No 'well-being' for Bromley by Bow? **Stan Edwards** poses the question

There was a lesson to be learned from the Wolves case – the courts have been astute to impose a strict construction on statutes expropriating private property[1]. In the light of the failed CPO at Bromley by Bow, it is useful to attempt to analyse the sources of errors in preparing recent CPOs.

Peep at Bromley by Bow
Lost a CPO
Even with planning behind them
Leave them alone, they'll have
to atone
For leaving statute and
guidelines behind them!
Stan Edwards

Introduction

Bromley by Bow (BbyB) is an area of London in serious need of regeneration, and the Inspector at the BbyB CPO inquiry acknowledged that. The serious lesson for everyone is that no matter how good the scheme, or how great the need, unless you can demonstrate that CPO principles have been followed, there is a greater likelihood that the CPO will fail, and rightly so.

It provides comfort when reading a judgment, or a CPO Inspector's Report, where the decision demonstrates that the Inspector has scrupulously followed the guidelines – we expect him/her to do so. At the same time it amazes me that, as the lines of argument are so easy to follow for those that know the rules, why those who promote a CPO think that inconvenient components can be glossed over and presumably assume that, with a bit of luck, no-one will notice.

A senior Judge stated in 2004, **"The current law of compulsory purchase of land is difficult to locate, complicated to decipher, and elusive to apply."** The learned Judge must have been talking about aspects of CP compensation, for many of us delivered numerous successful CPOs before and after 2004 without encountering challenge. Tracking back through recent articles, it is easy to demonstrate that many losses of CPOs have been through extravagant creativity and a somewhat disregard for the rules. Since 2004 we have had Supreme Court decisions (e.g. Wolves[2]) and those of sentient Inspectors in the BbyB and Heron's Quay Inquiries (both in Tower Hamlets) begin to apply the rules many had forgotten, and by which we all attempt to live. Those, and their advisers, who do not seem to follow the rules only have themselves to blame. These may be the very people who would complain that the rules are unfair, saying perhaps that the rules applied impartially appear to disfavour the perpetrators.

So what happened in BbyB that is so much a useful encouragement to those of us who attempt to follow the rules? We can have knowledge of the empowering Acts for CPOs and have at our disposal well tried guidance, but in the absence of teaching on these principles, it is only when an Inspector applies the guidance or the Courts illuminate the rules that the importance of CPO process is brought to the fore.

Our choicest plans have fallen through,
our airiest castles tumbled over,
because of lines we neatly drew
and later neatly stumbled over.
Piet Hein

Background

The case of BbyB stems from a retail led regeneration project in an area of East London within the designated area of the London Thames Gateway Development Corporation (LTGDC), involving the proposed delivery of a two phased retail-led scheme[3] using the Corporation's CPO powers. **The Order was made on the 2nd March 2010 with the Inquiry sitting in late July and late September 2010.** The purposes of the Order were, "*to secure the regeneration of the area by bringing land and buildings into effective use, encouraging the development of new commerce, creating an attractive environment, and ensuring that housing and social facilities are available to encourage people to live and work in the area by the provision of mixed use development.*" Both phases had planning permission – the first phase (the Tesco element) had detailed consent, and the second was in outline. A misconception is that if a project fulfils planning policy and is an accepted regeneration project, it fulfils the CPO requirements, to demonstrate a compelling case in the public interest, or that it justifies the use of CPO powers.

The case

At a Public Local Inquiry, the Inspector considered the issues generated by objectors to the CPO. There seems to be little dispute

between all parties that there is a need for regeneration of the area. **The prime area of contention was the handling of the scheme delivery and the CPO process.**

The only people surprised by the Inspector turning down the CPO were those who had not fully understood the requirements of CPO process. Two key aspects were highlighted by the Inspector:

1. the enabling power and the application of specific guidance
2. the general guidance of Circular 06/2004[4].

However, the simple application of the guidance of Circular 06/2004, particularly Appendix D Para.7, by the acquiring authority and its advisors would have killed these two birds with one stone.

The power

Since 2004 we have become used to the empowerment of regeneration CPOs to be the Town & Country Planning Act 1990 Sect. 226 (as amended)[5], and as such are used to looking at whether the acquiring authority had complied with the terms of the statute in respect of 'think will facilitate' (Section 226 (1) (a) the development, redevelopment, improvement of the land, as qualified by the social, economic and environmental well-being of Section 226 (1A)).

Such was not the case here. **Social, economic and environmental well-being as a qualification in terms of empowerment were not required.** However, the compulsory purchase empowerment under the Local Government Planning and Land Act 1980 (LGPAL Act) Section 142, although very wide, did include its own 'socio/economic well-being' provision – that relating to businesses affected by the CPO and the specific requirement by the acquiring authority to find alternative premises. The usual CPO mitigation principles (noting Shun Fung provisions) were overridden by the statute. The specific requirement of the Act[6] states that, "*so far as practicable, to assist persons or businesses whose property has been acquired, to relocate to land currently owned by the UDC.*" The acquiring authority seems also to have overlooked the basic regeneration ethos of its empowering Act to encourage the development of both *existing and new* industry to achieve its regeneration objectives.

Employment objectives

The employment issues were two fold:

1. assistance to relocate existing businesses
2. the quality and quantity of the jobs that were being lost.

Assistance to relocate existing businesses

There had been contact by Tesco to negotiate with the nationwide scaffolding services firm, the Trad Group, and others, but as the Inspector noted, there appears to have been little account taken of existing occupiers' relocation at the time the Order was made. The important point to be made here is that it is the Corporation's CPO and not that of Tesco, and the Corporation/advisors, apart from any perceived requirement to expedite the project and compel acquisition, should have ensured CPO compliance. It seems that much was left to be sorted out at or around the Inquiry – a common, but risky strategy. This is not an isolated practice. The Inspector noted that Confirmation of the Order would pose a significant risk to the continuation of Trad's business and the quantity and quality of employment it provides. In addressing the issue of relocation, the Inspector considered that the Corporation's approach had not been consistent with the guideline of Circular 06/2004.

The quality and quantity of the jobs that were being lost

The Inspector stated that in general terms he did not consider that the existing jobs in a well established company can be regarded as having the same social and economic values that may result from the proposed development. **This is an important statement for many who gloss over the socio/economic implications of 'trade diversion' and 'job transfer' in purely retail schemes – but how much more is it important here?**

The Inspector picked up on this point of great public interest. Admittedly here, it was to do with specific requirements of statute, but in the realm of many 'so-called' town centre regeneration CPOs, 'new employment' is provided as a major argument for progress. Even without the statutory requirement in BbyB it could be argued that the public interest is not being served in town centre, district or local centres where established retail businesses and livelihoods are competing, delivering social impacts on the community. PPS4 is unable to address this in terms of policy, because it is pro-competition, which for socio/economic reasons is not in the public interest – each case has to be considered on its merits.

This point is picked up by many consultants delivering retail advice, but is perhaps ignored by promoting local authorities because it does not align with their corporate agenda.

It would be very easy for promoters of T&CPA CPOs to just relegate those employment issues as being specific to the LGPAL Act 1980, and say that they do not apply to the T&CPA CPOs. Indeed specifically they do not apply, but this is the very issue of public interest at the root of failed town centre regeneration CPOs – the lack of consideration on the wider impact on existing businesses and social structure.

Delivery

There were numerous points that the Inspector picked up on, notwithstanding that there was no demonstration that there was a realistic prospect of the Corporation's proposals being delivered within a reasonable timescale, particularly in respect of the second phase. In fact the Inspector stated that, "*whilst the regeneration of this part of London is an important strategic planning objective, the Corporation did not identify any specific reasons for urgency.*" What makes it compelling?

Negotiation

The Inspector stated that there is no reason to doubt that Tesco made a genuine attempt to assemble land by agreement. However, whereas Tesco entered discussion from 2006/7 and agreed conditional terms, it withdrew from these. Negotiations were attempted by Tesco again in 2009, which eventually culminated in the Corporation making a CPO on behalf of its partner, Tesco.

For one claimant in particular, no offer to purchase was made until June 2010, well after the Order was made, and only shortly before the Inquiry opened. The acquiring authority must be careful to ensure that it is not perceived as merely being used as a 'banner CPO' for a developer to deliver private interest at the expense of a compelling case in the public interest – no tails wagging dogs. However, there seems plenty to alert the Inspector to the fact that

the acquiring authority was not using compulsory powers as a last resort, and did not accord with the advice of Circular 06/2004. This was a scheme to require deep scrutiny.

Human rights

To quote the Inspector, "*My overall assessment is that the factors which weigh against confirmation outweigh the points in favour. The Corporation has not demonstrated that there is a compelling case in the public interest for the Order to be confirmed. In these circumstances it is not necessary for me to comment further on the human rights considerations.*" **It would appear that in many cases expediency overrides goods practice, with disastrous consequences –** CPOs are easy, and human rights not an obstacle, just as long as you follow the rules on process.

The games people play

In the ideal CPO world, purists speak of all CPO valuations ultimately being resolved by the Upper Chamber (still Lands Tribunal to me!) – and so they would if it came to that. In the real world, games are played where even a legitimate objection demonstrating that there has not been a compelling case in the public interest is bought off before it even sees the light of day. Such is the case with retail led town centre CPOs where adherence with planning policy does not mean that the public interest has been heard or protected. There may be a public interest test to satisfy beyond getting a PPS4 compliant consent. The statutory objector is the major factor in the decision to trigger a Public Inquiry.

Cynically speaking, most objections are a means of attempting to enhance the total compensation beyond that which would be paid following the CPO compensation rules. Would Sainsbury have challenged the Wolves CPO if they had received a piece of the Raglan Street uplift value from the outset? However, we all know that if it was the acquiring authority alone, they would be left with the traditional position of demonstrating compliance with the statutory rules of compensation. Where the developer is involved, the developer will be willing to sacrifice developer's profit, as seen in the BbyB case to achieve delivery of the scheme, probably factoring in future sales and market share as being more important. There is a song[7] where the chorus runs:

> You've got to know when to hold 'em
> Know when to fold 'em
> Know when to walk away
> Know when to run.

Many cases related to CPO process have really been gamesmanship in terms of the price that will be negotiated. Rather than have the value settled at the Upper Chamber, the parties take a view as to the quality of the CPO process, and the degree of success in objecting or challenging a CPO. It is galling for those who pursue 'good practice' that many CPOs' 'poor practices' become just a commodity to be negotiated away. There is nothing like a successful objection or challenge (BbyB and Wolves) to sharpen the approach and content of others undertaking CPOs.

Price brokerage v value (appraisal)

To a point, in the early stages of CPO negotiations, we are in the world of price brokerage as opposed to value (appraisal). In the USA this is more formal, where a 'broker price opinion' may be delivered. Anyone employed under the broker negotiating for third parties must have a licence. Any valuation other than a broker price opinion (BPO) requires a certification of value. Those who are not certified as real estate appraisers should be careful to discuss price only. If you talk value, that's an appraisal. We have not got that in the UK, but it is an interesting dimension for the future.

Within the CPO process, there are a number of stages where a price can be brokered – from before the objection is submitted to prior to withdrawing the objection, even up to the steps of an Inquiry. The only objection of any real value is where the claimant is the only one to identify a serious defect in a CPO before it goes public.

There are those that say that the decision in respect of BbyB swings the pendulum in favour of the claimant. I would disagree. **Each case has to be judged on its merits.** A well constructed and presented CPO following the rules should hold no fears for the promoters. It would appear that the objectors and claimants are beginning to learn and apply the rules faster than the promoters.

Tower Hamlets

The point was made in the Tower Hamlets CPO (same locality) where the Inspector confirmed that public law principles apply when a private entity is negotiating on behalf of an acquiring authority, and that developers that negotiate alongside or on behalf of public bodies are expected to adopt higher standards than in private deals.

CPO 'good practice'

How many times in CPOs has it to be hammered home?

- policy
- purpose
- power
- procedure
- practice.

How many times does it need to be reiterated that if you change the power, the parameters change in line with the statute? How many times does it need to be reiterated that there has to be a demonstrable compliance with the guidance in Circular 06 /2004? How many times do we have to see in the Statement of Reasons the one line statement, "*there is a compelling case in the public interest*"? It leaves us to ask where and how was it assessed and demonstrated? If the Inspector found ways of stating where it was not, why were these not in the minds of the promoters? Is it just expediency? At the end of the day the developers and superstores such as Tesco are not to blame – it is the acquiring authority's CPO. Surely someone in the acquiring authority or its advisors are watching over CPO compliance and considering the waste of public resources in respect of a possible challenge.

Again quoting Lord Collins in the Wolves case, with an attribution to Blackstone of, "*a caution to the legislature in exercising its power over private property, is reflected in what has been called* ***a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights*** *… As a practical matter it means that, where a statute is capable of more than one construction, that* ***construction will be chosen which interferes least with private property rights***". It is comforting that the Courts ultimately take

seriously the job of reinforcing decisions where taking someone's rights is a serious business, with guidelines to be followed for all our protection.

Wolves and Tower Hamlets (inc.BbyB) in context

It is sometimes useful to put CPOs in context of others and see whether the sequencing and cross impacts could possibly have influence. **A chronology is put forward in Figure 1 regarding which are drawn the following observations:**

- Tesco partnered Wolverhampton CC in respect of the Wolverhampton case, which ultimately failed through non-compliance with the T&CPA 1990 (as amended) in respect of Section 226 (1)(a) and 1A, regarding 'well-being' connectivity and any cross subsidy not forming part of a comprehensive programme. Found: deficient in following qualification requirements of the empowering statute (T&CPA 1990 – as amended)
- Tower Hamlets LB (Heron Quays CPO). The developer, Canary Wharf Group (CWG), partnered the London Borough of Tower Hamlets for a T&CPA 1990 (as amended) CPO. Found – no compelling case in the public interest – no demand demonstrated for office use. Guidance Circular 06/2004 had not been not followed
- Tesco partnered the LTGDC (in Tower Hamlets) in the BbyB CPO to avoid the apparent 'well-being' qualification of the T&CPA 1990, and to demonstrate connectivity in a two phase scheme, part of a comprehensive remit. Found – deficient in following a 'socio/economic well-being' qualification requirements of a different empowering statute (LGPAL Act 1980) and that guidance in Circular 06/2004 had not been followed.

These decisions send out a clear message. The rules (statute and guidance) are there to be followed – the reader may deduce for him/herself why they are not.

DATE	EVENT
7 May 2009	The London Borough of Tower Hamlets made The Heron Quays West, Canary Wharf, CPO[9]. The Order was made under the Town & Country Planning Act 1990 (as amended)
31 July 2009	Court of Appeal judgment on the Wolverhampton case
27 January 2010	The Inspector recommended that the Heron Quays Order not be confirmed
2/3 February 2010	Supreme Court heard the Wolverhampton Case
2 March 2010	Bromley by Bow (in Tower Hamlets) Order made
2 May 2010	Judgment given by the Supreme Court on the Wolverhampton case
20 July 2010	Bromley by Bow Inquiry starts
30 September 2010	Bromley by Bow Inquiry ends
11h January 2011	Inspector delivers his report on Bromley by Bow CPO

Fig.1 – Chronology of CPO events at Tower Hamlets and the Wolves case

Lessons to be learned – General

In life, there are lessons to be learned at every turn. Reverting back to the learned Judge's statement in 2004, much could be achieved, and objections /challenges avoided if there was some simple quality control/good practice checklist to be signed off during the making of a CPO. However, that would upset those who say we have too many rules, but even more those who make a living from conflict.

Lessons to be learned – Bromley by Bow and Wolves

1. consider in strict terms the empowering Act
2. make every attempt to comply with the guidance
3. remember that 'creative expediency' can only lead to problems
4. the Inspector reads and applies the rules, even if the acquiring authority and its advisors apparently do not
5. an acquiring authority on its way out of existence may feel pressures to undertake a CPO before it was quite ready to do so.

In the BbyB CPO, 'well-being' was the unstated victim both in non-compliance with statute, and not being able to demonstrate a compelling case in the public interest. **Whether it be statute or public interest considerations or not, 'well-being' should be at the core of all activities and openly demonstrated.**

A verse of promoters who produce failed CPOs:

> My adversary's argument
> is not alone malevolent
> but ignorant to boot.
> He hasn't even got the sense
> to state his so-called evidence
> in terms I can refute.
>
> Piet Hein ■

Footnotes:

1. Taggart, Expropriation, Public Purpose and the Constitution, in The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC, (1998) ed Forsyth and Hare, 91 (as restated by Lord Collins in the Wolverhampton case).
2. R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20.
3. The London Thames Gateway Development Corporation (Bromley by Bow) (South) Compulsory Purchase Order 2010.
4. ODPM Circular 06/2004 'Compulsory Purchase and the Crichel Down rules'.
5. Town & Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.
6. ODPM Circular 06/04 Appendix D Para. 7.
7. 'The Gambler', by Kenny Rogers.
8. Inspector's Report to The London Borough of Tower Hamlets (Heron Quays West, Canary Wharf) Compulsory Purchase Order 2009, & "Inspector slams Canary's CPO tactics" by Richard Heap, Property Week 01 April 2011.
9. The London Borough of Tower Hamlets (Heron Quays West, Canary Wharf) Compulsory Purchase Order 2009.

Stan Edwards, a Chartered Surveyor, is a Director of Evocati Limited, a consultancy specialising in CPO process. He is also visiting lecturer in retail planning and development at Cardiff University, and formerly Vice-Chairman of the Compulsory Purchase Association. Evocati is based in Caerleon, Newport. Contact him on stan.edwards@evocati.co.uk