



Law Commission

COMPULSORY PURCHASE AND COMPENSATION: DISREGARDING “THE SCHEME”

A Discussion Paper

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THE LAW COMMISSION

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DISCUSSION PAPER

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PART I

BACKGROUND

TERMS OF REFERENCE

- 1.1 On 12th July the Lord Chancellor 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 Commission will give priority to consideration of the rules relating to the disregard of changes in value caused by the scheme of acquisition.

- 1.2 The reference arose out of the Final Report of the Compulsory Purchase Advisory Group, published in July 2000¹ (“the Review”), which recommended the preparation of new legislation in consultation with the Law Commission. In March of this year the Commission published a preliminary paper (“the Scoping Paper”), proposing a framework and programme for work.²
- 1.3 The present Discussion Paper is directed to the priority task, identified at the end of the terms of reference, relating to the “scheme”. It is intended to provide a basis for discussion at a seminar, to be held at the IALS in October. The proposals emerging from that discussion will be taken into account in a formal Consultation Paper, dealing with all aspects of the reference, which it is hoped to publish next summer (2002).

¹ Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report (DETR July 2000).

² Compulsory Purchase and Compensation: a Scoping Paper (Law Commission, March 2001). The text is available on the Commission’s web-site (www.lawcom.gov.uk).

BASIC PRINCIPLES

Equivalence

- 1.4 The “principle of equivalence” underlies the law of compensation:-

[Compensation for the dispossessed owner] is the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains a money payment not less than the loss imposed on him in the public interest, but on the other hand no greater.³

... 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.⁴

Heads of compensation

- 1.5 Although compensation is treated as a single global figure,⁵ it is traditionally assessed under separate heads: “market value”, “severance/injurious affection”⁶ and “disturbance”.⁷ There is special provision for uses for which there is no general market (such as churches), which are assessed on the basis of “equivalent reinstatement”.⁸
- 1.6 These basic principles are largely uncontroversial, and are shared by many Commonwealth jurisdictions, including Australia and Canada.⁹ They have been incorporated in a number of different modern statutes by federal and state legislatures in both countries. A concise modern statement of these principles can

³ *Horn v Sunderland Corp.* [1941] 2 KB 26, 42 per Scott LJ.

⁴ *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, 125, per Lord Nicholls.

⁵ *Hughes v Doncaster MBC* [1991] 1 AC 382. For an up-to-date account of the law, see Denyer-Green, *Compulsory Purchase and Compensation*, 6th Ed (2000) (Estates Gazette).

⁶ “Severance” refers to any loss of value caused by the severance of the subject land from other land held with it. “Injurious affection” refers to loss in value caused to retained land by the works or their use.

⁷ “Disturbance” is the term used to describe any loss (typically, business or home relocation expenses) caused by the acquisition.

⁸ Land Compensation Act 1961 s 5(5).

⁹ See Scoping Paper para 25-7, referring (inter alia) to The Australian Law Reform Commission (“ALRC”), *Lands Acquisition and Compensation Report No 14* (1980); D Brown, *Land Acquisition* 4th Ed (1996); M Jacobs, *Law of Resumption and Compensation in Australia* (1998); and E. Todd: *Law of Expropriation and Compensation in Canada*, 2nd Ed (1992).

be found in the Australian “Land Acquisition Act 1989 (Cth)” (“LAA (Cth)”) (See Appendix A).¹⁰

The Review

- 1.7 No radical change to these principles is proposed by the Review. The main recommendation is that these principles should be reproduced in a single modern statute, subject to some detailed amendments, as discussed in the Scoping Paper. The Commonwealth statutes could provide useful models.

DISREGARDING THE SCHEME

The “Pointe Gourde” rule

- 1.8 One established principle of compensation law is the so-called *Pointe-Gourde* rule, that compensation “cannot include an increase in value which is entirely due to the scheme underlying the acquisition.”¹¹ (The rule will be referred to in this paper as “the no-scheme rule”) The rule applies to decreases as well as increases in value.¹² Other recent formulations include:

- (1) Value must be assessed “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition”.¹³
- (2) “The principle is that 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.”¹⁴

The LAA (Cth) expresses the rule thus:

60 In assessing compensation, there shall be disregarded:

¹⁰ This covers federal acquisitions. It is modelled on the draft Bill attached to the ALRC report. Individual states have their own statutes, based on similar principles: see Jacobs *op cit*.

¹¹ *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565 PC, at p 572, per Lord MacDermott. Although this 1947 case has given its name to the rule, the principle goes back the 19th C, and was described as “well-settled” by the Court of Appeal in 1909: *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 (citing, inter alia, *Re Ossalinsky and Manchester Corporation* (1883) unreported) It is conveniently referred to as a “common law rule”, to distinguish it from the various statutory versions discussed in this paper; but is perhaps more accurately be treated as an interpretation of the word “value” in the relevant statutes: see *Rugby Water Board v Shaw-Fox* [1973] AC 202, 214 per Lord Pearson. The rule appears to be shared by all common law systems: see e.g. Jacobs *ref. cap* 27 (Australia); Todd *ref. cap* 6 (Canada). See also *Shoemaker v US* (1892) 147 US 282, for the corresponding rule in the USA.

¹² *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426.

¹³ *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”.

¹⁴ *Walters v Welsh Development Agency* [2001] RVR 93, para. 54. The decision contains a detailed review of the authorities by the President of the Lands Tribunal (George Bartlett QC). He treats Land Compensation Act 1961 s 5(3), 6-9 as related to the same principle.

(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;

- 1.9 The basic idea is simple. A railway project may cause blight and reduced land values while it is being planned and constructed; but once its completion is imminent, it may result in higher land values in residential areas close to the new stations. The *Pointe-Gourde* rule says that land acquired by the authority for the project should be bought at prices which reflect neither the blight nor the enhancement. A related issue is that of “betterment”. If someone whose land is acquired for the railway retains other land which is benefited by it, should that benefit be offset against the compensation (The issue of “betterment” on adjoining land is not dealt with directly in this paper)?
- 1.10 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”); section 6 (disregard of changes in value actual and prospective development);¹⁵section 9(depreciation due to prospect of acquisition); sections 14-16 (planning assumptions); section 17ff (certificates of appropriate alternative development). (See Appendix B, for selected extracts).

A modern restatement

- 1.11 In *Bolton MBC v Tudor Properties* (2000),¹⁶ an authoritative summary of the common-law rule as it has now developed was given by Mummery LJ:
- (1) The *Pointe Gourde* principle is not a principle of valuation. It is a principle of law. If the principle was not applied by the Tribunal or was misinterpreted or if the Tribunal reached a conclusion which no reasonable tribunal could reach (e.g. because there was no evidence to support it), the decision is erroneous in law. But a decision is not legally wrong simply because this court, if it had been the decision making body (which it is not), would have taken a different view of the evidence and arrived at a different conclusion on the scope of the underlying scheme.
 - (2) The purpose of the principle is to prevent the compensation for the value of the land on compulsory acquisition from being inflated by the very scheme which gives rise to the acquisition (See Widgery LJ in *Wilson v Liverpool Corporation* [1971] 1 WLR 302 at 310A.) An enhancement in value resulting entirely from the underlying scheme has to be ignored. The principle does not, however, require the valuer to ignore an increase in value attributable to factors other than the underlying scheme, such as the pre-scheme value of the land for development.

¹⁵ 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.

¹⁶ [2000] RVR 292.

- (3) In order to ascertain what is to be ignored by the valuer it is first necessary to delimit the scope of the scheme. The compulsory acquisition itself cannot be the scheme which underlies it: *JA Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159 at 162M. The compulsory acquisition of the relevant land presupposes that there was an underlying scheme of development, in consequence of which the CPO was made.
- (4) The underlying scheme need not, as a matter of law, be confined to the area of land compulsorily acquired or to the specific purposes of the CPO. The acquisition may be only a small part of the underlying scheme: *Bird and Bird v Wakefield MBC* (1978) 37 P&CR 478. Nor is it necessary for the underlying scheme to provide for the compulsory acquisition of land for the purpose for which the CPO is ultimately made: see p 487.
- (5) A “scheme” (also referred to in some authorities as a “project” or “undertaking”) is neither a technical term nor a legally precise concept. A scheme may take shape over a number of years. It may be regarded as a scheme even before it is fully fledged. Its impact on land values may therefore increase as it passes through various stages from vague beginnings to a final form.
- (6) The Tribunal must ascertain the existence and extent of the underlying scheme from a consideration of all the relevant evidence about the past, present and future activities. It must then determine, as a matter of fact, whether those activities are properly to be regarded as part of the underlying scheme: *Wilson v Liverpool Corporation* [1971] 1 WLR 302 at 310B. Only when that factual question has been decided is it possible to answer the next question which is one of valuation: what part of the market value of the land acquired is entirely attributable to the enhancing effect of the scheme underlying the acquisition? Answering that question involves imagining a state of affairs antedating the scheme - a “no scheme world” (as it was described in *Wards Construction (Medway) Limited v Barclays Bank plc* (1994) 68 P&CR 391 at 396, 397) and ascertaining what “bargain ... would have been made between the claimant and a prospective developer-purchaser had the acquiring authority not intervened.”
- (7) These fact finding and valuation questions have been entrusted by Parliament to

“a specialist and expert tribunal, well able to understand the realities of a complicated factual and transactional situation ... a finding by a tribunal ... cannot be shown to be perverse just because a possible alternative was open to the tribunal but not adopted by it”: per Buxton LJ in *Pye* (supra) at 163 A-B.”

The Review

- 1.12 The Review proposed that the *Pointe-Gourde* rule and its statutory manifestations should be rationalised and codified. However, they regarded this as dependent on policy decisions to be made by Ministers on the future and scope of the rule. They

further proposed that the section 17 procedure should be simplified and extended, and should replace the existing assumptions in sections 14-16.¹⁷

¹⁷ Review para. 117.

PART II

HISTORICAL PERSPECTIVE

THE POLITICAL CONTEXT

Public or private?

2.1 The development of the law of compensation must be seen in a political and historical context. Before the First World War a typical compulsory purchase was 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 Act would incorporate the Lands Clauses Consolidation Act 1845, which set out machinery for the implementation of compulsory purchase and the payment of compensation. The cases established that compensation should be paid on the basis of “the value to the owner”.¹ Compensation was usually assessed by a jury. A special allowance was given to reflect the compulsory nature of the acquisition.

2.2 As the Scott Committee commented in 1918:²

Compulsory acquisition of land to any great extent first took place in connection with the Railway development in the first half of the 19th 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...³

2.3 By contrast, the 20th century, until the last two decades, was the century of the corporate state – the state that waged war and prepared the defences, cleared slums, built houses, schools and hospitals, built roads, provided gas, electricity and water, and took over the running of the railways.

The Scott Committee

2.4 Already by the time of the Scott report in 1918, it was the State – then the war-time state – that was seen as the chief repository of compulsory powers of acquisition, and there was no doubt a consensus on the desirability of restricting the amount of compensation in the public interest. The Scott Committee was set up to carry out an urgent review of the compensation laws, because of the likelihood of large quantities of land needing to be acquired “in the early stages of

¹ See the historical review in the *Birmingham City Corp v West Midlands Baptist Trust* [1970] AC 874.

² 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”).

³ Scott Report para. 8.

the Reconstruction period”.⁴ It was concerned that the “value to the owner” concept had allowed “highly speculative elements of value” to be included.⁵

- 2.5 The Committee’s approach was based on 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

- 2.6 The Committee made a number of specific recommendations relating to compensation,⁶ which were enacted as a set of six “rules” in the Acquisition of Land Act 1919 (“the 1919 rules”), later replaced by section 5 of the Land Compensation Act 1961. The most significant was that compensation should be based on “the market value as between a willing seller and a willing buyer”, with no special allowance for compulsory acquisition.⁷ The “special suitability” rule (now 1961 Act s 5(3)), also recommended by them, will be dealt with in detail below.

The 1947 Act – rise and fall

- 2.7 In the aftermath of the Second World War, the interests of the State became yet more dominant. This trend reached its zenith in the scheme adopted by the Town and Country Planning Act 1947, under which planning control was extended to the whole country, and all development value was expropriated by the State, resulting in land acquisitions being made at existing use value.⁸
- 2.8 This system was not finally abolished until the restoration of market value, as the basis for compensation, by the Town and Country Planning Act 1959. A succinct summary of the intervening history was given by the Lord Chancellor, when introducing the 1959 Bill:

⁴ Scott Report para. 5.

⁵ *Ibid* para. 8.

⁶ The Committee’s first recommendation (not unlike that of the 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.

⁷ Scott Report, para. 8-9; given effect respectively by rules (2) and (1) of the 1919 rules.

⁸ 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 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 Corfield and Carnwath Compulsory Acquisition and Compensation (1976) p 4-7.

... 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.

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...⁹

- 2.9 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.¹⁰
- 2.10 The Town and Country Planning Act 1959 was designed to restore market value for public acquisitions, in accordance with the 1919 rules, while taking account of the comprehensive system of planning control introduced in 1947. The relevant provisions were in sections 2-9 of the Act. Parts II and III of the Land Compensation Act 1961, which remains in force today, were a consolidation (inter alia) of these provisions, together with the 1919 rules.
- 2.11 The following 15 years saw two further attempts¹¹ 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 was no longer seen as an intrinsic right of land-ownership, the restriction or removal of which would attract compensation.¹² Thus, even in cases where restriction would formerly have carried a right to compensation, the right could in effect be nullified by planning controls.¹³

⁹ See Hansard 14th April 1959, col 579 (Viscount Kilmuir LC introducing the 1959 Bill).

¹⁰ See Corfield and 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).

¹¹ The Land Commission Act 1967 (introducing Betterment Levy) and the Community Land Act 1974 (allied with Development Land Tax).

¹² See *Belfast Corp v OC Cars Ltd* [1960] AC 49.

¹³ *Westminster Bank Ltd v MHLG* [1971 AC 508 (highway widening)]; *Hoveringham Gravels Ltd v Secretary of State* [1975] QB 764 (ancient monument protection).

Privatisation

- 2.12 The Thatcher era (from 1979) initiated an entirely 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.¹⁴ 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 private hands. 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.
- 2.13 The change of Government in 1996 (uniquely in the post-war period) did not result in a radical change of direction in terms of land or development policy. There are no proposals to take greater public control of development, or tax development gains. The utilities remain privatised. Developments involving public authorities are likely to be through some form of public/private partnership or private finance initiative.
- 2.14 Thus, we seem to have come full circle. Just as in the case of the 19th C railway projects, most 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 is seen as a desirable end in itself, without the need to secure direct public control, or to recoup the resulting betterment.
- 2.15 In formulating modern principles of compensation, these historical changes need to be taken into account. Any conception that compulsory acquisition is largely devoted to promoting public, non profit-making activity would be misleading. Many, perhaps most, compulsory purchases now involve transferring land, and the potential to profit from it, from one private person or undertaking to another. Any rule which seeks to exclude from compensation part of the value of that potential requires a clear policy justification.

THE HUMAN RIGHTS ACT

- 2.16 Finally, the Human Rights Act 1998, incorporating the European Convention of Human Rights, imposes a new discipline. 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.
- 2.17 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

¹⁴ 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).

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”¹⁵.

- 2.18 However, 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.¹⁶ Further, the law must not discriminate unfairly as between different groups of property owner affected by the interference.¹⁷
- 2.19 The application of these principles to the present compensation law has yet to be tested under the Human Rights Act. The Act does, however, underline the importance of ensuring that the compensation rules produce results which are fair, rational and reasonably predictable, and do not result in arbitrary discrimination between those affected. Where the effect of the compulsory acquisition is simply to transfer value from one private body to another, departures from “full compensation” will require particularly clear policy justification.
- 2.20 Reference should also be made to Article 6(1) which guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. The House of Lords has recently confirmed that the role of the Secretary of State, in determining planning appeals and confirming compulsory purchase orders, does not breach this principle, in view of the policy content of the issues involved, and the supervisory role of the High Court.¹⁸ He has a similar role on appeals in respect of “certificates of appropriate alternative development” issued by planning authorities.¹⁹ Since these have no policy significance in the real world, and are simply a part of the process of determining compensation, there may be doubts about his role in this context, particularly in relation to compulsory acquisitions by Government departments.

¹⁵ *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).

¹⁶ See *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35 para. 69 (“a fair balance”). See also Clayton and Tomlinson, *The Law of Human Rights* para. 18.82ff, for a review of Convention cases relating to the UK prior to the Human Rights Act.

¹⁷ Article 14 prohibits discrimination in the enjoyment of Convention rights. In *Pine Valley Developments Ltd v Ireland* (1991) 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. Article 6 (right to a fair hearing) may also be relevant, if determination of compensation is unreasonably delayed: see e.g. *Guillemin v France* (1997) 25 EHRR 435.

¹⁸ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

¹⁹ Land Compensation Act 1961, ss 17-18. The authority determines the development that would have been appropriate in the absence of compulsory purchase. (see below para. 4.47-4.49).

PART III

FROM THE LANDS CLAUSES ACT TO POINTE-GOURDE

INTRODUCTION

- 3.1 As will be seen, although the rule has a long history, its development has been neither coherent nor consistent, and the justifications put forward have varied from time to time. The interventions of the legislature have also added significantly to the complexity of the picture. In this Part, we consider in more detail the genesis and evolution of the no scheme rule, including the changes made by the 1919 Act, up to and including the *Pointe Gourde* case itself.

Problem issues

- 3.2 Before looking at the cases, it is helpful to keep in mind two main issues which posed particular problems in this period:-
- (1) Special suitability
 - (2) Extent of the “scheme”

Special suitability

- 3.3 At an early stage, it came to be accepted that, if the land had intrinsic advantages which gave it special suitability for the proposed use, quite apart from the undertaker’s scheme, that could be taken into account in the valuation. The more difficult issue was whether, for that special suitability to be taken into account –
- (1) there must be a market for that use, apart from the needs of statutory bodies (“general market need”¹); or
 - (2) it was sufficient that there should be some market, even if confined to competing statutory undertakers (“competing undertakers’ need”); or
 - (3) it was sufficient that the acquiring undertaker would itself be prepared to pay extra for that use in friendly negotiations, regardless of any demand by other bodies, public or private (“the undertaker’s overbid”).
- 3.4 As will be seen, the English courts before 1919 appear to have accepted (2) but not (3).² Subsequently, the Privy Council (in the so-called *Indian* case in 1939³) held that (3) was also acceptable. Although that approach has been applied in some

¹ Our shorthand.

² In line with the judgment of Fletcher Moulton LJ in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, as applied in *Sidney v NE Ry* [1914] 3 KB 629 (see below).

³ *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (known as “the *Indian case*”), (in line with the judgment of Vaughan Williams LJ in *Lucas*).

subsequent English cases, it does not appear possible to reconcile it with more recent authority.

- 3.5 In the meantime, the Scott Committee recommended that the possibility of competition between competing statutory bodies should be excluded altogether (implicitly rejecting both (2) and (3)). Rule (3) of the 1919 Rules was intended to give effect to this recommendation.

Extent of the scheme

- 3.6 This issue is identified less clearly in most of the early cases. However, as will be seen, the language used often leaves room for doubt as to what precisely is to be disregarded: is it

- (1) simply the existence of compulsory powers;
- (2) the existence of any statutory powers necessary to implement the scheme;
or
- (3) the scheme as a whole?

- 3.7 This issue was specifically addressed in the *Indian case*, which came down clearly in favour of (1). However, again, this is difficult to reconcile with subsequent authority.

DEVELOPMENT OF THE RULE – 1845 TO 1919

Value to the owner

- 3.8 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.⁴
- 3.9 The cases up to 1919 were directed to working out this principle. A useful summary of the effect of those cases, shortly before the intervention of the Scott Committee, is to be found in *South East Rly Co v LCC* [1915] 2 Ch 252. 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).
- 3.10 The judgment of Eve J summarised the principles as they then stood:
- (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

⁴ See e.g. *Penny v Penny* (1868) LR 5 Eq 277.

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.⁵ (emphasis added)

- 3.11 Proposition (4) (which was cited with approval in the *Pointe Gourde* case itself) was a statement of the no-scheme rule as it was then understood. To understand its prior evolution, it is necessary to look at a series of cases beginning in 1863.

The early cases

- 3.12 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.⁶

- 3.13 A number of the early cases on the rule concerned land acquired by water companies for reservoirs. *Re Ossalinsky and Manchester Corporation* (1883)⁷ confirmed that the valuer should disregard any enhancement due to the use of statutory powers;⁸ 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

⁵ [1915] 2 Ch 252, 259.

⁶ *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42 per Cockburn CJ.

⁷ 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 Fottit* [1973] AC 202 at 219.

⁸ “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).

(sic), but are schemes with certain probability in them. I do not see any objection to that being used as an argument.⁹ (emphasis added)

- 3.14 This approach was followed in 1904 in another reservoir case.¹⁰ If the site had “peculiar advantages for supplying water”¹¹ 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.¹²

From *Lucas* to *Fraser*

- 3.15 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

- 3.16 *In re Lucas and Chesterfield Gas and Water Board* (1909)¹³ 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 special suitability of the claimant’s land for the purpose of constructing a reservoir could be taken into account. In a classic¹⁴ statement of the rule, Fletcher Moulton LJ said:

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,

⁹ Per Grove J; quoted by Buckley LJ in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 36. (The words after “special purpose” were omitted from Lord Hodson’s quotation from the same passage in the *Rugby Water Board* case).

¹⁰ *In re Gough and Apatia, Silloth and District Joint Water Board* [1904] 1 KB 417. This seems to be the first use of the word “scheme” in this context.

¹¹ “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.

¹² *Ibid*.

¹³ [1909] 1 KB 16.

¹⁴ See e.g. *Crompton v Commissioner of Highways* (1973) 5 SASR 301: Wells J stated that “[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.”

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.¹⁵
(emphasis added)

3.17 This passage confirms the rule as one aspect of the “value to the owner” principle. The emphasised words are of particular interest: first, because they impose a temporal limitation (“as it stood before the grant of compulsory powers”); but, secondly, because the wording introduces an element of ambiguity as to what is to be disregarded (“before *the grant of the compulsory powers*” or “before *the scheme* was authorised”?) Neither point was significant to the facts of the case, but, as will be seen, both are relevant to the later debate.

3.18 The other significant feature of the case related to the precise limits of the “special suitability” principle. Fletcher Moulton LJ considered that where the “special value” exists only for acquiring body, it could not be taken into account:

But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes...¹⁶

It seems that he regarded it as essential that there should be evidence of *some* market, apart from the interest of the acquiring undertaker,¹⁷ even though it might be limited to those having, or able to get, statutory powers.¹⁸

3.19 Vaughan Williams LJ, however, went further, treating the acquiring authority’s own interest in the site, by itself, as a sufficient factor to justify additional value, regardless of the existence of any “market”:

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, both on the ground (stated in *Ossalinsky*), and also on the ground that *the fact that the board itself might become possible purchasers who would give a special price for the land ought to be considered*.¹⁹ (emphasis added)

¹⁵ *Ibid* p 29.

¹⁶ *Ibid* p 31.

¹⁷ 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*.

¹⁸ *Ibid* p 31-2: “Nor is it in my opinion an answer to say that the purchasers must necessarily be persons possessing parliamentary powers, and that none such exist at the moment except the one that is actually exercising his compulsory powers. 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.”

¹⁹ *Ibid* p 25.

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.²⁰ However, since the result of the case was not affected by the difference on this point,²¹ the existence of a majority for this view was not treated as conclusive in later cases.

- 3.20 In *Sidney v N E Ry Co* (1914),²² 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.²³ The special adaptability of the land for railway use could be taken into account,²⁴ but only to the extent that competition from other potential buyers for that purpose might have increased the price.²⁵

THE CANADIAN CASES

- 3.21 The judgments in *Lucas* were cited with approval by the Privy Council in two Canadian cases, both involving the acquisition of river land for hydro-electric projects.
- 3.22 In *Cedars Rapids Manufacturing and Power Co v Lacoste* (1914),²⁶ three islands in the St Lawrence river were acquired for a power generation scheme. The acquiring company had been granted powers under a Canadian statute to develop water

²⁰ *Ibid* p 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.”

²¹ 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).

²² [1914] 3 KB 629.

²³ The owners were in effect claiming a ransom value: “... 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).

²⁴ Shearman J traced the term “special adaptability” back to *Ossalinsky’s case* (see above) and commented that since then “... 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”. In his view “special adaptability is nothing more than an element in market value”; he gave as an example the “adaptability” of land bordering a river for the purposes of potential purchasers wanting to establish a wharf (per Shearman J at p 640).

²⁵ This appears to be the effect of the answer to para. 11 of the case (p635), as explained by Rowlatt J (following Fletcher Moulton LJ) (p 636-7).

²⁶ [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 LJ deal with the whole subject exhaustively and accurately.” (p 576, per Lord Dunedin).

powers on a stretch of the river, and had obtained a lease of the river bed and the right to abstract water. 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.²⁷ 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* which made the undertaking a realised possibility...

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...*²⁸ (emphasis added).

3.23 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. 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. On the other hand, the possibility of such powers being granted, to that or another company, was to be taken into account.

3.24 Similarly in *Fraser v City of Fraserville* (1917),²⁹ river falls (“the Great Falls”) were expropriated by an electric light undertaking, which had previously expropriated lands higher up the river and was constructing a reservoir to increase the power of the falls. The arbitrator had arrived at his award by taking a proportion of the capitalised additional profits to the undertakers. This award was set aside by the Canadian courts, and the appeal was dismissed by the Privy Council. Lord Buckmaster, citing *Lucas and Cedar Rapids* stated the principle thus:-

the value to be ascertained is the value to the seller of the property in its actual condition as 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.

²⁷ *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.”

²⁸ *Ibid* p 576, 579 This judgment was strongly criticised by the ALRC *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.”

²⁹ [1917] AC 187.

Unfortunately, in the context of the appeal, the Privy Council did not find it necessary to address the extent of the “scheme”. It is not clear therefore how much of the previous history fell to be disregarded under this formulation.³⁰

The Indian Case (1939)

- 3.25 Although this case came sometime after the Scott report, it is convenient to deal with it at this point, since it contains the most detailed review of the previous cases at Privy Council level, and the relevant Indian statute was not affected by the 1919 Act.
- 3.26 The Vizagapatam Harbour Authority had compulsorily acquired land which was part of the claimant’s gardens known as “Lova Gardens”. The part of the gardens obtained contained fresh water springs. The land was obtained for the purpose of providing a water supply to the harbourland and its hinterland, the previous water supply having been contaminated by malaria. On the evidence the only possible buyers of the water at that date were the Harbour Authority itself and the oil companies and labour camps that might be established as a result of the development of the harbour. The Court of Appeal had held that, because the value of the Spring as a source of drinking water arose entirely from the Anti-Malarial Scheme carried out by the Harbour Authority, the value for that purpose should be ignored.
- 3.27 The Privy Council allowed the appeal. Unlike the judges in *Cedars Rapids* and *Fraser*, Lord Romer recognised the significant difference in this respect between the two main judgments in *In re Lucas* (“diametrically opposed to one another”) and preferred that of Vaughan Williams LJ.³¹ Even where the special value existed only for the acquiring authority, that should be taken into account in considering what a willing vendor would pay:

... 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

³⁰ 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. A further bye-law authorising acquisition of the Great Falls was passed in 1909: *ibid* p 189-90.

³¹ [1939] AC 301, 320-1. He criticised the judgment of Rowlatt J in *Sidney v NE Ry Co* (see above) for similar reasons: p 321-2.

the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers...³²

- 3.28 Lord Romer commented on the use of the term “scheme” in the statement of the rule by Fletcher Moulton LJ in *Lucas* (see above), and preferred a narrow meaning. The “scheme” to be disregarded under the rule was not “the intention formed by the acquiring authority of exploiting the potentiality of the land”, but 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”:

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.³³

THE SCOTT COMMITTEE

- 3.29 The *Lucas* and *Sidney* cases provided the background for the Scott Committee’s consideration of the issue in 1918. As stated above, the Committee was concerned at the consequences of taking account of the potential of land:

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.³⁴

...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, 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.³⁵

- 3.30 The Committee considered that potential competition from statutory undertakers should not be taken into account:-

³² *Ibid* p 316-7, 322.

³³ *Ibid* p 319-20.

³⁴ *Ibid* para. 8.

³⁵ *Ibid* para. 10. Similar observations had been made in the *Sidney* case itself (see above).

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.

3.31 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 main part of what became rule (3):³⁶

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*³⁷] the requirements of any Government Department or any local or public authority.³⁸

3.32 From the Committee's discussion, the intended effect of this appears to have been intended to exclude both "competing undertakers' need" and "undertaker's overbid" (see Introduction above), and to allow "special adaptability" only so far as relevant to purposes for which there was a general market. As will be seen, subsequent cases, beginning with *Pointe Gourde* itself, adopted a narrow construction of the section, which tended to frustrate this purpose,; but at the same time the common law rule was being adapted to fill the gap.

THE POINTE GOURDE CASE³⁹

3.33 It was not until 1947, in the *Point Gourde* case itself, that the relationship between the no-scheme rule and the new rule (3) was considered by the higher courts.

³⁶ Acquisition of Land Act 1919 s 2(3), replaced by Land Compensation Act 1961 s 5(3).

³⁷ These words, which followed a separate recommendation of the Scott Committee, designed to counter the effect of the decision *IRC v Clay* [1914] 3 KB 346, were repealed by Planning and Compensation Act 1991.

³⁸ 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. 4.43 below.

³⁹ *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

- 3.34 Land used as a quarry was acquired in connection with the establishment of a U.S. naval base. 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”.⁴⁰

- 3.35 The sole issue⁴¹ raised by the local court was whether this item was excluded by rule (3) (which was reproduced in the relevant statute⁴²). 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.⁴³ However, in the Privy Council it was argued, in the alternative, that the \$15,000 should be disallowed under the common law rule. This argument succeeded. Lord MacDermott stated the rule as follows:

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.⁴⁴

⁴⁰ *Ibid* p 566-8. This reference to “prospective extra profit” seems to have led Keith Davies (*Law of Compulsory Purchase and Compensation* 5th Ed p 130-2) to infer 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, it is doubtful whether this is the correct interpretation of the Case. The Tribunal seems to have regarded the \$15,000 as the increase in the going concern value of the quarry undertaking, rather than the value of the products as such.

⁴¹ 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* p 572-3.

⁴² Section 11(2) of the Land Acquisition Ordinance, No 14 of 1941.

⁴³ [1947] AC at p 572.

⁴⁴ *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).

He rejected the argument that the relevant scheme was the acquisition of the quarry land, not the construction of the naval base, given the finding in the case that the land was “required by the United States for the establishment of a naval base in Trinidad.”⁴⁵

- 3.36 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.⁴⁶ An important aspect of this case is that the development in issue was not on the land subject to acquisition. Previous cases had been concerned principally with the development potential of the subject land itself.⁴⁷ This was the first reported case where the same principle was used in terms to exclude the enhanced value of the subject land attributable to use in connection with development on other land within the same scheme. This is significant for the development of the principle in the 1959 Act and subsequent cases. 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.⁴⁸

⁴⁵ *Ibid* p 573.

⁴⁶ Although the *Indian case* was cited in argument (*ibid* at p 569) it was not commented on in the judgment. A possible inference is that the Privy Council saw no conflict with the rule as there stated. This suggests that, if the extra sum had been represented, not as the measure of additional profits to the quarry, but as the additional value that the US navy would have been willing to pay in friendly negotiations (assuming no compulsory purchase), it might not have been excluded.

⁴⁷ As noted above (para. 3.21-3.24) the Canadian Privy Council cases appeared to envisage the “scheme” extending beyond the subject land, but this issue was not addressed directly in the judgments.

⁴⁸ Denyer-Green *op cit* p 217-8.

PART IV

DEVELOPMENT OF THE MODERN LAW

INTRODUCTION

- 4.1 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, following which compensation was based on existing use value. While that regime lasted, the potential uses of land had little relevance to compensation.¹ A new chapter in the development of the rule began with the restoration of compensation based on market value (in 1959).

MARKET VALUE RESTORED

Town and Country Planning Act 1959

- 4.2 The 1959 Act was intended to restore the market value principle of compensation as it applied before the 1947 Act. However it was thought necessary to make specific provision to take account of the imposition of universal planning control. The background was explained by Lord Denning in *Myers v Milton Keynes Development Corpn*:

Before planning permission was thought of, the value of the land was always assessed at its value to the owner. It was not merely the existing use value, but the value of the land with all its potentialities. Thus, if it was used as agricultural land, but was dead ripe for the building of houses, the compensation was increased accordingly. In those days front land, that is land with frontage to roads, was worth more than back land, and so forth....

In 1947 there came the Town and Country Planning Act, with all its great changes. No one was allowed to develop his land by building on it, or by making any material change in the use of it, unless he obtained permission from the planning authority... If his land was acquired compulsorily, he only received compensation for its existing use value. He got nothing for its potentiality as building land. Even if it was dead ripe land, he got nothing for it except existing use value: This gave rise to no end of difficulties. So in the Town and Country Planning Act 1959 the basis of compensation was altogether changed by provisions which were soon afterwards embodied in the Land Compensation Act 1961.

These new provisions recognised this basic fact: land with planning permission may be worth far more than the same land without it. Its value may be multiplied tenfold, or even a hundredfold. ...²

¹ The only reported case of significance during this period seems to have been *Lambe v Secretary of State for War* (1955): see para. 4.24 below.

² [1974] 1 WLR 696 at 702.

- 4.3 The solution of the 1959 Act was to make specific provision for planning assumptions to be made in the valuation of the subject land, 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 3);
 - (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 (s 4);
 - (3) If it was not so allocated, a certificate could be obtained as to the permission which would have been granted in the absence of compulsory purchase (s 5-8).
- 4.4 Separate provision (s 9) was made for the disregard of increase 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. Thus, there were different rules for the effects of development on other parts of land within the same compulsory purchase order (para. 1); within a comprehensive development area (para. 2); within an area designated under the New Towns Act (para. 3); within an area designated as a town development area (para. 4); within an urban development area (para. 4A); and within a housing action trust area (para. 4B) (The last two were added in 1980 and 1988 respectively, by the Acts which introduced those designations.³).
- 4.5 Section 9 also dealt with the disregard of any depreciation due to any indication (in the development plan or otherwise) of the likelihood of compulsory acquisition (s 9(6)).
- 4.6 This general purpose of the new rules was explained by 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 sold in the open market if it were not wanted by a public authority?" Clauses 2-8 seek to provide the answer to this question...

(Clause 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

³ Local Government Planning and Land Act 1980 s 134; Housing Act 1988 Part III.

same clause protects owners whose land is being bought from depreciation caused by the threat of a public acquisition.⁴

4.7 Mr Bevins⁵ was a little more explicit about the latter clause:

The background to the Clause is a complicated one which derives from the nature of the 1919 rules. In effect, the Clause modifies those rules to some extent to deal with particular cases where, perhaps... land is required by a local authority or other public authority for a purpose for which there is only a public, not a private, demand for the land, and it would be wrong to take into account that demand in assessing the market value...⁶

4.8 It seems clear from these two extracts that the clause 9 was seen as giving effect to the no-scheme rule, taking account of rule (3). However, we have been unable to find any more detailed explanation of the thinking behind it, and there appears to have been no further discussion of the principle in the debates.

Land Compensation Act 1961

4.9 The 1961 Act was a consolidation of (inter alia) the 1919 and 1959 Acts, 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 attempt to co-ordinate them. Furthermore, the order of the 1959 provisions was changed, in a way which did not improve clarity. Sections 9(2) and (6) became sections 6(1) and 9 in a group headed "General Provisions" of Part II. Section 3(1) became section 15(1), under a separate head "Assumptions as to planning permission". Thus the original relationship between section 3 of the 1959 Act (applying to the development of the subject land itself) and section 9(2) (applying to development of the other land) was obscured.

The no-scheme rule since 1961

4.10 The main features of the modern law, following the 1961 Act, emerged from a series of cases in the Court of Appeal, generally presided over by Lord Denning. He sought, not always successfully, to reconcile the common law with the new statutory rules. The resulting developments can be considered under four heads:

- (1) Assimilation of common law and statute
- (2) Evolution of the common law rule
- (3) The no-scheme world
- (4) The demise of the *Indian* case

⁴ Hansard 14th April 1959 HC col 578.

⁵ J R Bevins MP, Parliamentary Secretary, Ministry of Housing and Local Government. Introducing the Bill, he described it as "on this very difficult subject... a positive gem of lucidity"..Hansard 13th November 1958 HC col 583

⁶ Hansard 13th November 1958 HC col 589.

Assimilation of the common law and statute

- 4.11 The Courts readily accepted that the section 6 was intended to give “statutory expression” to the *Pointe-Gourde* rule.⁷ However, it was not clear whether it was intended to be a self-contained code, or merely to supplement the existing common law rules. Further, the convoluted wording of the section,⁸ made it very difficult to interpret or apply. The solution eventually adopted by the Courts was to treat section 6 and the common law rules as existing side-by-side as part of a single legal principle, so that in practice no distinction was made between the two, and any attempt at literal interpretation of the statute was abandoned.
- 4.12 This process began in *Camrose v Basingstoke Corporation*.⁹ 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 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, but it said nothing about the application of the rule to the subject land itself.
- 4.13 The claimants argued that the 1961 Act was intended as a complete code, and that, by implication, the rule did not apply to any of the subject land. 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 common law:

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 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 ...¹⁰

⁷ *Davy v Leeds Corpn* [1965] 1 WLR 445, 453 per Lord Dilhorne.

⁸ In *Davy* in the Court of Appeal, Harman LJ, in a memorable passage, described the language of section 9 as “a monstrous legislative morass”: [1964] 3 All ER 390, 394.

⁹ [1966] 1 WLR 1100.

¹⁰ *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. It also overlooked the fact that the *Pointe Gourde* case itself was concerned with the effects of development on “land other than the relevant land” (i.e. the naval base).

- 4.14 By 1970, therefore, it was clear that the *Pointe Gourde* rule survived, at least to plug any gaps in the 1961 rule.¹¹ 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 been achieved at common law, unless those results were already achieved by the statute.¹²

Indeed, the Tribunal's view was that, where appropriate, both had to be applied independently.¹³ However, it is difficult to point to a case where there was found explicitly to be any significant difference between the two.

Evolution of the common law rule

***Wilson v Liverpool City Corporation*¹⁴**

- 4.15 This important case can be treated as settling the modern form of the common law rule. It adopts a wide view of the rule, the effect of which is to exclude enhancement of value due to the authority's scheme, even where adjoining owners, unaffected by compulsory purchase, would be able to sell at the enhanced price.
- 4.16 The Corporation had acquired, for housing development, an area of 391 - 305 acres by private agreement, and 74 acres compulsorily. By the time of the acquisition of the 74 acres, comparable adjoining land was being sold to a private developer at a price (£6,700 per acre), which reflected the prospects of infrastructure and other improvements involved in the scheme.¹⁵ The Tribunal "making all allowances and deducting the increase owing to the scheme" had arrived at a figure equivalent to £4,600 per acre. The owners argued that this reduction was not covered by section 6(1), which should be treated as an exhaustive code. The Court of Appeal upheld the Tribunal's approach, applying the common law rule, as explained in *Camrose*.¹⁶
- 4.17 The Court also 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:

¹¹ The alternative view that section 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.").

¹² *St John the Baptist v Canterbury City Council* [1970] RVR 608, 630.

¹³ "... it is our opinion that, as a matter of strict law both the section (6) and the 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).

¹⁴ [1971] 1 WLR 302, CA.

¹⁵ As Lord Denning MR said (p 309): "That [land] value was an enhanced value because the seller and purchaser knew of the scheme: and they knew that the council would instal sewage works, and so forth, of which the developer could take advantage; and it was two years in advance of the land subject of this inquiry."

¹⁶ Keith Davies (*op cit* para. 7.7-10) observes: "(The rule's) application in the *Wilson* case seems capricious: 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?"

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.¹⁷

4.18 As Widgery LJ explained, the definition of the scheme was an issue of fact not law:

... 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

The scheme will always exist in some shape or form by the time the notice to treat is served. It must, indeed, be in some shape or form at the confirmation of the compulsory purchase order itself, and then as Lord Denning MR says, it may develop almost from day to day,¹⁸ and the ultimate question for the valuer is to decide to what extent the dead-ripe value of the land on the day upon which the valuation is to be made has been increased by reason of the existence of the scheme.¹⁹

The no-scheme world

4.19 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.

4.20 This process was encouraged by the wording of the 1961 Act. The *Pointe Gourde* rule itself had required the valuer to consider what changes in value were “entirely due” to the scheme, thus posing a simple issue of causation. The 1961 Act substitutes what may be termed a “but for” test.²⁰ Thus, section 6 poses a two

¹⁷ [1971] 1 WLR 302, at 310.

¹⁸ This suggests a possible difference as to the starting date for the no-scheme world. Lord Denning seems to have envisaged the rewriting of history from before the formal approval of the scheme. Widgery LJ was more guarded; he saw the scheme as being “in some shape or form *at the confirmation of the compulsory purchase order itself...*” and “developing from day to day” thereafter (p 310). This is closer to *Lucas* where Fletcher Moulton LJ referred to the circumstances “as they stood *before the scheme was authorised* by which they are put to public uses”.

¹⁹ *Ibid* p 310.

²⁰ See (in a different context) *Hoveringham Gravels v Secretary of State* [1975] 1 QB 754, 762 per Lord Denning MR: “... the true question... is one of causation. .. The test applied by the Lands Tribunal was that which the legal philosophers call the “but for” test of causation. It is misleading because it is equivalent to the *causa sine qua non*, namely the cause without

stage test: for example (in relation to an Urban Development Area) (1) what changes in value are “attributable” to development on surrounding land within the UDA; (2) to what extent would that development have occurred if the UDA had not been defined. Similarly, section 17 which was in issue in the *Fletcher* case) requires consideration of the forms of development which would have been appropriate “if (the land) were not proposed to be acquired...” The practical effect seems to have been to divert attention from an evaluation of the direct effects of the immediate project, and to encourage the invention of elaborate and speculative “no-scheme worlds”.²¹

4.21 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...²²

4.22 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 subject land. In *Margate Corp v Devotwill*²³ 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

which (but for which) the event would not have happened. In law the correct approach is *causa proxima non spectatur*. The search is for the significant cause or causes as against the insignificant.”

²¹ The change of emphasis may be seen in the formulation of the no-scheme rule in *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315: value must be assessed “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition”.

²² *Myers v Milton Keynes D.C.* [1974] 1 WLR 696, 704. The difficulty of the exercise in that case is evident from the complexity of the order, and the fact that the Tribunal had to seek further guidance from the Court of Appeal: *ibid* p 707.

²³ [1970] 3 All ER 864.

adjustments have been made?... (the judgment enumerates a series of similar questions which the unfortunate Tribunal would have to consider on the renewed hearing)

- 4.23 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...”²⁴ 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.

Demise of the *Indian* case

- 4.24 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. That had been accepted as correct by the Court of Appeal in *Lambe v Secretary of State for War* (1955),²⁵ in which the Secretary of State purchased the freehold of a territorial army headquarters building over which the territorial army already had a lease. The court accepted that the special interest of the Secretary of State in marrying the two interests could be taken into account; it approved a valuation (in the words of the Tribunal):

[a]ssessed in conformity with the judgment of the *Indian* case..., the value to represent the amount which the acquiring authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest for its purposes, and as though no powers of compulsory purchase had been obtained.’”

Parker LJ²⁶ 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.

The same approach was adopted by the Tribunal in a 1970 case concerning the acquisition of land for Kent University.²⁷ 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.²⁸

²⁴ Planning and Compensation Act 1991 s 70 (inserting new subsections (5)-(8), into section 14 of the 1961 Act.

²⁵ [1955] 2 QB 612.

²⁶ *Ibid*, at 622.

²⁷ *St John the Baptist v Canterbury City Council* [1970] RVR 608.

²⁸ [1970] RVR at p 631 (J S Daniel QC) The Tribunal held on the facts that there were other potential buyers.

4.25 Neither the *Indian* case itself, nor *Lambe*, has ever been over-ruled.²⁹ They were followed by Peter Gibson J in *BP Petroleum v Ryder* (1987), in assessing the compensation for additional land required for oil exploration.³⁰ However, in a recent case (*Walters v Welsh Development Agency*³¹), the Tribunal declined to follow them. 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. It was held that the “public purpose of acquiring the land for the development of a compensatory nature reserve” had to be left entirely out of account. The President observed 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.³² He accepted, however that 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.

The decision in *Lambe*, in his view, could no longer be regarded as good law.³³

SPECIAL PROBLEMS

4.26 In this section, we identify some particular problems which have had to be addressed in the cases, first in relation to the common law rule, and secondly in respect of the statutory versions:

- (1) Effect of the scheme on interests
- (2) Staged schemes
- (3) Ransom strips
- (4) Purchase notices
- (5) Disturbance

²⁹ The *Indian* case has been followed in the Supreme Court of Canada in *Fraser v R* [1963] SCR 455, and in later cases - see Todd *op cit* p146ff. “In *Mercury Communications Ltd v London and India Dock Investments* (1995) 69 P & CR 135, Judge Nigel Hague QC also followed the *Indian* case; but persuasively criticised Peter Gibson J’s judgment in *BP* for limiting the special value element to “one more bid”, an approach which had been rejected in the *Indian* case (following *IRC v Clay* [1914] 3 KB 466), and more recently by Donaldson J in *FR Evans (Leeds) Ltd v English Electric* (1978) 36 P&CR 185.”

³⁰ [1987] EGLR 233, 248. He increased the annual payment per acre from £40 to £45 to reflect the amount which BP, as a “special purchaser”, would be willing to pay in the market “to be certain that he will acquire the rights he seeks”.

³¹ [2001] RVR 93 (George Bartlett QC, President)

³² *Ibid* para 52. (He refers to *Davy, Wilson, Myers, and Rugby Joint Water Board*).

³³ *Ibid* para 53.

Effect of the scheme on interests

- 4.27 In the *Rugby Water Board* case,³⁴ 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 Act³⁵ 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. 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.³⁶
- 4.28 The effect of this decision, in the context of agricultural holdings, was reversed by statute.³⁷ Otherwise, it remains good law, although, as far as one can judge from reported cases, it does not appear to have caused serious problems in other contexts.³⁸

Staged schemes

- 4.29 One frequent problem is that of defining "the scheme", particularly in cases where there is staged development of an area over a long period, perhaps by different authorities. The Courts have always treated this as a question of fact not law, and have declined to give any guidance as to how it is to be approached. Yet, it is a very unfamiliar exercise for most valuers, who in practice are likely to rely on the lawyers.³⁹
- 4.30 Two contrasting cases illustrate the problem.

- (1) In *Bird & Bird v Wakefield MDC*,⁴⁰ the compulsory purchase order, relating to some 30 acres, was promoted by the District Council for the purpose of industrial development. The order land fell within an area of some 770 acres for which the County Council had previously prepared plans for investment in reclamation and redevelopment, but without any specific proposals for compulsory purchase. The issue was whether these wider

³⁴ *Rugby Water Board v Shaw-Fox* [1973] AC 202. The speeches contain a review of the earlier cases, and confirm the approach of the Court of Appeal in *Wilson*.

³⁵ Agricultural Holdings Act 1948 s 23, 24(2)(b).

³⁶ 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).

³⁷ Land Compensation Act 1973, s 48.

³⁸ The decision was followed reluctantly in Australia: *Road Construction Authority v Tiligadis* [1988] ACLD 203 (Gobbo J).

³⁹ In *Bolton* (below), the Tribunal recorded that one of the experts in this case, asked for his view of the scheme, replied that "he was not a lawyer and that it was for the lawyers to argue which of the no-scheme worlds was relevant". [2000] RVR 292, 295.

⁴⁰ [1978] 2 EGLR 16.

proposals, and the consequent enhancement of values due to the investment, should be disregarded under the no-scheme rule; or whether the “scheme” was confined to the District Council’s proposals for the order land. The Court of Appeal confirmed the Tribunal’s finding that the relevant scheme included the county council’s plans. The Court rejected the argument that the County Council’s scheme did not itself “provide for” compulsory acquisition; it was enough that it “underlay” the acquisition;⁴¹

- (2) In *Bolton MBC v Tudor Properties*,⁴² the court reached the opposite conclusion on apparently similar facts. The Council had compulsorily acquired freehold land in the Tonge Valley on the outskirts of Bolton for leisure development by a selected development partner. The Council argued that the underlying scheme went back to the initial regeneration project for the Tonge Valley area, begun in 1980, which included public infrastructure and reclamation works carried out in the 1990s at public expense. On this basis, the increases in value due to these improvements would be disregarded. The claimant, however, argued that the scheme to be disregarded was limited to the leisure development, preparation for which began in 1995.⁴³ The Tribunal preferred the claimant’s version of the scheme.⁴⁴ The Court of Appeal confirmed that decision, treating it as an issue of fact not law.⁴⁵

4.31 It is difficult to see any principled reason for the different conclusions in the two cases. In both the broader scheme, arguably, “underlay” the acquisition but was not the immediate purpose of the acquisition.

Ransom strips

4.32 Particular problems, and protracted litigation, have resulted from cases applying the no-scheme rule to “ransom strips”, that is parcels of land which hold the key to unlocking the development potential of adjoining land. The problem, and its treatment in the cases, have been well summarised by Adrian Trevelyan Thomas:⁴⁶

⁴¹ The Court did not explain how it reconciled this approach with another Court of Appeal formulation (cited by it without comment) defining “the scheme” as “no more than a project on the part of the authority to acquire land...for some purpose for which it was authorised to acquire it.” (*Birmingham DC v Morris & Jacombs* [1977] RVR 15, 18 per Sir John Pennycuick).

⁴² [2000] RVR 292.

⁴³ The difference in values was substantial. If the improvements were disregarded, the land, on the council’s valuation, would be worth £250,000; with the improvements, £1.2m (the claimant’s figure was £6.145 m).

⁴⁴ It gave three reasons: first, the improvements were not dependent on the development of the subject site; secondly, the objectives for the leisure development site were expected to be achieved by the private sector assembling the land through negotiation; thirdly, both expert witnesses appeared to have preferred the narrower scheme.

⁴⁵ Mummery LJ’s summary of the cases has been quoted above (para. 1.11).

⁴⁶ See Adrian Trevelyan Thomas, “Determining Appropriate Compensation: Some Relevant Legal Principles” in *Papers from the Compulsory Purchase Conference 2001* (p 91), held on Thursday 17th May 2001 at 2-3 Gray’s Inn Square, 91-96.

Developers are well aware of the importance of securing the interests in land needed to prevent their development to be held to ransom. The Lands Tribunal decision of *Stokes v Cambridge Corporation* [1961] 13 P&CR 77 has long been taken as establishing that the owner of the sole access to a development site is entitled to a share in the enhanced development value of the site because it is his access which unlocks the development value in the site. This is a principle of valuation and not a rule of law.

What is perhaps less well understood is the relationship between *Stokes v Cambridge* and the principle in *Pointe Gourde*. The rule in *Pointe Gourde* is that compensation for the compulsory acquisition of land cannot include any increase[or decrease] in the value which is entirely due to the scheme. Until recently there was a school of thought which believed that a ransom payment could be avoided provided that an authority was prepared to exercise its powers of compulsory acquisition to acquire the access land compulsorily. Thus there have been a number of examples of private sector developers seeking to persuade local planning or highway authorities to use their compulsory powers to acquire access land which the private developer has been unable to acquire at a reasonable price in the belief that the acquiring authority will be able to acquire it more cheaply.

It is now clear that such a view of the law is not tenable as a general proposition. See for example *Batchelor v Kent County Council* [1989] 59 P&CR 357. As Mann LJ said in *Batchelor* when considering the relationship between *Pointe Gourde* and *Stokes v Cambridge*, “I find no difficulty with the relationship. 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.”

- 4.33 As he says, the law now seems reasonably settled. However, the debate has led to highly complex and protracted litigation attempting to reconcile the statutory and common law rules. Most notorious is *Ozanne v Herts CC*, in which the 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 being sent back for rehearing by the Lands Tribunal.⁴⁷

Purchase notices

- 4.34 The Town and Country Planning Acts allow service of a purchase notice where land is shown to be “incapable of reasonably beneficial use” following the refusal of a planning permission. Where the notice is accepted, the effect is that the

⁴⁷ [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 Court of Appeals (3rd May 1994 and 10th October 1994). On the last occasion the case was remitted to the Lands Tribunal for a complete rehearing. The parties then settled.

authority is “deemed” to have served a notice to treat, and compensation is assessed as though pursuant to a compulsory purchase order.⁴⁸ 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 wholly consistent:

- (1) In *Birmingham DC v Morris & Jacombs*⁴⁹ 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 Tribunal awarded the higher figure, on the grounds that the difference was due to the “scheme” for the access road. 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* (see below), 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 residential value.⁵⁰

4.35 This issue continues to give rise to problems.⁵¹

Disturbance

4.36 It is clear that the no-scheme rule applies, not only to the valuation of the land itself, but also to disturbance claims, such as for loss of profits. Thus, if “shadow of resumption” has caused a decline in profitability, this decrease will be disregarded in assessing the claim. This was confirmed by the Privy Council in the leading case, involving the compulsory resumption of a steel works in Hong Kong for a new town development scheme in Hong Kong - *Director of Buildings and Land v Shun Fung Ironworks*.⁵² It was held, further, that losses incurred from the time of the announcement of the proposed acquisition, even though preceding the formal statutory process of resumption, could be included in the claim:

... losses incurred in anticipation of the resumption and because of the threat which resumption presented are to be regarded as losses cause by the resumption as much as losses arising after resumption.⁵³

⁴⁸ Town and Country Planning Act 1990 s 137, 143.

⁴⁹ [1977] RVR 15.

⁵⁰ Although the case was heard some six months after *Morris & Jacombs*, that case does not appear to have been cited in argument.

⁵¹ See *Richards v Somerset CC* LT ACQ/23/1999 (30/7/2000), where in a purchase notice case the Tribunal, after hearing extensive evidence (described in a judgment running to over 200 paragraphs), decided, as a preliminary issue, that neither s 9 nor the no-scheme rule applied.

⁵² [1995] 2 AC 111 PC.

⁵³ *Ibid* at p 137H, per Lord Nicholls.

- 4.37 In that case, the announcement of the new town scheme, and of the intended acquisition of the subject land as part of it, occurred on a single defined date, which provided a clear start date for the comparison of profits in the real and no-scheme worlds. Furthermore, the declining profits were caused directly by the threat of resumption of the steel works itself, rather than any more general effects of the scheme.
- 4.38 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. Before *Shun Fung*, the Scottish Court of Session took a relatively narrow view, in a case involving a claim by a shop-owner in an area of comprehensive development:

It is dispossession caused by the taking of lands which gives rise to compensation, not the threat of dispossession *or the effects of publication of plans for the execution of the works*.⁵⁴

Since *Shun Fung*, exclusion of loss due to “the threat of dispossession” is unjustified,⁵⁵ but the latter part of this statement probably remains correct.

Statutory problems

- 4.39 None of the statutory provisions related to the no-scheme rule (with the possible exception of 1961 Act s 9) has emerged without serious difficulties. The following is a brief summary of some of the problems of interpretation.

Special suitability (rule 5(3))

- 4.40 As appears from the Scott report (see above), the original purpose of rule (3) was to limit the scope for “merely theoretical and often highly speculative elements of value...”, in particular those related to the possibility of competition between statutory undertakers (following *Lucas*).
- 4.41 In practice the rule has been so interpreted and applied that it has had little practical impact, other than to introduce a further complication into the argument. A 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*);
 - (2) That “special” implies “some exceptional character” rather than qualities shared with other possible sites (*Walters*).⁵⁶

⁵⁴ *Emslie v Aberdeen DC* [1994] 1 EGLR 33, 38 per Lord President Hope.

⁵⁵ It was so held by Judge Rich QC in *Ryde International plc v London Regional Transport* LT 6.2.01 (ACQ/147/2000) in which he allowed a claim (under rule 5(6)) for holding costs (additional interest charges) resulting from delayed sales of properties blighted by the threat of acquisition.

- (3) That the purpose requiring use of statutory powers must relate to the subject land, not to other land; and, in any event, the need for planning permission or stopping up orders is not sufficient (*Ozanne*)
- (4) That the “market” may include a mere speculator, with no direct interest in the use of the land (*Blandrent*⁵⁷).

The legislature has also intervened to cut down the scope of the rule: it has already been noted that the “special purchaser” element of the rule was repealed in 1991.⁵⁸

4.42 A rare reported example of the rule having some practical effect is *Livesey v CEGB*.⁵⁹ In that case agricultural land was acquired for the erection of a power 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, although the no-scheme rule seems to have been treated as having the same result.

4.43 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”⁶⁰. As already noted, “public authority” was defined by the 1919 Act so as to exclude bodies “trading for profit”.⁶¹ 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...⁶²

Thus, no distinction is made between privatised utilities operating for profit, and public authorities. For example, if the decision in the *Livesey* case is correct, it would also exclude any value attributable to the possibility of competition from a privatised power-generator.⁶³ Further, there is no need for the body to be in any sense public, or operating under statute. For example, if a manufacturing company obtains compulsory powers (say, under the Transport and Works Act) for a railway

⁵⁶ *Walters v Welsh Development Agency* [2001] RVR 93, para. 38, following *Batchelor*. This seems to have the paradoxical result that a site with unique qualities may attract lower compensation than one whose qualities are more common. It does not seem consistent with the use of the term in cases before the 1919 Act, e.g. *Sidney v NE Ry* (see para. 3.20above).

⁵⁷ *Blandrent Investment Developments Ltd v British Gas Corporation* [1979] 2 EGLR 18, HL.

⁵⁸ Planning and Compensation Act 1991 Sch 15, 19.

⁵⁹ [1965] EGD 605 LT.

⁶⁰ 1919 Act, s 2(3).

⁶¹ 1919 Act s 12 (para. 3.31 above).

⁶² 1961 Act s 39(1) This amendment seems to have been made in the 1961 Act as a consequential amendment following the extension of the Act (by s 1) 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.

⁶³ See Electricity Act 1989 Sch 3, under which the Secretary of State may authorise compulsory acquisition by privatised licence-holders.

link to its factory, the value attributable to that commercial use would apparently be excluded, if there is no other body requiring the land for that purpose.

- 4.44 In the light of this history, rule (3) seems an unnecessary complication of the no-scheme rule,⁶⁴ but, if it is to be retained, a distinction may need to be drawn between commercial and non-commercial bodies.⁶⁵

Development on surrounding land (Section 6)

- 4.45 As already noted, the Courts have found section 6 virtually incapable of sensible interpretation, and it has been assimilated into the common law rule. Its main practical effect has been to widen the potential scope of the “scheme” to include defined categories such as whole New Towns or Urban Development Areas. This gives rise to the theoretical need, in effect, to rewrite history over a long period since the inception of the scheme.⁶⁶ It also creates potential unfairness, as between land acquired compulsorily (at reduced “no-scheme” values) and adjoining land changing hands in the real market.

Planning assumptions (sections 14-16)

- 4.46 The provisions of 1961 ss 14ff setting out the planning assumptions to be made for valuation purposes have not been successful, particularly in their relationship with the common law rule. We summarise some of the problems:

- (1) *S 14(2)* allows account to be taken of any permission relating to the subject land, whether or not it includes other adjoining land (*§ 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.⁶⁷
- (2) *S 15(1)* allows permission to be assumed for development of the subject land in accordance with the proposals of the planning authority (without reference to the no-scheme rule), but not of any other land proposed to be

⁶⁴ In Canada, the rule has been dispensed with in most jurisdictions (see Todd *op cit* p 152ff). In Australia, the ALRC (para. 234, 250) recommended its retention to deal with problems of speculative values (citing cases such as *Cedar Rapids*) but gave no evidence that the rule had been successful in achieving that purpose.

⁶⁵ 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).

⁶⁶ See *Bromley LBC v LDDC* [1997] RVR 173, 176, 186ff, for an example of rewriting history after 9 years of “scheme” development in the London Docklands Development Area.

⁶⁷ *Stavely Developments Ltd v Secretary of State* LT 21.12.00 (ACQ/144/1998) illustrates the very artificial results of these provisions. 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 effect of the Act was that the hypothetical permission for the subject land was taken into account (under section 17), but the actual permission for the surrounding land was ignored (under the no scheme rule). If the actual permission had included any part of the subject land, it would apparently have been taken into account (under s 14(4)(b)).

developed by the authority (unless covered by an existing permission under s 14(2)). The result is highly artificial.⁶⁸

- (3) *S 15(3)* preserves, subject to restrictions, a wholly obsolete right to take account of certain categories of so-called “Third Schedule” development.⁶⁹
- (4) *S 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.⁷⁰ It has failed for two reasons:
 - (a) the section has not caught up with the modern system of local plans, which do not “define” development;⁷¹
 - (a) 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).⁷²

Certificates of alternative development (section 17)

4.47 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, 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”.

⁶⁸ See *Myers v Milton Keynes DC* [1974] 1 WLR 696 CA. 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.

⁶⁹ Town and Country Planning Act 1990 Schedule 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 serve no purpose today.

⁷⁰ “...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 13th November 1958 HC col 588-9 (J R Bevens MP, Parliamentary Secretary, Ministry of Housing and Local Government).

⁷¹ *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).

⁷² *Provincial Properties v Caterham UDC* [1972] 1 QB 453 CA.

4.48 Thus curious mismatch is illustrated by two cases, relating to the same strip of land in Blaby District.⁷³ The claimants had been given planning permission to develop an area of their land, but the permission excluded a strip which had been intended to be part of a ring road. The surrounding development took place, but the ring road proposals were then abandoned. The strip could not be developed on its own for housing purposes, and the council accepted a purchase notice.⁷⁴ In the first case a section 17 certificate for residential development was refused. The Court decided that the matter had to be considered at the date of the deemed notice to treat, by which time the housing estates had been built on both sides of the strip of land so planning permission would not have been granted for any purpose. The second case, by contrast, related to the valuation of the land under the no-scheme rule. Under that rule, it was possible to assume the abandonment of the road-scheme from its inception, before the houses had been built, and to assume that the strip would then have been developed along with the other residential land.⁷⁵ Residential value was therefore paid.

4.49 In *Fletcher Estates v Secretary of State*,⁷⁶ the House of Lords accepted the Court of Appeal's interpretation of section 17. 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.”⁷⁷

This could have been taken as a comment on the no-scheme rule as developed since the 1961 Act, and as applied in the second *Jelson* case. However, the House simply reserved its position as to the correctness of that decision.

General observations

4.50 These technical weaknesses of the provisions relating to planning assumptions are only part of the problem. The main problem is that they are too “black or white”: planning permission is either assumed or not assumed. The approach of the valuer is much less clear-cut. The valuer will take into account the prospect of planning permission as an uncertain factor, which may or may not give rise to “hope value”.

4.51 In any event, there was no need for such elaborate provision. In jurisdictions unaffected by the 1961 Act, the no-scheme rule has proved sufficiently flexible to

⁷³ *Jelson Ltd v Minister of Housing and Local Government* [1970] 1QB 243, CA; *Jelson Ltd v Blaby District Council* (1977) 34 P&CR 77, CA.

⁷⁴ See para 4.34 above.

⁷⁵ The same result was arrived at under 1961 Act section 9.

⁷⁶ [2000] 2 AC 307, HL.

⁷⁷ *Ibid* page 323 per Lord Hope.

take account of any appropriate planning assumptions, without statutory assistance.⁷⁸

⁷⁸ See *Melwood Units v Commissioner of Main Roads* [1979]AC 426 PC (Queensland). 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.)

PART V

DISCUSSION ISSUES

CLEARING THE DECKS

- 5.1 The main conclusion from the history of the no-scheme rule (common law and statutory) is that we should clear the decks and start again. The development of the law through the cases has been incoherent; the statutory interventions have added confusion and complexity; the result is a mess. The Human Rights Act imposes a new discipline.

WHY A NO-SCHEME RULE?

- 5.2 Why do we need such a rule at all? The “principle of equivalence”, which underlies compensation law, is no different from the basis of common law damages. Yet there is no similar difficulty, say in the law of tort, in constructing a “no accident world” to compare with the consequences of the injuries suffered. The difference may be that an accident is normally an isolated and unplanned incident. A compulsory purchase order, by contrast, is planned over time, and is likely to be closely linked to the planning of a much wider area.
- 5.3 The law recognises this by comparing the actual events with a “no scheme world” rather than a “no CPO world”. The difficulty is to draw a logical dividing line, under a system which accepts that planning decisions may bring windfall gains to those whose land is selected for development, and sees no automatic need to compensate those whose land is adversely affected (whether by blight or by planning restrictions).¹ Drawing the line is an issue of policy, not fact.

DIFFERENT FORMULATIONS

- 5.4 These tensions are evident in the different terms in which the rule has been expressed. Although the rule has long been referred to as “well-settled”, the words used differ widely, and may have significantly different practical results. Examples include:

- (1) the “scheme underlying the acquisition” (*Pointe-Gourde*);
- (2) the “very scheme of which the resumption forms an integral part” (*Melwood*)²;
- (3) the “project on the part of the authority concerned to acquire the land... for some purpose for which it was authorised to acquire it” (*Morris and Jacombs*);

¹ We assume that there will be no further attempt to achieve an overall solution to problems of “betterment” (such as sought in the T&CPA 1947 and the Community Land Act 1975).

² See also the leading Canadian case – *Fraser v R* [1963] SCR 455: “the amount... must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as *an integral part of the scheme* devised by that authority.” (p 472, per Ritchie J).

- (4) “an indication... that the relevant land is... likely to be acquired by an authority possessing compulsory purchase powers” (1961 Act s 9 – applying only to decreases in value);
- (5) the carrying out of, or the proposal to carry out, the purpose for which the land was acquired” (LAA(Cth) s 60(c));
- (6) the “fact that compulsory powers have been obtained...” (*Indian case*).

Version (1) is the widest, and (6) the narrowest. The others fall somewhere between (depending on how precisely they are interpreted).

5.5 The possible effect of the differences can be illustrated by reference to a typical case - *Bird & Bird v Wakefield MDC*.³

The CPO was promoted by the District Council for industrial development on an area of 30 acres, within an “wider scheme” area of 770 acres for which the County Council had previously prepared a reclamation plans (but without any specific proposals for compulsory purchase). The Court of Appeal required the wider scheme to be left out of account, because it “underlay” the CPO (version (1)).

A different result would probably have been reached under any of the other versions. Arguably, the CPO was not an “integral” part of the wider scheme (2); it was not a “project... to acquire the land” (3); it contained no “indication” that this land was to be acquired compulsorily (4); and “the purpose” for which the CPO land was being acquired was industrial development (not the reclamation of 770 acres)(5). Under (6), the wider scheme would be wholly irrelevant; one would simply imagine arms-length negotiations for the purchase of the subject land for the purpose for which the authority required it.

PRINCIPLES OF THE NEW CODE

General approach

5.6 Consideration of a new code should perhaps start from recognition of four points:

- (1) The statutory interventions in this area (in both 1919 and 1959) have been misconceived, conceptually and technically. They should be repealed and a new start made.
- (2) A simple one-clause provision giving effect to the common-law rule would be a great improvement.
- (3) Any departure from such a simple model needs to be clear and justified by identifiable policy reasons;

³ [1978] 2 EGLR 16 (See para. 4.30 above). Cf *Bolton MBC v Tudor Properties* [2000] RVR 292, where the opposite conclusion was reached on similar facts.

- (4) There is no necessity for the rules governing increases in value to be the mirror image of those governing decreases.

Decreases in value

5.7 The no-scheme rule as it applies to **decreases** in value (also in 1961 Act s 9) is concerned with the property rights of the land owner (protected by the Human Rights Act). It gives effect to the principle that a dispossessed owner should not be put at disadvantage, as compared to other land-owners. A wider version of the no-scheme rule may be appropriate. Issues which arise:

- (1) Should the owner's protection extend only to the effects of impending acquisition of the subject land, or beyond that – and if so, how far?
- (2) Is it right to go back to the first “indication” of the possibility of compulsory purchase (as in s 9), or, in the interests of clarity should there be a defined date for the commencement of the application of the rule, related to some formal step, such as the making of the compulsory purchase order?
- (3) How should the rule apply to disturbance and similar claims? Should the compensation be limited to loss by the acquisition or threat of acquisition, or should it extend to loss caused by the overall scheme (however defined)?

Increases in value

5.8 As regards **increases** in value, the rule has nothing to do with human rights. The justification must be found in policy considerations relating to the acquisition of land for public purposes. In general, the willing vendor/willing purchaser approach of the *Indian* case⁴ may be thought more appropriate for privatised utilities, and public/private partnerships. If the owner is not to have the full benefit of any increase in value of his land caused by use for commercial purpose, there needs to be some clear policy reason.

Issues which arise:

- (1) What policy purposes are served by the no-scheme rule as it applies to increases in value?⁵ For example,
 - (a) To protect statutory authorities from having to pay a “ransom” price for performance of their public functions.⁶
 - (b) To facilitate urban regeneration projects, and other comprehensive development schemes promoted in the public interest.⁷

⁴ The only departure from the real world is that one imagines a negotiation with a willing vendor, rather than one under threat of compulsory purchase.

⁵ The ALRC (see para. 4.44 above) proposed retaining the rule to exclude purely speculative elements of value (as in the *Cedar Rapids* case), but gave no evidence that this is a serious problem in practice. The experience of the Lands Tribunal may be sufficient protection.

⁶ For example, where the choice of land is constrained by the nature of the function (e.g. an extension of an existing road or railway – see *Sidney v N E Ry Co* (1914) para. 3.20 above)

- (c) any other policy objectives?
- (2) Having regard to those objectives, how should the “scheme” be defined?
- (3) Under objective (a), should the rule extend to compulsory acquisitions for private commercial purposes? How should the distinction be drawn?
- (4) Under objective (b), should there be any qualification to the rule, having regard to the problems identified in the analysis –
 - (a) The fact that the owner whose land is compulsorily acquired will be at an unfair disadvantage compared to adjoining owners whose land is sold in the open market (without any corresponding deduction)?
 - (b) The problems of “reinventing history”, which become magnified as the inception of the scheme recedes in time?⁸

Generally

- 5.9 Should the “no scheme rule” apply for the purposes of valuation only, or should it also apply to the ascertainment of (a) the interests to be valued⁹ (b) the physical surroundings of the land?¹⁰

Planning assumptions

- 5.10 The elaborate provisions in the 1961 Act relating to **planning assumptions** are ineffective and confusing. Even the section 17 regime (which the Review wished to retain and expand) has caused problems of interpretation (see *Fletcher Estates*) which are not easy to resolve. In any event, local planning authorities may not be suited to making hypothetical planning decisions. Issues which arise

- (1) Is a separate section 17 procedure required? Or can it be left to the Lands Tribunal to make any planning assumptions justified by the evidence, as part of its ordinary role of assessing the value of land “with all its potentialities”?¹¹

⁷ The 1991 Urban Task Force report spoke of concern that actions taken by public authorities to redevelop could result in “sharp increases in land and property values”, and that compensation should be based on the prevailing market value immediately before the announcement of the plans (Towards an Urban Renaissance: Final Report of Urban Task Force p 228-31). A comparison may be drawn with France, where special rules apply within *zones d’aménagement diffère* (ZAD), and the authority is given pre-emption rights at a price which reflects the cost of infrastructure: see Acosta and Renard *Urban Land and Property Markets in France*. (UCL 1993) p 46-48.

⁸ One solution may be to define certain categories of public development scheme), and to provide that, in relation to CPOs made within a defined period (say 5 years) from the approval of any such scheme, land will be valued ignoring any increase attributable to it.

⁹ See the *Rugby Water Board* case (para. 4.27 above).

¹⁰ Compare *Jelson v Blaby DC* and *Jelson v MHLG* (para. 4.48 above).

¹¹ As in *Melwood Units v Commissioner of Main Roads* (Queensland) (para. 4.51 above).

- (2) Should the rules provide for inspectors to sit with the Tribunal in suitable cases, and, if appropriate, for the planning assumptions to be settled by way of a preliminary hearing in the Tribunal reference?

SUMMARY OF DISCUSSION ISSUES

5.11 In the light of the above, we suggest that discussion at the forthcoming conference should concentrate on the following issues:-

- (1) Should the existing statutory versions of the no scheme rule (1961 Act s 5(3), and 6-9) be repealed and a new start made?
- (2) Would it be sufficient to have a simple restatement of the common law rule (as, for example, in the LAA(Cth) s 60(c) – see Appendix A)?
- (3) If so, how should the rule be expressed?
- (4) Alternatively, should different rules apply to *decreases* and *increases* in value resulting from the scheme?
- (5) If so, how should the rule in relation to decreases be expressed? In particular
 - (a) Should there be a defined date for the commencement?
 - (b) How should the rule apply to disturbance and similar claims?
- (6) What policy reasons are there for applying the rule to increases in value?
- (7) How should it be applied to such increases? In particular
 - (a) Should it apply to acquisitions by or for commercial or profit-making undertakings? If not, how should the distinction be drawn?
 - (b) If the rule is applied to facilitate regeneration and similar schemes, should it be limited to categories of project defined by the Act? How should it be limited, to avoid unfairness and “rewriting of history”?
- (8) Should the rule apply to valuation only, or also to the ascertainment of (a) the interests to be valued (b) the physical surroundings of the land
- (9) Is there any need for any special statutory procedure relating to planning assumptions?
- (10) Are there any other proposals for improving, simplifying or clarifying the formulation or operation of the no-scheme rule?

APPENDIX A

AUSTRALIAN LEGISLATION

Land Acquisition Act 1989 (Cth)

Entitlement to compensation

52 A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition

Amount of compensation general principles

55 (1) The amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.

(2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including:

(a) except in a case to which paragraph (b) applies:

(i) the market value of the interest on the day of the acquisition;

(ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest;

(iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and

(iv) where the acquisition has the effect of severing the acquired interest from another interest, any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired;

(b) if:

(i) the interest acquired from the person did not previously exist as such in relation to the land; and

(ii) the person's interest in the land was diminished, but not extinguished, by the acquisition;

the loss suffered by the person because of the diminution of the person's interest in the land;

(c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any

circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of:

(i) the acquisition of the interest; or

(ii) the making or giving of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest;

other than any such loss, injury, damage or expense in respect of which compensation is payable under Part VIII;

(d) if the interest is limited as to time or may be terminated by another person—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;

(e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of:

(i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and

(ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Secretary to the Attorney-General's Department or a person authorised under subsection 55E(4) of the "Judiciary Act 1903" requires.

Meaning of “market value”

56 For the purposes of this Division, the market value of an interest in land at a particular time is the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer.

Special provision where market value determined upon basis of potential of land

57 Where the market value of an interest in land acquired by compulsory process is assessed upon the basis that the land had potential to be used for a purpose other than the purpose for which it was used at the time of acquisition, compensation shall not be allowed in respect of any loss or damage that would necessarily have been suffered, or expense that would necessarily have been incurred, in realising that potential.

Matters to be disregarded in assessing compensation

60 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;

(b) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law;

(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; and

(d) any increase in the value of the land caused by the carrying out, after a copy of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest was given to the person, of any improvements to the land, unless the improvements were carried out with the written approval of the Minister.

APPENDIX B

SELECTED PROVISIONS OF THE LAND COMPENSATION ACT 1961

LAND COMPENSATION ACT 1961

5 Rules for assessing compensation

Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:

- (1) No allowance shall be made on account of the acquisition being compulsory:
- (2) 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:
- (3) 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 . . .¹ the requirements of any authority possessing compulsory purchase powers:²

...

6 Disregard of actual or prospective development in certain cases.

(1) Subject to section eight of this Act,³ no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if-

- (a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of the land; and

¹ Here the words “the special needs of a particular purchaser” were deleted by the Planning and Compensation Act 1991

² “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...”. 1961 Act s 39(1). The reference to an authority possessing compulsory purchase powers replaced the words “any Government Department or any local or public authority”.

³ Section 8 provides for adjustment, on a subsequent acquisition of the adjacent land, of any allowance for increase or decrease in value made on the earlier acquisition.

(b) (where the circumstances are those described in one or more of paragraphs 2 to 4B in the said first column) the area or areas referred to in that paragraph or those paragraphs had not been defined or designated as therein mentioned.

(2) The provisions of Part II of the First Schedule to this Act shall have effect with regard to paragraph 3 and so far as applicable paragraph 3A of Part I of that Schedule and the provisions of Part III of that Schedule shall have effect with regard to paragraph 4A.

(3) In this section and in the First Schedule to this Act - "the land authorised to be acquired" -

(a) in relation to a compulsory acquisition authorised by a compulsory purchase order or a special enactment, means the aggregate of the land comprised in that authorisation, and

(b) in relation to a compulsory acquisition not so authorised but effected under powers exercisable by virtue of any enactment for defence purposes, means the aggregate of the land comprised in the notice to treat and of any land contiguous or adjacent thereto which is comprised in any other notice to treat served under the like powers not more than one month before and not more than one month after the date of service of that notice;

...

First Schedule

ACTUAL OR PROSPECTIVE DEVELOPMENT

RELEVANT FOR PURPOSES OF SECTION 6

DESCRIPTION OF DEVELOPMENT

Case

Development

- | | |
|---|---|
| 1. Where the acquisition is for purposes involving development of any of the land authorised to be acquired. | Development of any of the land authorised to be acquired, other than the relevant land, being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired. |
| 2. Where any of the relevant land forms part of an area defined in the current development plan as an area of comprehensive development. | Development of any land in that area, other than the relevant land, in the course of the development or redevelopment of the area in accordance with the plan. |
| 3. Where on the date of service of the notice to treat any of the relevant land forms part of an area designated as the site of a new town by an order under the New Towns Act 1965 . | Development of any land in that area, other than the relevant land, in the course of the development of that area as a new town. |
| 3A. Where on the date of service of notice to | Development of any land included in that area, |

treat any of the relevant land forms part of an area designated as an extension of the site of a new town by an order under the New Towns Act 1965 becoming operative after the date of the commencement of New Towns Act 1966. other than the relevant land, in the course of the development of that area as part of a new town.

4. Where any of the relevant land forms part of an area defined in the current development plan as an area of town development. Development of any land in that area, other than the relevant land, in the course of town development within the meaning of the Town Development Act 1952.

4A. Where any of the relevant land forms part of an area designated as an urban development area by an order under section 134 of the Local Government, Planning and Land Act 1980. Development of any land other than the relevant land, in the course of the development or redevelopment of that area as an urban development area.

4B. Where any of the relevant land forms part of a housing action trust area established under Part III of the Housing Act 1988. Development of any land other than the relevant land in the course of the development or re-development of the area as a housing action trust area.

9 Disregard of depreciation due to prospect of acquisition by authority possessing compulsory purchase powers.

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 of other particulars contained in the current development plan, or by any other means) an indication had been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

...

14 Assumptions as to planning permission

(1) For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections fifteen and sixteen of this Act as are applicable to the relevant land or any part thereof shall [(subject to subsection (3A) of this section)] be made in ascertaining the value of the relevant interest.

(2) Any planning permission which is to be assumed in accordance with any of the provisions of those sections is in addition to any planning permission which may be in force at the date of service of the notice to treat

(3) Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed.

[(3A) In determining—

(a) for the purpose referred to in subsection (1) of this section whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land; or

(b) whether any of the assumptions mentioned in section 16 of this Act (but not section 15) are applicable to the relevant land or any part thereof,

regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part III of this Act.]

(4) For the purposes of any reference in this section, or in section fifteen of this Act, to planning permission which is in force on the date of service of the notice to treat, it is immaterial whether the planning permission in question was granted—

(a) unconditionally or subject to conditions, or

(b) in respect of the land in question taken by itself or in respect of an area including that land, or

(c) on an ordinary application or on an outline application or by virtue of a development order,

or is planning permission which, in accordance with any direction or provision given or made by or under any enactment, is deemed to have been granted.

[(5) If, in a case where—

(a) the relevant land is to be acquired for use for or in connection with the construction of a highway, or

(b) the use of the relevant land for or in connection with the construction of a highway is being considered by a highway authority,

a determination mentioned in subsection (7) of this section falls to be made, that determination shall be made on the following assumption.

(6) The assumption is that, if the relevant land were not so used, no highway would be constructed to meet the same or substantially the same need as the highway referred to in paragraph (a) or (b) of subsection (5) of this section would have been constructed to meet.

(7) The determinations referred to in subsection (5) of this section are—

(a) a determination, for the purpose of assessing compensation in respect of any compulsory acquisition, whether planning permission might reasonably have been expected to be granted for any development if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers, and

(b) a determination under section 17 of this Act as to the development for which, in the opinion of the local planning authority, planning permission would or would not have been granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.

(8) The references in subsections (5) and (6) of this section to the construction of a highway include its alteration or improvement.]

15 Assumptions not directly derived from development plans

(1) In a case where—

(a) the relevant interest is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for development of the relevant land or part thereof, and

(b) on the date of service of the notice to treat there is not in force planning permission for that development,

it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, such as would permit development thereof in accordance with the proposals of the acquiring authority.

...

(3) Subject to subsection (4) of this section, it shall be assumed that, in respect of the relevant land or any part of it, planning permission would be granted—

(a) subject to the condition set out in Schedule 10 of the Town and Country Planning Act 1990, for any development of a class specified in paragraph 1 of Schedule 3 to that Act; and

(b) for any development of a class specified in paragraph 2 of Schedule 3 to that Act.

...

16 Special assumptions in respect of certain land comprised in development plans

(1) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of a site defined in the current development plan as the site of proposed development of a description specified in relation thereto in the plan, it shall be assumed that planning permission would be granted for that development.

(2) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which—

(a) is development for the purposes of that use of the relevant land or that part thereof, and

(b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.

...

17 Certification of appropriate alternative development

[(1) Where an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers, either of the parties directly concerned may, subject to subsection (2) of this section, apply to the local planning authority for a certificate under this section.]

...

(4) Where an application is made to the local planning authority for a certificate under this section in respect of an interest in land, the local planning authority shall, not earlier than twenty-one days after the date specified in the statement mentioned in paragraph (c) of subsection (3) of this section, issue to the applicant a certificate stating either of the following to be the opinion of the local planning authority regarding the grant of planning permission in respect of the land in question, if it were not proposed to be acquired by an authority possessing compulsory purchase powers, that is to say—

[(a) that planning permission would have been granted for development of one or more classes specified in the certificate (whether specified in the application or not) and for any development for which the land is to be acquired, but would not have been granted for any other development; or

(b) that planning permission would have been granted for any development for which the land is to be acquired, but would not have been granted for any other development,

and for the purposes of this subsection development is development for which the land is to be acquired if the land is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for that development.]

...

18 Appeals against certificates under s17

(1) Where the local planning authority have issued a certificate under section seventeen of this Act in respect of an interest in land

(a) the person for the time being entitled to that interest, or

(b) any authority possessing compulsory purchase powers by whom that interest is proposed to be acquired,

may appeal to the Minister against that certificate.

...