 1) because the clearance would not have taken place in the absence of the proposal for compulsory purchase. (Before the Tribunal it had been argued erroneously that s 6 did not apply, because clearance was not "development"; it was not until the CA that it was noticed that this point was expressly covered by the section: see [1964] 3 All ER 390, 392).

[117] Since there was a single CPO covering the whole of the area planned for redevelopment, there was no need for any discussion of the possible differences between s 6 and the judicial no-scheme rule.

[118] Cf n 90 above, referring to the 1962 edition of *Cripps*.

case, and its approval by the Court of Appeal in *Lambe*, seem to have been largely forgotten.[119]

D.67 The main features of the modern law, following the 1961 Act, emerged from a series of cases, principally in the Court of Appeal presided over by Lord Denning MR. He sought, not always successfully, to reconcile the common law with the new statutory rules. The resulting developments can be considered under six heads:

(1) Assimilation of the judicial and statutory versions

(2) Judicial evolution

(3) The no-scheme world

(4) Decreases in value due to the scheme

(5) A valuation tool only

(6) The *Indian* case

(1) Assimilation of the judicial and statutory versions

D.68 Although the new statutory rules were seen as giving effect to the *Pointe-Gourde* principle, it was not clear whether they were intended to be a self-contained code, or merely to supplement the existing judicial version of the rule. Further, the convoluted wording of the section,[120] made it very difficult to interpret or apply. The solution eventually adopted by the Courts was to treat section 6 and the judicial rule as existing side-by-side as part of a single legal principle, so that in practice little distinction was made between the two, and literal interpretation of the statute was largely abandoned.

D.69 This process of assimilation began in *Camrose v Basingstoke Corporation*.[121] In *Camrose*, the Corporation made an order under the Town Development Act to expand Basingstoke and receive an influx of population from London. A large proportion of the land required was owned by the appellant, who agreed to sell it

[119] In *Davy*, the *Pointe Gourde* case was the only authority cited on this point. The *Indian* case does not appear to have been cited in any of the leading modern cases (see below, eg *Camrose, Wilson*, *Myers*, *Devotwill*), until the *Rugby Water Board* case in 1973 (see paras D.87 – D.91 below). Even then, the differences between various versions were not discussed. The most illuminating discussion in the earlier period, including reference to the *Indian* case, is to be found in the decision of the Lands Tribunal (Sir Michael Rowe QC) in *Kaye v Basingstoke Corp* (1969) 20 P&CR 417. However, his view that the judicial rule only survived for the purpose of "plugging gaps" in section 6 was not followed in later cases, because it was inconsistent with *Camrose*: see n 126 below (*Sprinz*).

[120] In *Davy* in the Court of Appeal, Harman LJ, in a memorable passage, described the language of the section as "a monstrous legislative morass" or "Slough of Despond": [1964] 3 All ER 390, 394. To Diplock LJ, preferring "a Minoan to a peregrine metaphor", it was a "labyrinth" (p 396). Even Lord Denning MR said that he had "rarely come across such a mass of obscurity, even in a statute" (p 392). (It was no mean achievement to have so baffled three of the leading minds of the then Court of Appeal; and this, in spite of the assistance, as counsel, of the future Lord Bridge and Sir Frank Layfield QC.)

[121] [1966] 1 WLR 1100. The only cases referred to in argument, or in the judgment, were *Pointe Gourde* and *Davy*.

for its compulsory purchase value. In valuing the subject land, the Tribunal distinguished between parts of the subject land close to the town, which it valued at full residential value, and more remote parts, which it valued (ignoring the town development scheme) at "hope value" only. The problem was that section 6 applied a statutory version of the no-scheme rule to surrounding land, within defined categories ("the other land"), but it said nothing about the application of the rule to the subject land itself.

D.70 Accordingly, the claimants argued that the whole of the subject land should be valued with the benefit of the town development scheme. They argued that the 1961 Act was intended as a complete code, replacing the judicial version of the rule. Lord Denning accepted this as a literal reading of the section, but rejected it as contrary to common sense. He gave his understanding of the interaction of the statute and the judicial rule:

> 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 (sic) the acquisition. That was settled by *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* ... 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 ...[122]

D.71 Russell LJ relied on:

> … the history of compulsory acquisition, in which it has long been judicially established that the prospect of the direct impact of the relevant scheme on the land to be acquired is to be ignored. It is not possible against that background to construe the section as tacitly or by implication altering the law. Rather is the exclusion of the relevant land a recognition of a well-known situation for which legislation was not necessary.[123]

D.72 By 1970, therefore, it was clear that the *Pointe Gourde* rule survived alongside the provisions of the 1961 rule.[124] As the Tribunal said in a case in 1970:

> The existing state of the law is certainly that the *Pointe Gourde* principle will operate to achieve results which would previously have

[122] *Ibid*, p 1107. The explanation, while producing a sensible result in the case, was not supported by anything in the history of the Act, or in the Parliamentary debates.

[123] *Ibid*, pp 1110–1. He commented: "The drafting of this section appears to me calculated to postpone as long as possible comprehension of its purport".

[124] The view that s 6 of the 1961 Act was an exhaustive code seems to have had its last gasp in *Devotwill v Margate Corp* [1969] 2 All ER 97, 106, *per* Winn LJ (he referred, however, to "the gallantry with which counsel for the acquiring authority sought to interpret the lamentable language of the section before finally abandoning any reliance").

> been achieved at common law, unless those results were already achieved by the statute.[125]

Indeed, the Tribunal's view was that, where appropriate, both had to be applied independently.[126] However, it became difficult to see why the statute was needed at all, since, as the Tribunal itself observed, all the cases in Schedule 1 seemed "to fall fairly and squarely within the common law principle as stated by Lord MacDermott".[127]

(2) Judicial evolution

WILSON V LIVERPOOL CITY CORPORATION[128]

D.73 This important case can be treated as settling the modern form of the common law rule, at least in the Court of Appeal.[129] From 1960, the Corporation had been seeking to assemble an area of 391 acres for housing development. 305 acres were acquired by private agreement. Planning permission for the whole area was granted by the Minister in late 1963. In early 1964, a compulsory purchase order was made for the remainder. The claim related to 74 acres belonging to one owner. By the time of the acquisition of the 74 acres, comparable adjoining land of the claimants was being sold to a private developer at a price (£6,700 per acre), on the basis that, having regard to the Corporation's plans, it was "dead ripe" for development, and could take advantage of the infrastructure and other improvements under the Corporation's plans. The Tribunal treated the development of the whole 391 acres as the "scheme" to be disregarded under the rule, on the basis that, in the no-scheme world, the development would have been deferred for two years, and there would have been additional infrastructure costs. The Tribunal reduced the value to £5,350 per acre.[130]

[125] *St John the Baptist Hospital v Canterbury City Council* [1970] RVR 608, 630.

[126] "… it is our opinion that, as a matter of strict law both [section 6] and the [*Pointe Gourde*] principle must be applied, where on the facts they are capable of applying, independently of each other.": *Sprinz v Kingston upon Hull City Council* [1975] RVR 178, 173 LT (D Frank QC, President and V Wellings QC). The Tribunal rejected the view (expressed in *Kaye* – see n 89 above) that the judicial rule survived only for the purpose of plugging the gaps in s 6: p 183. The main issue in *Sprinz* was whether the Council's plans for development, in the Bransholme South and North areas of the city, were to be treated as one scheme or two. The Tribunal took the latter view, largely because the development areas were separately defined and there was an 8 year gap between the development of Bransholme South and North respectively: p 184. The test applied was "to find out on what date there was a scheme and then to ascertain whether it included Bransholme North": p 183.

[127] *Wilson v Liverpool City Council* [1969] RVR 741 LT (J S Daniel QC and J R Laird). It is to be noted, however, that the legislature persisted in treating the Schedule as a separate and detailed Code, by adding yet further refinements, in relation to new towns (1973 Act, s 50), and urban development areas (Sched 1, Part III, added in 1980).

[128] [1971] 1 WLR 302, CA.

[129] See eg *Bolton MBC v Tudor Properties* [2000] RVR 292, where Mummery LJ gives a summary of the principles as established by that and later cases. The facts of *Bolton* are noted in CP 165, para 6.23.

[130] It made a further deduction, under 1961 Act s 7, to represent the enhancement, due to the scheme, in the value of the adjoining land which had been sold privately. The full facts of the cases appear in the Lands Tribunal decision at [1969] RVR 741.

D.74 The owners argued that this reduction was not justified, either by section 6, because the area for application of the rule was limited to the "area authorised to be acquired" under the compulsory purchase order;[131] or under the judicial rule, because the plans for the 391 acres were not sufficiently "precise and definite" to constitute a "scheme". The Court of Appeal rejected these arguments and upheld the Tribunal's approach.

D.75 The judgments in effect ignored the limitations on section 6, proceeding on the basis that, in the light of *Camrose*,[132] it was sufficient to apply the judicial rule.[133] As to that, they rejected the argument that the *Pointe Gourde* principle only applies "when the scheme is precise and definite; and is made known to all the world". Lord Denning (in a much quoted passage) said:

> 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 at the time when the value is to be assessed.[134]

D.76 Widgery LJ said that it was wrong to focus attention on the word "scheme" as having "some magic of its own"; it was to be treated as synonymous with other words used, such as "undertaking" or "project":

> … the purpose of the so called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition. The extent of the scheme is a matter of fact in every case ... It is for the tribunal of fact to consider just what activities - past, present or future - are properly to be regarded as the scheme within the meaning of this proposition.[135]

D.77 *Wilson* was (perhaps unconsciously) innovatory in four ways:

(1) It confirmed that the judicial rule survived, not merely for the purpose of remedying apparent anomalies in the statutory version. In *Camrose*, the Court of Appeal had been faced with the apparent absurdity that the rule should apply to "other land" but not to the subject land. In *Wilson*, there was no such absurdity. It would have been perfectly possible to have

[131] See 1961 Act, Sched 1, case 1, and s 6(3)(a).

[132] The claimants accepted in argument that the continued existence of the judicial rule was settled by *Camrose*, but reserved the point for argument in the House of Lords: [1971] 1 WLR 302, 310.

[133] The only cases referred to (without any detailed analysis) were *Pointe Gourde* and *Fraser*.

[134] [1971] 1 WLR 302, 310. It is not clear why Lord Denning needed to go so far. The only issue was whether the "scheme" was made sufficiently clear by the Minister's grant of outline permission in 1963, or whether it needed to await "final clearance" of detailed plans in 1968 (see [1969] RVR at 748).

[135] *Ibid*, p 310.

limited it to the land subject to the actual order. The result was that the tightly drafted limits[136] of section 6 became irrelevant thereafter.

(2) Lord Denning's statement that the scheme needed to be traced back to the time when the scheme was "vague and known to few" was a substantial extension of the retrospective scope of the rule, and apparently unsupported by previous authority.[137] For example, Fletcher Moulton LJ in *Lucas* required the valuer to look back to the position "as it stood before the grant of compulsory powers" or "before the scheme was authorised."[138] It went further even than section 9 (in relation to decreases in value), which at least required some "indication" (in a development plan or otherwise) of the prospect of compulsory purchase.[139] Widgery LJ did not apparently go so far.[140]

(3) The rule lost any necessary link with the scope of the special powers granted to the authority. As has been seen, the original justification of the rule was directly linked to the special advantages only available to a body having statutory or similar powers for a particular project.[141] In all the subsequent cases, the definition of the scheme was related in some way to the extent of those powers. The 1961 Act preserved that link in Schedule 1, under which all the cases are defined by reference to specific statutory regimes. In *Wilson*, however, that link is lost. No reference is made to any particular statutory basis for the development of the remainder of the 391 acres.[142] The Corporation appears simply to have acquired the land, and sought planning permission,[143] in the same way as a private developer.

[136] An illustration of the precision of the drafting can be seen in 1961 Act, s 6(3)(b) which, in relation to acquisitions for defence purposes, extends the scope of Case 1 to include adjacent land comprised in a notice to treat under like powers, served one month before or after the notice to treat for the subject land. Under the *Wilson* interpretation, this provision would have been unnecessary, since orders, so closely connected in time and space, would have been treated as part of a single scheme.

[137] Of the two cases referred to in the judgment, in *Pointe Gourde* the history of the "scheme" seems to have started with the UK/US agreement in March 1941, followed almost immediately by the acquisition: para D.40. n 73 above. In *Fraser* the retrospective scope of the scheme was not determined by the Privy Council: see para D.29 above.

[138] See para D.14 above.

[139] The text of s 9 is in App 3. Cf the second *Jelson* case (paras D.82 and D.103-105 below), where Lord Denning equated s 9 with the *Pointe Gourde* rule.

[140] He said that the scheme must exist "in some shape or form *at the confirmation of the compulsory purchase order itself*", and "*then*… it may develop almost from day to day…": p 310 (emphasis added). The other judge (Megaw LJ) made no comment on this point but simply "agreed".

[141] See paras D.6 – D.12 above.

[142] Other than its general powers to acquire land for housing purposes.

[143] Cf *Ozanne v Herts CC* [1991] 1 WLR 105 (see para D.107 below), where it was confirmed that the reference to "statutory powers" in rule (3) meant something more specific than the mere need to obtain planning permission.

(4) It followed that there was no necessary limit to the spatial extent of the scheme.[144] This increased the potential for unfairness between those whose land was taken, and those able to retain it and take advantage of the wider scheme. As Keith Davies observes (in relation to the *Wilson* case):

> Why should one owner get less per acre than his neighbour for comparable land, merely because he sold under compulsion and his neighbour did not?[145]

(3) The no-scheme world

D.78 The width of the rule as so established meant that valuers were required to conduct an elaborate game of imagination, inventing the "no-scheme world" to be assumed for the purpose of valuation. In theory, this involved going back to the very inception of the scheme (possibly even before approval, when it was "vague and known to few") and rewriting history thereafter. This process of looking back beyond the particular order had been sanctioned by the 1961 Act, in the case of the specific designations (as set out in cases 2 to 4B).[146] However, under the extended version of the judicial rule, it was not confined to those categories.[147]

D.79 The exercise was graphically explained by Lord Denning:

> 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…[148]

D.80 It is not, however, to be assumed that under "the old order" things would have remained static in the area. The valuer is required to consider whether there might have been other changes in the area, which would have affected the value of the

[144] An extreme illustration is *Bird & Bird v Wakefield MDC* [1978] 2 EGLR 16 CA, where a CPO for some 30 acres, promoted by a District Council for industrial development, was held to be part of a County Council "scheme" for an area of some 770 acres, even though the County Council had made no proposals for compulsory purchase.

[145] K Davies, *op cit*, para. 7.9.

[146] An example is *Bromley LBC v LDDC* [1997] RVR 173, 176, 186ff (rewriting history after nine years of "scheme" development in the London Docklands Development Area).

[147] See eg *Cronin v Swansea CC* [1972] RVR 428 (the scheme was traced back 25 years to a declaratory order made in 1947 in connection with war damage). The Tribunal held that the rule did not require it to assume that "the whole of the town centre of Swansea should remain fossilised in the state in which it was to be found at the end of the last war". All that was to be left out of account, under *Pointe Gourde*, was any increase in value which was "entirely due" to the scheme. It was proper therefore to take account of any enhancement by virtue of the development "by agencies other than that of the council acting in the exercise of their statutory powers": p 431 (Emlyn Jones, FRICS).

[148] *Myers v Milton Keynes DC* [1974] 1 WLR 696, 704. The exercise was further complicated in that case by the fact that, under the statutory rules, planning permission was to be assumed in 10 years' time. The valuer's imagination, therefore, had to be sufficiently fertile, to rewrite history eight years back to the beginning of the new town scheme, and carry it forward for 10 years in the future.

subject land. In *Margate Corporation v Devotwill*,[149] land allocated for residential development was required for a by-pass scheme. The question arose what assumption the Tribunal should make about the possibility of an alternative road scheme in the no-scheme world, which would have facilitated development of the subject site. The Tribunal had taken the view that, if the actual bypass on the subject land were to be disregarded, the inevitable corollary would be the construction of an alternative by-pass on other land, to meet the urgent traffic need. This approach was held, in the House of Lords, to be too simplistic:

> If there was to be a bypass on the respondent's land it by no means followed that there would inevitably be a bypass somewhere else. There might be or there might not be. It might have been possible to have another route for the bypass; it might have been quite impossible… There would have to be a new examination of the problem. 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?…[150] (the judgment enumerates a series of similar questions which the unfortunate Tribunal would have to consider on the renewed hearing)

D.81 The impracticality of this solution was recognised by the legislature in 1991, by providing that where land is taken for a highway, it is to be assumed (for the purposes of the planning assumptions under the 1961 Act) that "no highway would be constructed to meet the same or substantially the same need..." [151] But no change was made in relation to the similar questions which arise under the common law rule, or in relation to acquisitions for purposes other than highways.

(4) Decreases in value due to the scheme

D.82 As developed in the cases up to *Pointe Gourde*, the no-scheme rule was concerned with disregard of *increases* in value caused by the scheme. Recognition of the need for a rule to protect the dispossessed owner against the blighting effect of designation for acquisition seems to date back to section 51(3) of the 1947 Act,[152] which was expanded in section 9 of the 1961 Act:

> 9. No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of … allocation or other particulars contained in the current development plan, or by any other means)[153] an indication had been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

[149] [1970] 3 All ER 864.

[150] *Ibid*, 869–870.

[151] Planning and Compensation Act 1991, s 70 (inserting new subsections (5)–(8), into s 14 of the 1961 Act).

[152] See paras D.48 – D.49 above.

[153] The reference to "allocation… in the current development plan" can be traced back to s 50(3) of the 1947 Act. Under, *ibid*, s 5(2), one of the principal functions of the development plan was to designate land for compulsory purchase. That is no longer the case.

This was not originally seen as related to the *Pointe Gourde* rule.[154] It seems that it was not until the second *Jelson* case[155] that section 9 was directly linked with the *Pointe Gourde* rule.[156]

D.83 In the *Melwood Units* case, in 1979, the Privy Council confirmed that the judicial rule applied to decreases in value, as well as increases, quite apart from any statutory provision to that effect.[157] In that case, the claimant's site of 37 acres was severed by an expressway, with the result that only 25 acres north of the road could be developed as a shopping centre, and the actual permission was confined to that area. Compensation was assessed (under the no scheme rule) on the basis that but for the road-scheme, planning permission would have been granted for the whole 37 acres.

(5) A valuation tool only

D.84 In the *Rugby Water Board* case,[158] the House of Lords held that the no-scheme rule applied to valuation only, and not to the ascertainment of the interests to be valued. The case concerned the compulsory acquisition of two farms held under agricultural tenancies. Under the Agricultural Holdings Act[159] and the relevant leases, the landlords could serve a notice to quit where land was required for another use for which permission had been granted. The issue was whether, following compulsory purchase for a permitted reservoir, the respective interests of landlord and tenant should be valued as though such a notice could be served; or whether that possibility should be disregarded as entirely due to the authority's scheme.

D.85 The House, by a majority, held that the interests had to be assessed as they stood in the real world at the date of notice to treat, and that the no scheme rule had no application.[160] As already noted, the speeches contain extensive references to the earlier authorities. However, although it represents probably the leading modern authority on the rule in the House of Lords, the limited issue raised by the appeal did not require any detailed analysis of the underlying principles, or the conflicting formulations.

[154] See eg *Cripps*, para 4–111; s 9 is dealt with separately (para 4–121a).

[155] *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020 CA; see paras D.103 – D.105 below.

[156] It was treated as part of the same principle in *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315, *per* Lord Hope. See also the critical discussion of the *Pointe Gourde* rule in K Davies, *op cit*, para 7.4ff.

[157] *Melwood Units v Commissioner of Main Roads* [1979] AC 426 PC. *Pointe Gourde* was referred to and it was simply asserted, without discussion, that the same principle applied "in reverse": p 434, *per* Lord Russell. The particular statute referred only to "increases" in value; but "the absence of the reverse of the medal" in the statute did not change the position: *ibid*, p 435E.

[158] *Rugby Water Board v Shaw-Fox* [1973] AC 202.

[159] Agricultural Holdings Act 1948, ss 23, 24(2)(b).

[160] In his dissenting speech, Lord Simon convincingly attacked the majority's reasoning as "artificial, legalistic and destructive of the fundamental principles on which compensation is assessed…" (p 241H).

D.86 The effect of this decision, in the context of agricultural holdings, was reversed by statute.[161] Otherwise, it remains good law, [162] although, as far as one can judge from reported cases, it does not appear to have caused serious problems in other contexts.[163]

(6) The *Indian* case

D.87 The new, wider version of the no-scheme rule was difficult to reconcile with Lord Romer's interpretation of the rule in the *Indian* case. As we have noted, the *Indian* case had been followed by the Court of Appeal in *Lambe v Secretary of State for War* (1955).[164] The same approach was adopted by the Tribunal in a 1970 case concerning the acquisition of land for Kent University.[165] The Tribunal, following Lord Romer said:

> … even if the existing university is regarded as the only possible purchaser, that does not mean that the value of the land for university purposes is to be ignored, or that we should say there was no demand for the land because the only person who wanted it was the existing university.[166]

D.88 Neither the *Indian* case itself, nor *Lambe*, has ever been over-ruled, or even doubted, in the higher courts. The *Indian* case has been followed in other jurisdictions, and in English cases in other statutory contexts, in which market value was relevant to compensation.[167]

D.89 However, in a recent case,[168] the Tribunal declined to follow it. The case concerned the acquisition of land required to provide a wetland nature reserve to replace mudflats and other land taken for the Cardiff Bay Barrage development scheme. One question was whether the valuation should take any account of the potential

[161] Land Compensation Act 1973, s 48.

[162] The decision was followed reluctantly in Australia: *Road Construction Authority v Tiligadis* [1988] ACLD 203 (Gobbo J).

[163] The results can seem artificial. For example, in *Abbey Homesteads Ltd v Northants* CC [1992] 32 RVR 110 CA, land was acquired for a school and was subject to a prior restrictive covenant reserving it for that purpose. It was held that (in accordance with *Rugby Water Board*) the interest to be valued was the land subject to the covenant; but that, in valuing it, it could be assumed that in the no-scheme world there was an 85% chance of the covenant being discharged by the Lands Tribunal (under s 84 of the Law of Property Act 1925).

[164] [1955] 2 QB 612. See paras D.51 and D.66 above.

[165] *St John the Baptist Hospital v Canterbury City Council* [1970] RVR 608.

[166] [1970] RVR at p 631 (J S Daniel QC). The Tribunal held on the facts that there were other potential buyers.

[167] The *Indian* case has been followed in the Supreme Court of Canada in *Fraser v R* [1963] SCR 455 (see para D.119 below) and in later cases – see Todd, *op cit*, p146ff. It has also been followed in English cases, not covered by the Land Compensation Act 1961: see *BP Petroleum v Ryder* [1987] EGLR 233, 248 (Peter Gibson J); *Mercury Communications Ltd v London and India Dock Investments* (1995) 69 P & CR 135 (Judge Nigel Hague QC). The latter case is discussed in CP165, App 7. See also *R Evans (Leeds) Ltd v English Electric* (1978) 36 P&CR 185 (Donaldson J).

[168] *Waters v Welsh Development Agency* [2001] RVR 93 (George Bartlett QC, President) at first instance.

value of the land as part of the overall development scheme, or whether that should be excluded under the no-scheme rule.

D.90 The President accepted the approach of the *Indian* case has "some attractions":

> … particularly where the acquiring authority is a commercial utility rather than an arm of central or local government acquiring the land for social needs. It does, however, give rise to problems in distinguishing between the authority's pressure to buy, which is to be disregarded, and its motivation which is not; and difficulties of valuation are also likely to arise.

D.91 However, he concluded that the *Indian* case was "unquestionably at odds" with the rule as it has been applied in cases in the Court of Appeal and House of Lords, [169] and that the decision in *Lambe* could no longer be regarded as good law.[170] He summarised the effect of the no-scheme rule, in its judicial version, as follows:

> Compulsory powers of acquisition are only conferred in the public interest. A compulsory purchase order is only made and confirmed for a public purpose which the making authority and the confirming authority judge to be sufficiently important to warrant compulsion. The principle is that any effect on the value of the land acquired arising from the public purpose or public purposes prompting their acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded. A scheme or proposal is the embodiment of the public purpose or public purposes concerned.[171]

Applying this test, he decided that, even if the "scheme" was taken as simply the nature reserve proposal, the "public purpose" for that proposal was to compensate for the loss of the mudflats under the Barrage development scheme. Accordingly, any effect on value of this purpose had to be left out of account.[172]

Particular issues

D.92 Against the general approach established by the cases referred to above, a number of particular issues had to be considered:

(1) Limits of rule (3)

(2) Planning assumptions

(3) Ransom strips

[169] *Ibid*, para 52 (He refers to *Davy, Wilson, Myers*, and *Rugby Joint Water Board* – see above).

[170] *Ibid*, para 53.

[171] *Ibid*, para 54.

[172] *Ibid*, paras 55–7. He also held that, if it were necessary to identify "the scheme underlying the acquisition", it should be taken as the Cardiff Bay barrage, not simply the nature reserve: para 65. This aspect of the decision, but not the "public purpose" test, was upheld by the Court of Appeal. The Court of Appeal also declined to accept that the *Indian* case was no longer good law; see para D.45 above.

(4) Disturbance

(5) Purchase notices

(1) Limits of rule (3)

D.93 We have already referred to the narrow interpretation of rule (3),[173] adopted in *Pointe Gourde,* as the same time as the judicial rule was expanded to fill its place.[174] Subsequent cases have followed that lead, and the rule has been further cut down by statute. The legislature has also intervened to cut down the scope of the rule.[175]

D.94 In practice, it appears to have little remaining purpose. This sequence of decisions has established:

(1) That 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*)[176];

(2) That "special" implies something "exceptional in character, quality or degree", rather than qualities shared with other possible sites (*Batchelor*);[177]

(3) That the purpose requiring use of statutory powers must relate to the subject land, not to other land (*Ozanne*); [178]

(4) That the need for general forms of consent, such as planning permission or stopping-up orders, is not sufficient to bring the rule into play;[179]

(5) That the "market" may include a mere speculator, with no direct interest in the use of the land (*Blandrent*).[180]

D.95 A rare reported example of the rule having some practical effect is *Livesey v CEGB.*[181] In that case agricultural land was acquired for the erection of a power

[173] See para D.32 above for the original wording of the rule in the 1919 Act.

[174] See para D.45 above.

[175] The "special purchaser" part of the rule (not directly relevant to the present discussion) was repealed by Planning and Compensation Act 1991, Scheds 15, 19.

[176] *Lambe v Secretary of State for War* [1955] 2 QB 612.

[177] *Per* Mann LJ in *Batchelor v Kent CC* [1989] 59 P&CR 357, 362.

[178] *Ozanne v Herts CC* [1991] 1 WLR 105,111 per Lord Mackay LC. In that case it was argued that the rule required to be left out the possibility of the use of adjoining land for access, since that could only be achieved by use of the council's powers to stop up an existing road. See below ("ransom strips").

[179] *Ibid*, at p 112. Lord McKay cited, as illustration of the powers to which rule (3) might apply, the Parliamentary powers granted for water-power development in the *Cedar Rapids* case (para D.24 above); he contrasted those powers, with the consents required in the same case for erecting works in the river-bed and for water-abstraction, which were not within rule (3). A wider construction would mean that the rule would exclude any use to which the land could be put "only after obtaining some particular statutory consent such as planning permission, consent under the Building Acts, or the like": p 112C-E.

[180] *Blandrent Investment Developments Ltd v British Gas Corporation* [1979] 2 EGLR 18, 22, *per* Lord Scarman.

station at Ferrybridge. The Tribunal accepted, without any detailed discussion, that rule (3) applied, so as to exclude the value for use as a power station. However, the judicial version of the no-scheme rule seems to have been treated as having the same result.

D.96 Had it not been so restricted by judicial interpretation, the rule might have had unexpected effects. A significant but unremarked change was made by the 1961 Act, in which a reference to an authority "possessing compulsory purchase powers" replaced the words of the 1919 Act "any Government Department or any local or public authority."[182] As already noted, "public authority" was defined by the 1919 Act so as to exclude bodies "trading for profit".[183] The 1961 replacement has no such limitation. "Authority possessing compulsory purchase powers" means:

> …in relation to any transaction,… any body of persons who could be or have been [authorised to acquire an interest in land compulsorily] for the purposes for which the transaction is or was effected…[184]

D.97 Thus, no distinction is made between privatised utilities operating for profit, and public authorities.[185] For example, if the decision in the *Livesey* case is correct, it would also apparently exclude any value attributable to the possibility of competition from a privatised power-generator.[186] Further, there is no need for the body to be in any sense public, or operating under statute. All that is needed is that it should have obtained, or have been able to obtain, compulsory powers.[187]

(2) Planning assumptions

D.98 We have referred above to the provisions of 1961 Act, sections 14 to 16, setting out the planning assumptions to be made for valuation purposes. They are not easy to

[181] [1965] EGD 605, LT.

[182] 1919 Act, s 2(3). See para D.32 above.

[183] 1919 Act, s 12. The 1947 Act, s 57(1) extended the 1919 Act so that references to "public authorities" included the Central Land Board (established under that Act), and statutory undertakers (as defined by s 119(1)), whether or not trading for profit. The 1959 Act, s 1(2) applied the 1919 rules to all compulsory acquisitions.

[184] 1961 Act, s 39(1). This amendment seems to have been made in the 1961 Act as a consequential amendment, as appropriate to a consolidation Act, following the extension of the Act (by s 1 of the 1959 Act) to cover all compulsory acquisitions (cf 1919 Act, s 1, which applied only to acquisitions by Government Departments, or local or public authorities, as there defined). There is no indication in Hansard that the implications for rule (3) were separately considered.

[185] A recent review for the Scottish Executive has recommended consideration of the "need for privatised utilities to be required to obtain a 'public interest certificate' if they wish to continue to benefit from the application of rule 3" (Review of Compulsory Purchase and Land Compensation: Scottish Executive Central Research Unit 2001).

[186] See Electricity Act 1989, Sched 3, under which the Secretary of State may authorise compulsory acquisition by privatised licence-holders.

[187] Compulsory powers do not necessarily depend on a public or statutory function. For example, a private manufacturing company might obtain compulsory powers under the Transport and Works Act 1992 for a railway link to its factory; if so, the value attributable to that use would apparently be excluded under the rule, even though the purpose is essentially commercial.

interpret or apply, particularly in their relationship with the common law rule. We summarise some of the problems.

D.99 Section 14(2) allows account to be taken of any permission relating to the subject land, whether or not it includes other adjoining land (section 14(4)(b)). This applies whether or not the permission would have been granted in the no-scheme world. However, a permission on adjoining land, not including the subject land, will apparently have to satisfy the no-scheme rule. *Stayley Developments Ltd v Secretary of State*[188] illustrates the inconsistencies which may result:

> The subject land had been acquired for the M66 motorway. By the time of the notice to treat, the motorway scheme had led to permission being granted on the surrounding land (but not the subject land) for industrial and related development; and a section 17 certificate was also given for industrial development of the subject land. The Act required the hypothetical permission for the subject land (under section 17) to be taken into account.[189] However, the actual permission for the surrounding land was ignored, because it would not have been granted in the no-scheme world.[190]

D.100 Section 15(1), inconsistently with the judicial rule, requires permission to be assumed for development of the subject land in accordance with the proposals of the planning authority, whether or not it would have been granted in the absence of the underlying scheme.[191] However, the same assumption does not apply to any surrounding land proposed to be developed by the authority. Unless it is covered by an existing permission which also applies to the subject land (see above), permission can only be assumed if it would have been granted in the no-scheme world. The result can be highly artificial, as illustrated by *Myers v Milton Keynes DC*:[192]

[188] LT December 2000 (ACQ/144/1998).

[189] 1961 Act, s 15(5).

[190] If, however, the actual permission on the surrounding land had included any part of the subject land, it would have been taken into account: 1961 Act, s 14(2)(4)(b), whereby any permission in force at the date of notice to treat is taken into account, if it is a permission for the subject land, or *for any area including that land*.

[191] Although not directly relevant to the no-scheme rule, we should also note section 15(3), which preserves, subject to restrictions, the right to take account of certain categories of so-called “Third Schedule” development: see Town and Country Planning Act 1990, Scheds 3, 10. These complex provisions defined certain categories of minor development which were excluded from the definition of “new development” under the 1947 Act, for the purpose of determining the scope of the existing use under that Act. They have limited purpose today and there seems little justification for including them.

[192] [1974] 1 WLR 696, CA. We have already quoted Lord Denning’s description of the “land of make-believe” required by the rule. It was apparently agreed in that case that the assumed permission under s 15 was a matter affecting the nature of the “interest”, and therefore (under the *Rugby Water Board* case – see para D.84 above) not affected by the no-scheme rule: p 702. However, this approach is unsupported by any other authority; it conflicts with *Melwood Units v Commissioner of Roads* (see n 94 above and para D.83 above), and with Lord Denning’s own application of the rule in e.g. the second *Jelson* case (see para D.103 below) (in both of which cases assumed permissions were treated as valuation issues, within the judicial version of the no-scheme rule).

> The Development Corporation acquired the claimant's Estate, for the purpose of developing the new town of Milton Keynes. The Court accepted that the subject land itself was to be valued with planning permission for residential development, even though such a permission could not have been expected in the absence of the new town proposal. However, the existence of the new town proposal on the surrounding land had to be ignored.

D.101 Section 16 was apparently intended to have the effect that, where land was either "defined" or "allocated" by the development plan for valuable development, permission for it would be assumed. For example, in an area allocated in the plan for industry, an industrial permission would be assumed.[193] It has failed for two reasons:

(1) The section has not caught up with the modern system of local plans, which do not "define" development;[194]

(2) In relation to "allocated" land, its purpose was in effect nullified by the Court of Appeal holding that permission would only be assumed if it would have been granted in the no-scheme world (an assumption which could have been made without the assistance of statute).[195]

D.102 Section 17 has been more successful.[196] The certificate procedure was intended to provide a means by which, in cases where land was not allocated for any valuable use, the planning authority could "certify" the planning permission which would have been granted in the no-scheme world. As interpreted by the Courts, however, it has lost touch with the basis of the common law rule. Under the common law rule, apparently, the no-scheme world has to be recreated looking back to the inception of the scheme. Under section 17 there is no looking back; the position is considered on the basis that the scheme is cancelled immediately before the notice to treat or other "proposal to acquire".

D.103 This can produce very different results, as illustrated by two cases, relating to the valuation of the same strip of land acquired from Jelson Estates Ltd in Blaby District. The subject land was a strip excluded from the development of surrounding land, to form part of a ring road. The ring road proposal was abandoned. The strip could not be developed on its own for housing purposes, and the council accepted a purchase notice:[197]

[193] "…it is to be assumed that there is permission for the use for which the land is defined or allocated in the development plan" *Hansard* (HC) 13 November 1958, cols 588–589 (J R Bevins MP, Parliamentary Secretary, Ministry of Housing and Local Government).

[194] *Purfleet Farms v Secretary of State* (LT, January 2001, ACQ/108/2000): "It is an element of the compensation legislation that…cries out for revision." (George Bartlett QC President).

[195] *Provincial Properties v Caterham and Warlingham UDC* [1972] 1 QB 453 CA.

[196] See para D.65 above.

[197] Under Town and Country Planning Act 1990, s 137 (land incapable of reasonably beneficial use).

(1) The *first Jelson* case[198] was concerned with a decision by the Secretary of State, refusing a section 17 certificate for residential development. For this purpose the prospect of alternative development had to be considered at the date of the deemed notice to treat,[199] by which time the housing estates had been built on both sides of the strip of land, and separate development was impossible. A "nil" certificate was therefore correct.

(2) The *second Jelson* case[200] related to the subsequent decision of the Lands Tribunal, assessing compensation for the same strip of land. For that purpose, the Tribunal was not restricted by the negative certificate.[201] Applying the no-scheme rule, it was possible to look further back in time, and to assume the abandonment of the road-scheme from its inception, before the houses had been built; on that assumption, the strip would have been developed along with the other residential land.[202] Accordingly, the compensation for the land was assessed at residential values.[203]

D.104 The interpretation (in the first case) of section 17 was confirmed recently by the House of Lords in *Fletcher Estates v Secretary of State*.[204] The position had to be considered as at the date of the proposal to acquire, as defined,[205] on the basis that:

> … 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.[206] (emphasis added)

The emphasised words provide an interesting contrast with Lord Romer's statement (in the *Indian* case) that the "scheme" was limited to the obtaining of compulsory powers, and was not to be taken as including "the intention formed by the authority of exploiting the potentiality of the land."[207]

198 *Jelson Ltd v Minister of Housing and Local Government* [1970] 1QB 243, CA.

199 The "proposal date" as defined by 1961 Act, s 22(2)(b).

200 *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020, CA.

201 1961 Act, s 14(3): see para D.65 above.

202 The same result was arrived at under 1961 Act, s 9 (see para D.77 above), by treating the original road scheme as an "indication" that the land was to be compulsorily acquired. Cf the narrower view of causation taken by the Court of Appeal (also under Lord Denning) in *Hoveringham Gravels Ltd v Secretary of State for the Environment* [1975] QB 764 (compensation not allowed under the Ancient Monuments Act, when designation had been followed by refusal of planning permission for development).

203 In *Fletcher Estates,* the House of Lords did not find it necessary to examine the correctness of the second *Jelson* case (see *Fletcher* at p 325C).

204 [2000] 2 AC 307, HL. The case concerned land acquired in 1990 by the Department of Transport for a bypass, on a line which had been defined since 1970. It was held that the s 17 issue should be judged by reference to the time of the proposal to acquire (1986).

205 That is, depending on the procedure, the date of the original notice of the order, the deemed notice to treat, or an offer in writing by the authority: 1961 Act, s 22(2).

206 *Fletcher,* at p 322H, per Lord Hope.

207 See para D.37 above.

D.105 Lord Hope emphasised the difficulty of:

> …try[ing] 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.[208]

This might have been equally valid as a comment on the application of the no-scheme rule in the second *Jelson* case; however, the House did not find it necessary to comment on the correctness of that decision.[209]

(3) Ransom strips

D.106 Particular problems, and protracted litigation, have resulted from cases applying the no-scheme rule to "ransom strips". Typically, a builder may own a substantial area of potential development land, but need a small strip of land to secure the necessary access to the public highway. The owner of the strip will expect a substantial premium (or "ransom value") above its existing use value, to unlock the potential of the development area. The Lands Tribunal decision in *Stokes v Cambridge Corporation*[210] has given its name to the valuation practice of treating the premium as equivalent to a proportion (typically one third to one half) of the increased development value so released.

D.107 There were questions about the relationship of this rule to the no-scheme principle. Authorities, acquiring access land to facilitate development on adjoining land, argued that the development value should be disregarded under the no-scheme rule, and the land valued at existing use value, without any ransom element.[211] In *Ozanne v Herts CC*, such arguments (encompassing the common law rule and rule (3)) led to hearings extending over six years (including three visits to the Court of Appeal and one to the House of Lords), before the case was sent back for complete rehearing by the Lands Tribunal.[212]

[208] *Ibid*, p 323D. He quoted (p 324A) Phillimore LJ (in the first *Jelson* case, para D.103 above, at p 255) where he said that to look back further "would open up a considerable field for guesswork which would often make it impossible to give firm advice to any member of the public as to his rights."

[209] *Ibid*, p 325C.

[210] (1961) 13 P&CR 77. The particular case concerned the valuation of land compulsorily acquired for industrial development, where the authority owned the land needed for access; the issue was the amount of the deduction to represent that interest.

[211] In *J A Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159, the authority and the developer had entered an agreement for the authority to acquire the access land, on the assumption (mistaken as it proved) that existing use value would be paid.

[212] [1988] RVR 133 (First Lands Tribunal decision); [1989] RVR 179 (Court of Appeal); [1991] 1 WLR 105 (House of Lords); [1991] RVR 229, [1992] 38 EG 158 (Second Lands Tribunal decision); [1995] RVR 40 (Second Court of Appeal decision). There were two separate hearings before differently constituted Courts of Appeal (3 May 1994 and 10 October 1994). On the last occasion the case was remitted to the Lands Tribunal for a complete rehearing. The parties then settled.

D.108 The present law appears now to be settled, following *Batchelor v Kent County Council* (1989),[213] where Mann LJ made it clear that the "ransom" element of value was not to be excluded under the no-scheme rule, unless it was solely attributable to the authority's own proposals for development:

> If a premium value is 'entirely due to the scheme underlying the acquisition' then it must be disregarded. If it was *pre-existent to the acquisition* it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate without compensation and would contravene the fundamental principle of equivalence."[214]

Thus, for example, where land is allocated in the local plan for private residential or commercial development, dependent upon access across the ransom strip, the negotiating position of the owner of the strip is not "entirely due" to the authority's scheme, but derives from the planning allocation.

D.109 Although the law is apparently settled, its application in practice can cause difficulties, and the figures arrived at can seem somewhat arbitrary. The choice of the appropriate access for a major development will usually be based on both physical and planning factors, and may be the subject of special financing agreements between the developer and the relevant authorities, including provision for compulsory purchase of the necessary land. It may be impossible for the parties to judge in advance the likely cost of the access arrangements.[215]

(4) Disturbance

D.110 In *Director of Buildings and Land v Shun Fung Ironworks*,[216] it was held that the disturbance claim could include losses incurred from the time of the announcement of the proposed acquisition (of the site of a steelworks), even though preceding the formal statutory process of resumption. The Privy Council upheld the Tribunal's award for loss of profits from that date, assessed by comparing the profits (or losses) in the real world with those in the no-scheme world. The "scheme" in that cases was held to be confined to the threat of resumption of the steel works itself, rather than any wider proposal.

[213] (1989) 59 P&CR 357.

[214] *Ibid*, p 361. In a later case it was suggested that the words in italics should have read "pre-existent to the scheme": *Wards Construction Ltd v Barclay Bank* (1994) 64 P&CR 391, 396 *per* Nourse LJ.

[215] See, eg, the *Batchelor* case itself (*ibid)*. Planning permission had been granted for a substantial residential development, subject to a condition preventing occupation of houses in phase 2, until off-site road works (including a new roundabout) were completed. The County Council, under an agreement with the developer, made a compulsory purchase order for the necessary land (0.86 acres). The value for its existing agricultural use was £3,000. The first tribunal valued it at £500,000; following a successful appeal (on the grounds that the basis of the award had not been explained) a second Tribunal valued it at £2.15m. An appeal against this award was rejected: *Wards Construction Ltd v Barclays Bank* (1994) 68 P&CR 391. Nourse LJ expressed some "mystification" at the range of the figures, but concluded that there was no error of law (p 394). See also *J A Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159.

[216] [1995] 2 AC 111, PC. The case is discussed in more detail in Part IV.

D.111 The application of the principle may pose more difficulties where the inception of the scheme is less clear-cut, and where its effects are less specific. For example, the declining profits of a corner shop in an area blighted by redevelopment proposals may be attributable to the "scheme", but not necessarily to the acquisition, or threat of acquisition, of the shop itself.[217]

(5) Purchase notices

D.112 The Town and Country Planning Acts allow service of a purchase notice where land is shown to be "incapable of reasonable beneficial use" following the refusal of a planning permission. Where the notice is accepted, the effect is that the authority is "deemed" to have served a notice to treat, and compensation is assessed as though pursuant to a compulsory purchase order.[218] The application of the no-scheme rule in such cases poses a conceptual difficulty, since the rule assumes a scheme or project by the authority to acquire the land, rather than a sale which is forced upon it. The results have not been consistent:

(1) In *Birmingham DC v Morris & Jacombs*[219] the lack of beneficial use was due to the land being reserved by a planning condition as part of the access road. Its value as an access road was found to be £4,000, while its value for residential development would have been £15,000. The Court of Appeal held that there was no scheme of acquisition, the acquisition having been forced on the Council, and that the land should be valued at the lower figure.

(2) In *Jelson v Blaby DC*,[220] the purchase notice related to a strip of land which had been excluded from an earlier development, because of its reservation for a road scheme (later abandoned), and was incapable of development on its own. Although the acquisition was, as in the previous case, forced on the authority, the Court of Appeal accepted that the effects of the road scheme were to be disregarded (under the common law rule and section 9), and upheld the award based on the higher residential value.[221]

INTERNATIONAL COMPARISONS

Commonwealth

D.113 The no-scheme rule appears to feature in some form in all other Commonwealth systems derived from the 1845 Act.[222]

[217] See *Emslie & Simpson Ltd v Aberdeen City DC* [1994] 1 EGLR 33, 38, *per* Lord President Hope.

[218] Town and Country Planning Act 1990, ss 137 and 143.

[219] [1977] RVR 15.

[220] See para D.103 above.

[221] Although the case was heard some six months after *Morris & Jacombs*, the latter does not appear to have been cited in argument.

[222] See eg Jacobs, *The Law of Resumption and Compensation in Australia* (1st ed 1998) ch 27; Todd, *The Law of Expropriation and Compensation in Canada* (1st ed 1992) ch 6.

Australia

D.114 Most of the Australian statutes include some reference to it, but it is also treated as part of the common law.[223] It is a question of statutory construction whether the particular provision is to be treated as expressing, modifying, or supplanting the common law.[224] Typical is LAA 1989 (Cth), which restates the no-scheme rule in two paragraphs:

> In assessing compensation, there shall be disregarded:
>
> (a) any special suitability or adaptability of the relevant land for a purpose for which it could only be used pursuant to a power conferred by or under law, or for which it could only be used by a government, public or local authority…
>
> (c) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the purpose for which the interest was acquired;[225]

D.115 (a) is similar to rule (3) as it appeared in the English 1919 Act.[226] The ALRC thought such a provision was necessary to counter cases[227] where compensation had reflected potential for public use by including a figure "unsupported by mathematical calculation and lacking intellectual persuasion". They said:

> It is desirable to have a rule, excluding any potentiality realisable only by a statutory authority. In cases where the statutory authority is only one of the potential purchasers, the usual rules should apply. The landowner should not suffer because one bidder uses its statutory powers to pre-empt competition.[228]

It gave no evidence that the rule had been successful in achieving that purpose. In Canada, the rule has been dispensed with in most jurisdictions.[229]

[223] See eg the *Melwood Units* case (n 94 and para D.83 above).

[224] *Road Construction Authority v Tiligardis* [1988] ACLD 203; and see D Brown, *op cit*, para 3.22.

[225] LAA (Cth) 1989, s 60(a) and (c).

[226] See para D.32 above.

[227] Notably *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, where three islands in the St Lawrence river were acquired for a power generation scheme; the Supreme Court of Canada awarded compensation on the basis of their value for the scheme. The Privy Council rejected this approach, because the actual scheme of the acquiring company could not be taken into account; it held, however, that the valuation had to have regard to "the possibility of that or any other company coming into existence and obtaining powers": *ibid*, p 579. Rule (3) of the 1919 rules seems to have been designed to exclude that possibility.

[228] ALRC, *op cit*, paras 234, 250. It recommended retention of the rule to deal with problems of speculative values (citing cases such as *Cedar Rapids*, see para D.24 above).

[229] See Todd, *op cit*, pp 152–4. The Report of the Royal Commission on Expropriation, 1961-63 ("The Clyne Report") had considered the matter and concluded that the possibility of increased compensation resulting from competition among statutory takers was so remote that it was not necessary to exclude it (*ibid*).

D.116 (c) is designed to give effect to the no-scheme rule.[230] The previous Act was in similar terms but referred only to disregard of increases in value.[231] The ALRC recognised it as a statutory expression of the *Pointe Gourde* principle, but regarded the existing statute as deficient in merely referring to increases.[232] There is no suggestion in the ALRC report that the application of the rule in this formulation had caused significant problems.

D.117 The reference to the "purpose" for which the interest is acquired may be read against the background of the procedure for compulsory purchase under the same Act. This starts with a "pre-acquisition declaration" by the Minister that he is considering acquisition for "a public purpose"; the "public purpose" must be identified in the declaration.[233] The implication may be that it is this purpose which will be disregarded in assessing compensation.[234]

Canada

D.118 A similar mixture of statutory and judicial versions of the rule is to be found in Canada.[235] A typical example of a statutory rule is Canada Act 1985, section 26(11)(c) which requires disregard of increases or decreases due to:

> the anticipation of expropriation by the Crown or from any knowledge or expectation, prior to the expropriation, of the public work or other public purpose for which the interest was expropriated.

D.119 The leading Supreme Court case of *Fraser v R*[236] shows a narrow approach to the judicial rule. The case concerned the acquisition by the Crown of land required to build a causeway; the issue was whether the valuation should take account of the use of 9 million tons of rock, on the subject property, to build the causeway.[237] Ritchie J referred to *Pointe Gourde* and other cases, which he regarded as establishing that:

> … the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority

[230] The use of "purpose" rather than "scheme" is echoed in some of the English cases: see e.g. *Waters v Welsh Development Agency* [2001] RVR 93 (LT), 102, para 54: "…any effect on the value of the land acquired arising from the public purpose or public purposes prompting the acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded."

[231] Land Acquisition Act 1955, s 23(2).

[232] ALRC, *op cit,* para 247.

[233] LAA 1989 (Cth), s 22(1)(2).

[234] Although this implication does not appear to have been drawn expressly in any of the relevant authorities, it may help to explain the relative lack of litigation on the scope of the "purpose" to be disregarded under the rule.

[235] See Todd, *op cit*, pp 160–165.

[236] (1963) 40 DLR (2d) 707.

[237] The facts of the cases were unusual, in that, due to "bureaucratic bungling" the expropriation order had to be reissued, by which time the Crown had entered an agreement with a contractor which contemplated use of this rock for the project; "the potential market for this commodity had thus become a reality" (see the analysis at Todd, *op cit*, p 148).

> after expropriation and as an integral part of the scheme devised by that authority.[238]

However, distinguishing *Pointe Gourde*,[239] and following the *Indian* case,[240] he held that this did not require the special adaptability of the land for use for the Crown's purpose to be disregarded.[241]

South Africa

D.120 The South African Expropriation Act 1975, section 12(5) provides a series of rules to be applied in determining compensation, of which the following are relevant in the present context:[242]

> (b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;
>
> (f) any enhancement of depreciation, before or after the date of the notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account.[243]

238 *Ibid*, p 722.

239 Ritchie J distinguished *Pointe Gourde* on the basis that there: "the special suitability… could not arise until after the acquisition by the British Crown and after the lands had been leased to the United States for the purpose of building the base and that it only came into being because of the special needs of the United States." (p 723). It is not easy to see, however, why these were seen as distinguishing factors, since in both cases it was the needs of the public project which created the special demand. Cartwright J reached the same result on the basis that "the reality of the situation" was that what the Crown was acquiring "was intended to be used not as land but as a source of building material for which there was an ascertainable market price". (pp 709–710).

240 See para D.88 above.

241 See also the Californian case, *People v Andresen* (1987) 193 CA3d 1144, where a quarry was expropriated for repairs to a dam; the enhanced value off the quarry for this purpose was allowed because the expectation that the state would use rock from this quarry was "not tantamount" to an expectation that it would take the quarry itself. See below.

242 The 1975 Act (Act 63 of 1975) was a consolidation of South Africa's principal expropriation legislation. Its main compensation provisions were expressed in a single section: section 12 (as amended by the Expropriation Act Amendment of 1992). The State is entitled to expropriate property for public necessity or public utility. Compensation generally is based on the amount that would have been realised by the property "if sold…in the open market by a willing seller to a willing buyer", subject to a number of detailed rules. These provisions have to be read now subject to the 1996 Constitution, section 25(3), which contains a number of overlapping provisions relevant to compensation, which have no parallel in the UK.

243 Expropriation Act 1975 (Act 63 of 1975), s 12(5)(f).

D.121 Paragraph (b) is of interest as a more modern version of rule (3). It is difficult, however, to envisage many situations in which it would have effect in practice, which are not also covered by (f).

Other jurisdictions

California

D.122 The American courts have developed an equivalent principle of "project enhancement", but narrowly confined to the enhancement due to the prospect of compulsory acquisition of the subject land. The case-law was reviewed by the Californian Supreme Court in *Merced Irrigation Dist. v Woolstenhulme*.[244] The Court referred to the general principle, as established by the US Supreme Court, that "project enhanced" value is a proper element of compensation, unless the property itself was "probably within the scope of the project from the time the Government was committed to it."[245] A distinction was drawn between enhancement in the value of land *likely to be taken* as part of the proposed improvement; and enhancement in the value of land *expected to be outside* the improvement, whose value may rise because of the benefits of proximity to the project. In determining just compensation, the former, but not the latter, had to be excluded.[246]

D.123 In the particular case, the land was in the area of a regional water project. It was originally excluded from the project, but was subsequently included. It was held that it was wrong to eliminate the appreciation in market value which the project gave it before it was "designated for condemnation", since that would in effect deny the owner "the market value of his property prior to the time when it was pinpointed for taking".[247]

D.124 The same principle was applied in another California case, on facts not dissimilar to *Pointe Gourde*. In *People v Andresen*,[248] the state sought to condemn property for use as a rock quarry for repairing dams in the area, following a major rock slide. Compensation was assessed taking account of the enhanced value due to the Government's indications (in the months prior to condemnation) that the rock would be used for this purpose. Indications of prospective *use* did not necessarily imply *condemnation*, and therefore were properly taken into account in fixing the market value.

[244] (1971) 4 Cal.3d 478, Tobriner J. The California Constitution (S 14, Art 1) provides that private property shall not be taken without "just compensation".

[245] *United States v Miller* (1943) 317 US 369, 377.

[246] (1971) 4 Cal.3d 478, 490-92. The Court declined the invitation to hold in the abstract that identical principles applied to project *depreciation* or "blight", since it might encourage authorities to announce a project at an early stage in order to drive down values: p 483, n 1.

[247] *Ibid*, p 484.

[248] (1987) 193 CA3d 1144.

D.125 There is now specific provision in the Californian Code:[249]

> The fair market value of the property shall not include any increase or decrease in value of the property that is attributable to any of the following:
> (a) The project for which the property is taken….

France

D.126 A similar concept is found in the French Expropriation Code.[250] Values are based on the "effective use" ("l'usage effectif") of the land one year before the date of the opening of the statutory inquiry into the project; no account is to be taken of changes in value after this date due to the "announcement of the works" (l'annonce des travaux), or to public works carried out three years before that date in the built-up area (l'agglomération) in which the land is situated.

Conclusion on international comparisons

D.127 Comparative study shows that the no-scheme rule or its equivalent is a normal feature of compensation codes. Otherwise, it offers no ready-made solutions. The various statutory versions provide some possible models for the new Code. Some of the cases offer interesting parallels, but generally they provide further demonstration of the difficulty of drawing clear dividing lines in this area of the law. It is noteworthy, however, that in spite of the numerous examples of statutory versions of the basic no-scheme rule, and some examples based on rule (3) of the 1919 rules, there appear to be no parallels for the more elaborate provisions of other parts of the 1961 Act. The comparisons support our overall view that the primary aim of the new Code should be to remove or confine such unnecessary complications.

CONCLUSION – THE NO-SCHEME RULE TODAY

D.128 It is a curious fact that the no-scheme rule, in its judicial and statutory versions, has not been subject to full review by the House of Lords in the 40 years since the restoration of the market value basis of compensation in 1959.[251] The present law rests on Court of Appeal authority, which itself, as we have seen, was based on limited analysis of either the statute or the earlier authorities. Those earlier authorities include two conflicting Court of Appeal judgments (in *Lucas*), and two conflicting decisions of the Privy Council (the *Indian* case and *Pointe Gourde*).

D.129 It is, therefore, still open to the House of Lords to reconsider the position, and it is far from clear how the various conflicts would be resolved. The recent decision in

[249] Californian expropriation law is codified principally in the California Code of Civil Procedure ("CCP"), sections 1230.010–1273.050. Compensation is specifically addressed in sections 1263.010–1263.620. Further provisions, on relocation, are found in the California Government Code, sections 7260-7277 ("Relocation assistance"). See also the California Evidence Code, sections 810–824 ("Evidence of Market Value of Property").

[250] See Code de l'expropriation pour cause d'utilité publique, Art L 13–15.

[251] In *Davy* and *Rugby Water Board* the issues were relatively narrow. Even in the *Ozanne* saga (see para D.107 above), the House of Lords' consideration (unlike that of the Court of Appeal) was limited, by the grounds of appeal, to rule (3).

Fletcher, though limited to section 17, suggests that the House might be sympathetic to an argument which sought to restrict the more speculative features of the rule.[252]

D.130 The clearest, and most authoritative, statement of the rule, which the Privy Council apparently intended to adopt in *Pointe Gourde*, is probably that of Lord Buckmaster in *Fraser v City of Fraserville* (1917).[253] What is to be excluded is "any advantage due to the carrying out of the scheme for which the property is compulsorily acquired". That was said in the context of projects, whose extent was identified by the statute or statutory instrument by which they were authorised, the only factual issue being whether or not they were to be treated as a single "scheme" for the purposes of the rule. The ambit of the rule has been extended and obscured by its rewording by the Privy Council in *Pointe Gourde*, referring to "the scheme *underlying* the acquisition", and by its interpretation in later cases, which have treated the issue as one of pure fact.

D.131 As for the statutory versions, rule (3) of the 1919 Act has been interpreted so narrowly as to have little practical effect. In any event, it was directed to the perceived problems of the time, as identified by the Scott Committee.[254] It sought to exclude speculative values dependent upon the exercise of statutory powers, whether by the acquiring authority itself, or by competing authorities. The problem of *competing authorities* was attributed to the "imperfect system" of granting statutory powers; it is not an issue which has featured in any of the post-war cases, no doubt due to the more centralised and regulated systems of control now in place. As to exercise of powers by the *acquiring authority* itself, this seems in practice to be covered by the judicial version of the rule.[255] Accordingly, rule (3) seems to have become effectively redundant.

D.132 Turning to the more modern versions, section 9 of the 1961 Act, originally derived from the 1947 Act, requires disregard of *decreases* in value attributable to an "indication" of the prospect of compulsory purchase. It provides protection against blight caused by the prospect of compulsory acquisition. It was not originally related to the no-scheme rule, but can be seen as a reasonable extension of it. It is less easy to support its use, as in the second *Jelson* case,[256] as a foundation for additional planning assumptions not supported by the provisions of the 1961 Act dealing specifically with that issue.[257]

D.133 Section 6 of the 1961 Act (first introduced in 1959) got off to a very bad start, from which it never recovered. It appears to have been a genuine attempt to give some shape to the no-scheme rule within the new planning system established by

[252] See paras D.104 – D.105 above.

[253] [1917] AC 187. See para D.27 above.

[254] See paras D.30 – D.33 above.

[255] As shown by *Pointe Gourde* itself, where rule (3) was held not to apply: see paras D.39 – D.47 above.

[256] See para D.103 above.

[257] Although s 14 accepts the possibility of assumed permissions other than those derived from any certificate under s 17, it seems to contemplate that the test for determining those assumed permissions will be exactly the same as under s 17: see para D.65 above.

the 1947 Act. It took account of the different circumstances in which compulsory purchase orders might be made, by distinguishing between those for self-contained projects (case 1); and those related to more extensive designations, such as comprehensive development areas or new towns (cases 2ff). The application of the rule in each case was defined by strict statutory limits. However, because of the convoluted wording of the section, literal interpretation was largely abandoned in the cases, and instead it was treated as existing side-by-side with the judicial rule, as part of a single, widely stated principle.

D.134 A more faithful interpretation might have modelled the future development of the no-scheme rule on the statutory version, rather than the other way round. In relation to self-contained orders, application of case 1 (directly or by analogy) would have led to the rule being confined to the area of the particular compulsory purchase order. In relation to the other cases, the need to "rewrite history" would have remained, although it would have been within defined statutory bounds. Furthermore, the comparison of the wording of section 6 with that of section 17 might have encouraged the court to bring the two into line as far as possible.[258]

D.135 Most of the provisions of the 1961 Act relating to planning assumptions, other than section 17 (certificates of appropriate alternative development), have proved anomalous or ineffective. Section 17, as interpreted in *Fletcher Estates*, provides a firmer basis for developing a single and exclusive set of rules for planning assumptions in the new Code.

[258] The "cancellation approach", eventually approved for section 17 in *Fletcher*, could have been seen as equally appropriate for s 6. Thus, under case 1, it would not have been necessary to look back beyond the particular proposal to acquire. The precise definition of "proposal to acquire" would have required to be considered, since s 22(3) does not apply directly to s 6.

POSTCRIPT – THE *PENTREHOBYN* CASE

A textbook example

D.136 As a postscript to our discussion of the history, it is appropriate to include a brief discussion of the most recent detailed examination of the issue by the Lands Tribunal, in *Pentrehobyn Trustees v National Assembly for Wales*.[259] The case is a textbook example of the problems with which we have been attempting to grapple.

Facts

D.137 Two parcels of land, totalling 5 acres, on either side of an existing road, were compulsorily acquired for a bypass. The acquiring authority was the National Authority for Wales ("NAW"), as highway authority. Draft orders for the bypass had been published in 1974, but the CPOs were not made until 1990, and entry took place in 1991. The issue for the Tribunal was whether the land should be valued on the basis of an assumed planning permission for industrial development. The parties had agreed values on three alternative bases: (i) "existing use value" (£35,000); (ii) "industrial development value" (£236,250); (iii) "hope value" (assuming prospect of planning permission within 7 to 8 years) (£118,125).

D.138 On an application for a certificate under section 17 of the 1961 Act, it had been decided by NAW (this time, as appellate authority) that no permission for industrial development would have been granted, either immediately or in the future. For that purpose (following *Fletcher Estates*[260]) it had considered the position on the "cancellation assumption", that is, assuming that the road proposal had been cancelled at the time of the publication of notice of the CPOs.

D.139 On a reference to determine compensation, the Lands Tribunal had to consider whether, notwithstanding the negative view expressed in the certificate, the prospect of any industrial development should be taken into account in the valuation. The Tribunal conclusions, in summary, were:

(1) For valuation purposes, the potential for alternative development had to be determined, not by applying the "cancellation assumption", but by reference to the "no scheme world",[261] that is, by considering the position as it would have been if there had *never* been a scheme for a bypass;

(2) Applying the "no scheme world" basis, it had not been established that permission for industrial use would have been granted. Compensation was therefore assessed at existing use value.

(3) If (contrary to that view) the issue should have been considered on "the cancellation approach", the Tribunal disagreed with the reasoning of NAW; it held that permission for industrial development would have been

[259] [2003] RVR 140.

[260] See paras D.104 – D.105 above.

[261] That is, following the second *Jelson* case: see para D.103 above. The Tribunal took the view that s 14(3A) of the 1961 Act (inserted in 1991) represented "implied statutory acceptance" of the approach of the second *Jelson* case (Decision para 79).

expected within 7 to 8 years, and that the "alternative award" [262] should therefore be based on the agreed "hope value".

D.140 The Tribunal's conclusion under (1) reflects the unsatisfactory position, under the existing law, that what is in effect the same issue (the prospect of development) is considered by two different tribunals on conflicting approaches. Its reasoning under (2) and (3) illustrates the extreme difficulties posed under the existing law, for the parties and the Tribunal, in applying either approach.

D.141 Applying the "no-scheme world" approach, the President commented on the practical impossibility of the exercise of rewriting history over 17 years:

> The parties are agreed that the bypass scheme came into existence in 1974. The valuation date is 1991, some 17 years later. Over that period the factors bearing upon the development of planning policy would have changed considerably - national economic pressures, the local economy, the demand for minerals, the need to deal with unemployment, the types of employment that might be generated, population trends and the housing market, the scope for public expenditure on social and infrastructure developments. The way in which Mold developed over those 17 years, as with any other town, would have depended on the inter-action of such factors as these, and the planning policies to which they gave rise, and a multiplicity of decisions on the part of those interested in developing land and on the part of the local planning authority. Individual projects would have been conceived, progressed, altered, implemented, abandoned. Numerous individual sites could have been developed or not developed for various purposes, and there would be a range of possibilities as to how they could have been developed and when. The interrelationship of these matters and the 17-year timeframe would produce a vast range of permutations in the way that the development of Mold might have proceeded.
>
> It seems to me that notionally to reconstruct the development of Mold over this 17 year period, so as to establish as probable that the land would have received permission for industrial development is a virtually impossible task…. (paras 97-98)
>
> The conclusion I have come to, therefore, is that, although the claimants have failed to make out a case for B1 planning permission in the no-scheme world, the acquiring authority have equally failed, despite their efforts to do so, to show that such permission would not have been forthcoming. (para 102)

Since the burden of proof was on the appellant, the issue had to be resolved in favour of the authority.

[262] Where the award depends on a disputed issue of law, the Tribunal is required to make an "alternative award" in case its decision on the law is reversed on appeal: Lands Tribunal Rules 1996, r 50(4).

D.142 On the alternative "cancellation assumption" approach, the President considered that NAW had erred in relying on the fact that the sites were outside the settlement boundary in the Local Plan:

> … it is essential to bear in mind, in my judgment, that the settlement boundary was drawn along the line of the bypass, so that, if the bypass scheme had been cancelled, the council would, in advancing its draft plan, inevitably have had to review the boundary and to have reconsidered the appropriateness of notations associated with it. (para 105)

He considered the planning issues which would have arisen on that assumption, including the competing merits of sites for industrial land, and concluded:

> What seems to me important, however, is that a decision on whether at the valuation date planning permission should be granted for B1 development would have taken account of the considerations I have mentioned, which were not addressed in the section 18 decision letter. Those considerations – the fact that the council would have had to reconsider the settlement boundary and the notations associated with it in taking forward the draft local plan, the likely deletion of area E1(5) and the consequences of that for industrial land availability in Mold, the boundary of the SLA as shown on the statutory plan, and the need to soften the raw edge of the existing industrial development – would have been seen as constituting a case of substance for the allocation for B1 purposes of the subject land and the land adjoining in the local plan, then still at its draft stage.

Accordingly, while "having regard to the contrary opinion" expressed by NAW in the section 17 certificate, he concluded that there was a reasonable prospect of planning permission being granted for B1 development within the 7 or 8 years used by the parties in agreeing the figure for "hope value". (para 108)

Conclusion

D.143 Apart from the general complexity and uncertainty of the existing law, the decision illustrates at least three profoundly unsatisfactory features of the existing law:

(1) The practical impossibility, for the parties and the Tribunal, of reaching a sensible decision on the "no scheme world" basis, where the scheme has a long history;

(2) The unacceptable potential for conflict created by the need for the same issue, relating to planning assumptions, to be considered by two different tribunals, applying different tests;

(3) The unattractive possibility, under the current procedure for appeal from a section 17 certificate, of the same body (in this case the National Assembly for Wales) being both respondent and judge in the same case.[263]

[263] See para 7.13(6) above.

APPENDIX E
RESPONDENTS TO CP 165

SURVEYORS

Peter Cunliffe and Co

Richard Hayward, Surveyor

Nigel Laing, Laing & Co

Philip Maude, Hammond Suddards Edge

J C Pagella, Montagu Evans Surveyors

Andrew Pym, Surveyor

Gary Sams, Surveyor

Paul Todd, Surveyor

Norman Winbourne, Winbourne Martin French

LAWYERS AND MEMBERS OF THE JUDICIARY

Bar Council Law Reform Committee

Michael Curry, Member of Lands Tribunal for Northern Ireland

Barry Denyer-Green, Barrister, Falcon Chambers

Farrer & Co

Law Society

City of London Law Society

John M Moritz, WDL Solicitors

Michael Orlik, Lodders

Norman E Osborn, Retired Solicitor

Robin Purchas QC, Barrister, 2 Harcourt Buildings

Guy Roots QC, Planning and Environmental Bar Association

Malcolm Spence QC, Barrister, 2–3 Gray's Inn Square

District Judge Michael Tennant, Law and Procedure sub-committee, District Judges' Association

LOCAL PLANNING AUTHORITIES

Birmingham City Council

Bradford Metropolitan District Council

East Sussex County Council

Fareham Borough Council

Northumberland County Council

Staffordshire County Council

Westminster City Council

ACADEMICS

Professor Rowan-Robinson, Paull & Williamsons

STATUTORY BODIES

British Waterways

English Partnerships

London Transport Property

REPRESENTATIVE BODIES

Association of Chief Estates Surveyors

Central Association of Agricultural Valuers

Compulsory Purchase Association

Council for the Protection of Rural England

Country Land and Business Association

Estates & Wayleaves Forum (Electricity Supply Industry)

Independent Compensation Surveyors Association

National Farmers Union

Royal Town Planning Institute

Royal Institution of Chartered Surveyors

COMMERCIAL ORGANISATIONS

Colin Smith, BK Property Consultants

Cable &Wireless

National Grid

Tesco Stores Limited

Transco

Union Railways Property

GOVERNMENT DEPARTMENTS AND EXECUTIVE AGENCIES

Highways Agency

Civil Justice Division, Lord Chancellor's Department (now the Department for Constitutional Affairs)

Tribunals Policy Branch, Lord Chancellor's Department

ODPM

Planning Inspectorate