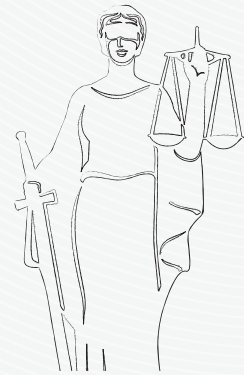




The CPO cases that have been challenged in court in recent years contain common characteristics that demonstrate a refreshing reinforcement of purposes and powers in promoting CPOs



Argos in Iceland and Wolves in a cattle market!

*'The time has come, so counsel said
To justify the things
Of purposes in the Order
For the GVD it brings'*
Stan Edwards

Introduction

It is said that 'it is better to re-read an old book than to read a new one' and that 'those who cannot remember the past are condemned to repeat it'. In compulsory purchase, we have seen the Iceland case² and noted its outcomes, and yet its basic principles were rehearsed in the Argos case³ with the same outcome (Argos prudently decided not to proceed to appeal). The principles of the Wolverhampton case⁴ have soon been forgotten (or selectively disremembered by those who wished a different result) and yet the applications of the principles elucidated by Lord Collins in Wolves became a useful sounding board for a host of other cases reinforcing CPO law and practice. **It seems we should learn more from the circumstances of Iceland, Argos and Wolves and other CPO failures, picking up a gem every time we revisit them.** So, we look again at purposes and public interest plus proximity and connectivity.

Argos and Iceland

Vérité en-deça de M5, erreur au-delà ('There are truths on this side of the M5 that are falsehoods on the other.')

We shall look at these cases in turn, and then attempt to extract the distilled juice from the decisions.

Iceland

It will be recalled that Iceland's challenge⁶ to the John Frost Square, Newport, CPO⁷ was at the GVD stage, and that basically since the confirmation of the CPO and the subsequent failure of the acquiring authority's partner, Modus Developments, the purpose of the scheme had changed significantly. Iceland argued the scheme was unviable, and the council would just 'land-bank', facilitating an unspecified development in the future. The detail of the Iceland case was set out in a previous article⁸, but the Argos case now requires consideration.

Argos

In July 2008, Birmingham City Council made a CPO⁹ under section 226(1)(a) of T&CPA 1990 as amended, the order lands of which included New Street Station and the whole of the Pallasades Shopping Centre which sits above the station. It included a Unit 30 occupied by Argos Limited (Order plots 160 and 161) who occupied under a 25 year lease, of which ten years and one month remained.

Argos did not withdraw an objection to the CPO, which had been pursued at the inquiry only as a written objection. In its objection, Argos did not accept that the entirety of the 'occupational interest' in the Pallasades Shopping Centre needed to be acquired, nor the viability of the scheme, nor sufficient justification for taking its unit, or sufficient discussion had been held about alternative premises for it.

Following a public inquiry, the Inspector recommended confirmation of the CPO, which the SoS did in July 2009 without modification. No challenge was made under section 23 of the Acquisition of Land Act 1981. After confirmation of the CPO, Birmingham City Council made a number of GVDs to transfer ownership, and to obtain possession of various parts of the Order lands, including GVD No.8 relating to Argos' interest. It was sealed on 8 June 2011, with possession postponed. No land outside the shopping centre was included in GVD8.

"It seems we should learn more from the circumstances of Iceland, Argos and Wolves and other CPO failures, picking up a gem every time we revisit them."

After the CPO was confirmed, but before GVD8 was made, this scheme had become unviable and abandoned. The particular problem was the office and residential development and other purposes outside the shopping centre. This had led to further proposals, not yet embodied in a planning permission, in which a large John Lewis Partnership department store would occupy part of the Pallasades Shopping Centre, including Argos Unit 30, and extend to occupy the southern development site for retail purposes instead of specific office, residential and other uses. Unit 30 could no longer be occupied by Argos during, let alone after, construction.

A challenge to GVD8 by Argos followed the grant of permission by Beatson J, who refused a stay in its operation, but ordered expedition for the hearing. The basis of the challenge by Argos was broadly that the CPO was promoted for a scheme which would have left Argos potentially able to trade, albeit with some disruption, through the construction and refurbishment works to New Street Station and to the Pallasades Shopping Centre, leaving it still in occupation afterwards.

Argos contended that GVD 8 was unlawful because:

1. it was being used to obtain land for purposes outside the scope of the CPO
2. unauthorised acquisition breaches Argos' human rights



under Article 1 Protocol 1 of the ECHR, and even legally authorised rights were breached

3. Birmingham City Council had failed to consider the balance required under Article 1 of Protocol 1 between public and private interests in the new circumstances after confirmation of the CPO
4. the use of the GVD was unfair and unreasonable in these circumstances in relation to CPO, and is a wider test than conventional *Wednesbury*¹⁰ principles.

Although both *Iceland* and *Argos* survived challenges, there were differences between them which the Justices, Williams and Ouseley, explained in each case. Ouseley J was able to describe a wider rationale of the principles involved, including a reference to *Iceland*.

Compare and contrast

'If you cannot say what you mean, your majesty, you will never mean what you say ...'

R J Johnston – 'The Last Emperor'

It is worthwhile reading the *Argos* judgment as a whole, because it contains so much useful argument and discussion that cannot be contained in just part of this article.

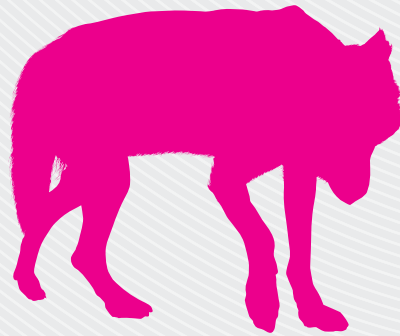
Ouseley J went into substantial explanation before dismissing the *Argos* challenge, and it is useful to compare this with the *Iceland* case. The Birmingham CPO, however, has a much firmer footing than the Newport one.

Both relate to:

1. city centre projects
2. a CPO empowered by the Town & Country Planning Act 1990 (as amended)
3. suffered funding failure
4. no challenge within the six week challenge period
5. a challenge at the GVD stage
6. challenges requiring making reference to the *Simpsons Case*¹¹, where CP power authorised for a particular statutory purpose, cannot be exercised for a different or collateral purpose
7. challenges in terms of human rights
8. the purpose of the CPO as defined by the Act
9. the purpose as defined in the CPO
10. what was said in the Statement of Reasons (SoR)
11. it turned on the facts of the case.

The Birmingham CPO was very coherent, both in terms of the wording of the Order itself providing the purposes, and the description in the SoR. Birmingham CC provided a focused CPO with a robust statement of the compelling case in the public interest that not only focused on the prime purpose, the changes to New Street Station, but the other associated benefits described in terms of well-being. In contrast, the Newport CPO where, apart from a few lines that included *'there is a compelling case in the public interest'*, the SoR referred to a mixed used development which added nothing to the understanding of the CPO, and to a list of uses and floor areas.

Compulsory purchase and regeneration



Some of the uses were not referred to, and those that were referred to were listed non exhaustively in the compulsory purchase order (*Ouseley J*). The Judge said that *Wyn Williams J* considered evidence about the council's current intention, and concluded that the GVD was being used to further the CPO on its proper terms. *Wyn Williams J* considered the SoR, the Inspector's report and the decision of the National Assembly for Wales to confirm the CPO, the terms of which empowered acquisition – *'for the purpose of securing the carry out of a comprehensive scheme of development (including retail, leisure, residential and hotel uses together with car parking, highways alterations and public realm works)'*.

"Although both *Iceland* and *Argos* survived challenges, there were differences between them which the Justices, Williams and Ouseley, explained in each case."

The latter records the language of the CPO as confirmed. The former two record its purpose in equally general terms.

The main argument in *Argos*

Commencing in 2003, a master plan and a subsequent range of options were developed and refined for achieving the specific objectives of the Gateway Project, which were listed in the SoR, which was dominated by improvements to the New Street Station, its accessibility, the creation of 'a gateway to the regions', maximising the commercial value of the scheme within its passenger capacity and regeneration objectives, and securing the successful regeneration of the Pallasades Shopping Centre.

At the GVD stage, *Argos* was either challenging the lawfulness of the CPO by reference to what was said at the inquiry, which it could not now do, or was tying the CPO to the particular outline planning permission which *Argos* had also accepted it could not do. In determining the scope or purpose of the CPO, ***Argos* was confined to examining the empowering statute and the terms of the CPO itself in its strictest sense**. Extraneous material could be used where there was perhaps a genuine ambiguity in the terms of the CPO.

The proposals for which the City Council wished to vest the land in itself were clearly within the broad objectives of the CPO and the description of the permitted mix of uses. The Judge decided that the City Council and Network Rail were essentially correct. The GVD powers can only be used in respect of land which the City Council is authorised to acquire by compulsory purchase. The land to be vested was Order land, and was not being vested for a different purpose. Although the SoR for the CPO is non-statutory and, despite the dismissive and shallow approach to it in many CPOs, **it is the only vehicle by which the justification for a compulsory purchase order can be explained**. It provides the audit trail from the authorising reports and resolutions of the acquiring authority and

Compulsory purchase and regeneration



the basis for a Statement of Case. In fact, it is worthwhile to recall Lord Nicholls's comment in the Waters Case that *'normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority'*¹².

The public interest

The CPO on its terms contains the general purpose of *'facilitating the major refurbishment and associated development of New Street Station and adjoining land in connection with alterations and reconfigurations of the station facilities.'*

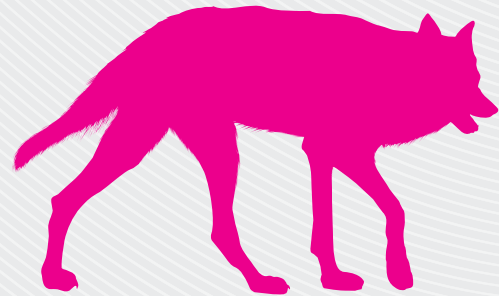
"All of this was to contribute to the economic, social and environmental well being of the city centre area."

This was followed by a more specific description of what that comprises, being changes to the Pallasades Shopping Centre, new build construction followed by a list of uses for the new build, demolition and associated highway works, public spaces and infrastructure. All of this was to contribute to the economic, social and environmental well being of the city centre area. To the Judge, the final phrase relating to well being clearly covered all and not just the final component. It is not itself a scheme specific assessment, but rather it is the expression of a view as to the merits of the CPO. The uses of the refurbished 'adjoining lands' are not specified. There was no requirement for the new build to be in any particular form or of any particular scale. **The CPO is plainly not tied to any particular planning permission, or to a particular development scheme defined in some other way than by a planning permission.** It was not necessary for all listed uses to be provided for in the new build.

The phrase 'changes to the Pallasades Shopping Centre' did not cover wholesale demolition and replacement by a new build, but so long as what is done to the Pallasades Shopping Centre comes within the concept of 'change', it is within the scope of the CPO.

In the judgment, 'changes to the Pallasades Shopping Centre' is a broad enough phrase to encompass the atrium with the loss of some retail units, the retention of other retail units and the incorporation of others, including Unit 30, into a larger retail development involving land outside the Pallasades Shopping Centre to the south. The Pallasades Shopping Centre would still exist but it would be changed. The new build construction would include retail, one of the listed uses, and does not have to include the others. The Judge was satisfied that GVD8 was made for the purposes of the CPO being properly understood in the context of its stated purpose.

To clarify further, it was on the basis that Unit 30 might be required for some construction works that it was included in the CPO in the first place. Whatever change there may be between the prospects of construction works being carried out without possession being needed, as envisaged at the inquiry, and now, does not go to whether the purpose of the acquisition is within



the CPO. It was quite clear that, even if not essential or absolutely necessary, there are very significant advantages to the construction process and programme in taking ownership and possession of Unit 30, which were sufficient for the initial purpose to be wholly within the compulsory purchase order powers.

Human rights

The Judge pointed out that Article 1 was intended to give a wide margin of discretion over what circumstances justified the use of compulsory purchase powers. **Compensation for the loss of a property owned at market value was not the issue.** The Judge also had a clear conclusion on the balance struck as at 2007 and 2009, the two projects, and assumed that acquisition is lawful under ground one.

He said that the overall tenor of the documents which are referred to in relation to the scope of the CPO, in particular the SoR, Statement of Case and the Inspector's report, left him in no doubt that neither the acquiring nor confirming authority would have reached a different view as to where the balance of public and private interest lay if faced with the changed circumstances now relied on. Also his own view was that the radical changes required to the Birmingham New Street Station, its operation, environment and access, and the changes required to the surrounding land, make a compelling case for acquisition in the public interest, whether Argos stayed or not.

Wednesbury

In the area of compulsory purchase, the courts have endorsed a broader basis of the view than 'Wednesbury' principles constituted by the reference to 'fairness and reasonableness'. On the Iceland case, Ouseley J did not think that Wyn Williams J intended to convey anything different when saying in the Iceland decision that a local authority had to act *'both fairly and reasonably in deciding whether and when to take the step of executing a GVD'*. The question is whether acquisition in such circumstances would fall outside the powers of the CPO. The Judge considered that the absence of a firm proposal to relocate Argos temporarily or permanently in the shopping centre did not make the decision unreasonable or unfair.

Reverting to Iceland, we must consider whether Wednesbury applied, and even a duty of candour in respect of the material issues regarding Newport and its developer's activities in the period between the confirmation, and the developer's failure just before the GVD. These issues were not brought before Wyn Williams J in Iceland. In his judgment, he did question the activities that occurred in that time period.

Overview

One gets the feeling that Argos considered they had a reasonable expectation that they would remain in the centre (perhaps with a temporary closure during works) and so did not press their objection to the CPO strongly at the inquiry. They should have perhaps secured that as an undertaking, but failed to do so.



They seemed unaware that plans can and often do change – what is presented as ‘detail’ in the inquiry is possibly only a statement that there is a deliverable scheme that will fulfil the objectives. If they had understood at the time that there was a possibility that they may be told to get out permanently, they may have presented their arguments differently.

Wolves revisited

The councils in each of the Iceland, Argos and Wolves related CPOs thought that the acquisition would facilitate the development or improvement on or in relation to the land (section 226 1(a)). The qualification of Section 226 1A for this empowerment is a negative one. The Act was meant to make the argument to utilise the power as simple as possible and it does. Wolves fell foul of the Act (section 226 1(a)) but all, in some way, required a closer look at the guidance in Circular 06/04.

The Wolves case was referred to in Iceland and Argos, and we recall:

1. the strict application of the empowering Act T&CP 1990 (as amended)¹³, particularly that the empowerment relates to the land being compulsorily purchased
2. Section 226 1A is a negative qualification to the empowerment. However, even just a contribution to one of the well being factors fulfils the requirement
3. the importance of proximity and connectivity acknowledging planning principles of ‘materiality’ and ‘reasonably related to’
4. to cross-subsidise it should be demonstrated that the direction of the flow is usually to the subject CPO land, except where it can be demonstrated that there is a linkage between compositely related projects. There must be a real, rather than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made
5. the benefit to be cross-subsidised in Wolves was effectively that value of the uplift in respect of the Raglan Street site of which Sainsbury’s owned 86%. It seems Sainsbury’s chose to challenge the process rather than argue the value of its interest in the Upper Chamber.

“The Judge considered that the absence of a firm proposal to relocate Argos temporarily or permanently in the shopping centre did not make the decision unreasonable or unfair.”

Abergavenny/Raglan (Bryn Gwyn) Cattle Market CPO¹⁴ (‘Get ‘em up, move ‘em out, rawhide!’)

Given what has been said in the previous eight articles, it is useful to attempt to apply them in respect of the Raglan CPO, which has



been confirmed notwithstanding that a High Court challenge is imminent.

Background

Monmouthshire County Council (MCC) has been contemplating the redevelopment of the livestock market site since 1997, and has been actively looking for a replacement site since at least 2004. MCC has owned the freehold to the Bryngwyn (Raglan) site since 2006.

Morrisons superstore is waiting in the wings to redevelop the town centre site, which required the acquisition of an alternative. KALM¹⁵ are the group progressing the High Court challenge regarding Abergavenny Improvement Acts (1854, 1860, 1871), that conferred numerous functions and duties now on MCC. When read in conjunction with the Markets and Fairs Clauses Act 1847 (as amended), **it requires MCC to hold a livestock market within the town of Abergavenny on designated land in the current town centre.** It should be noted that other livestock markets in the area (Newport and Monmouth) have closed, focusing only on Abergavenny. Since the holding of the inquiry, the Welsh Ministers have repealed the Abergavenny Improvement Acts, with leave granted for a Judicial Review of the repeal (see above). Here are some pointers on the CPO:

1. MCC used out of date guidance. They stated powers of the T&CP Act 1990 as amended correctly, and then also said that the SoR was in line with the guidance on SoR – the old Welsh guidance NAFWC 14/2004 – pre 2004 Act. There is no current Welsh guidance on the 2004 Act, and the replacement unfinished draft is unadopted in Wales. The only current guidance for the empowering Act (Appendix A) is the English one – in Circular 06/04. This delivers the appropriate guidance on the requirement for finding alternatives (as a note, all T&CP Act CPOs in Wales since 2004 have been without adopted guidance)
2. the ‘Waters’ case demonstrates that you can run a CPO to produce a replacement, but the point is that the whole scheme should be run to facilitate Abergavenny. The main argument in CPO terms is ‘connectivity and proximity’ – a sequential approach should have been demonstrated if attempting to move the market aligning with 06/04 (even if merely advisory guidance)
3. Wolves – at Abergavenny/Raglan, the cross-subsidy is flowing in the right direction. Also they only had to prove that the CPO site contributes to any one of the economic/ social/environmental wellbeing of the area (Monmouthshire), and they satisfied the 226 1A qualification of the use of the related power. The council’s main arguments in going for the Bryngwyn Farm is a logistical, farming industry one. Section 226 1(a) is satisfied if the council thinks it will facilitate the development, redevelopment, improvement on or in relation to the [subject] land (at Bryngwyn Farm).
4. funding is not the issue, and the council can partner who they wish – Standard Commercial.

5. the Order – the detailed rationale for the CPO was set out in its SoR, that explicitly advised that the improvements to the economic, social and environmental well being of the area on which the council relied were those set out in section 4. Section 4 referred to the benefits to the farming community of providing a new market, which was able to satisfy the demanding regulatory requirements, would be of sufficient size, and would be more accessible. Though it had been referred to in section 3, there was no mention whatsoever in section 4 of the benefits of redeveloping the existing site in Abergavenny town for a supermarket. These as supposed benefits were described as “indirect”.
6. the Statement of Case – here the above position changed. While Section 4 of the Statement of Case (dealing with ‘the scheme and its benefits’) repeated the benefits previously mentioned in the SoR, it introduced, as an entirely new benefit, *‘the redevelopment of the site of the current market with uses in accordance with planning policy, so as to strengthen the retail offer and attraction of the town.’* At this stage, the supermarket was still merely the fourth item in the list, apparently added on later. However, by the time of the inquiry, that position had completely changed. The proofs of evidence lead with the benefits of the supermarket. In section 6, the supposed benefits of relocating the market (which were the sole factor in the SoR) were relegated to the status of the by-product of a step, which is necessary in order to clear the existing site to make way for the supermarket. Confirmed in cross-examination was the view that principally the supermarket provided the benefits which justified the scheme.
7. the remaining statutory objector has sporting rights at Bryngwyn. MCC’s argument is that the public benefit of the livestock market in its proposed position greatly outweighs private rights. This can be countered in part here by Lord Collins’s rehearsal in the Wolves case of the presumption in CPO against the taking of rights. Connectivity and proximity of the market to Abergavenny is an important counter argument.
8. the subject land – the council obviously thought the CPO would improve the Bryngwyn land, notwithstanding that there is not a single policy in the UDP which explicitly proposes the redevelopment of the existing market site for a supermarket. Also there is not a single policy in the UDP which supports the relocation of the existing market, either in terms of a specific allocation for the Bryngwyn site (or anywhere else) or even in the form of a criteria-based policy to guide the search. Neither MCC’s proposals for the redevelopment of the existing market site, nor its proposals for the relocation of the market, are the subject of any SPG. Indeed, far from being supported by a ‘clear strategic framework’, the acquisition of the Bryngwyn site appears to have been the result of an opportunistic purchase by the council, without any consultation with either the public or even the council’s main partner in the enterprise, AMAL.¹⁶ The Inspector has, however, concluded that because there is an extant permission, the test is satisfied that there are no planning impediments to the implementation of the scheme.

Overview

There are those that will press the argument to keep Abergavenny in a time warp, not bothering to consider the negative impacts of a livestock market in the centre of town. **The only question I have**

here is whether the cattle market now benefits Abergavenny town centre, or whether it would benefit from an out of centre position. The corollary is whether Morrisons would improve shopping in Abergavenny, or have disbenefits impacting on the town and high street as a whole. It would have been useful if these issues had been approached in a structured way. However, we have to look at the arguments specifically related to the CPO.

It is on the CPO process and justification arguments that one could take issues. Any challenge, however, means ploughing through the Inspector’s Report, as the Decision Letter plus extracts does not really provide the material. The Report was, however, made readily available upon request.

Was the Raglan CPO done ‘on the hoof’?

Was there/is there a compelling case in the public interest? Was sufficient attention paid to guidance and relevant local Statute? This is one which has a lot of interest for CPO anoraks. ■

Footnotes:

1. George Santayana (1863-1952) "Life of Reason "
2. R (on the application of) Iceland Foods Ltd Claimant v Newport City Council. Defendant Neutral Citation Number: [2010] EWHC 2502 (Admin) Case No: CO/2654/2010 in the High Court of Justice Queen’s Bench Division Administrative Court at Cardiff before Mr. Justice Wyn Williams
3. R (on the application of) Argos Limited Claimant v Birmingham City Council and Network Rail Infrastructure Limited. Defendant Neutral Citation Number: [2011] EWHC 2639 (Admin) 17 August 2011 in the High Court of Justice Queen’s Bench Division Administrative Court at the Royal Courts of Justice
4. R (on the application of Sainsbury’s Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20
5. Acknowledgements to Blaise Pascale, 1623-62
6. R (on the application of) Iceland Foods Ltd Claimant v Newport City Council. Defendant Neutral Citation Number: [2010] EWHC 2502 (Admin) Case No: CO/2654/2010 In the High Court of Justice Queen’s Bench Division Administrative Court at Cardiff
7. Newport City Council (Redevelopment of John Frost Square) Compulsory Purchase Order 2006
8. IRRV ‘Valuer’ June 2011 – ‘A trip beyond Iceland’
9. Birmingham City Council (New Street Station City Centre) Compulsory Purchase Order 2008
10. Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1947] 1 KB 223 (This case or the principle laid down is cited in United Kingdom courts as a reason for courts to be hesitant to interfere into the decisions of administrative law bodies. Generally the test is that the activity being so unreasonable that no reasonable authority could have decided that way.)
11. Simpsons Motor Sales v Hendon Corpn. [1964] AC 1088
12. Waters v. Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5).
13. Town and Country Planning Act 1990 by Section 99 of the planning and Compulsory purchase Act 2004
14. The Monmouthshire County Council (land at High House Farm, Raglan) Compulsory Purchase Order. Confirmation letter 31 July 2012
15. Keep Abergavenny Livestock Market
16. Closing submission at the Inquiry by Paul Brown QC on behalf of the statutory objector. Also includes extracts in relation to Statement of Reasons/Case

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