

WHAT NOW FOR THE DOUGHTY FIGHTER? – THE CITIZEN AND COMPULSORY PURCHASE IN THE AGE OF THE PATHFINDER

(A lecture for the City of Westminster & Holborn Law Society in memory of Nigel Mayhew)
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I have been honoured to be asked to present a lecture tonight in memory of my friend, Nigel Mayhew. I cannot begin without saying a few words of my own about Nigel.

I knew Nigel for the best part of twenty years. Sometimes we would meet at his club for a long leisurely drink and talk on subjects far and wide. However we would always eventually be drawn to the subject of planning and public law. For all Nigel's many years in the service of the government, he remained a steadfast believer in maintaining the highest standards of conduct in public life. Sometimes he would send me press cuttings to provide me with material from which John Martin and I would base one of our Planning Notes columns in the Estates Gazette. As the wine flowed he would become more candid about the antics of some members of the political class. However he never did so maliciously. For Nigel was rare among lawyers these days – he was a true gentleman. And that is how I will remember him.

I have therefore taken as my topic today a subject that I feel sure he might have been concerned about – the growing use, and some may think abuse, of compulsory purchase powers. It is an area of public law that can obliterate private rights and, in my view, should be used sparingly and respectfully. My fear, however, is that increasingly compulsory purchase powers are being used with too much enthusiasm and too little regard for the effects upon affected landowner. This is particularly the case with regard to the somewhat inappropriately named “Pathfinder” projects.

The comments in this paper are entirely personal. No one else should shoulder the blame. This paper is based on personal observations over the last twenty years or so in practice as a lawyer – first in local government and then in private practice.

I grew up in Birmingham in the 1960s. Throughout my childhood the city centre was cursed by never ending property development. It seemed to me that more damage was done to the fabric of the city by developers and local authorities than was ever inflicted by the Luftwaffe. Old and often beautiful buildings were sacrificed for monolithic tower blocks and shopping centres. As a child I had to traipse through a labyrinth of building sites. It was not a pleasant place to live. And what was the result? A “concrete collar” of roads that forced pedestrians into smelly urine tainted underpasses or bridges that left one exposed to the elements. Even worse, it produced the Bull Ring! Furthermore vast areas of housing were sacrificed to produce new tower blocks that soon became dilapidated. Whole communities were sacrificed in the age of Harold Wilson's great white heat of technology.

Much of this development could not have happened without the use of compulsory purchase powers. However, by the early 1980s when I began practicing in the field of planning law, first in local government and then for City law firms, it appeared to me that the use of compulsory purchase powers had declined quite significantly. Certainly I knew plenty of colleagues in local government who were wary of using compulsory purchase powers for fear of the consequences of getting the law or procedure wrong. In any event, these powers were used sparingly.

As an aside it is worth bearing in mind that England has one of the oldest and most sophisticated legal systems governing compulsory purchase. It is hard to conceive how the turnpike roads, the canals, the railways or the modern motorway network could have happened without the use of compulsory purchase powers. Over the centuries the procedures have been added to and refined. – just glance at the Statutes section of the Encyclopaedia of Compulsory Purchase Law and Practice (Sweet & Maxwell) to get a feel for the history. Recently the Law Commission proposed the consolidation of the system. It is a pity that the current government has shown no appetite for following this through.

What most of us fail to realise is that many countries look to the English system for guidance. Over the years I have been fortunate to lecture to representatives of the PR of China over the English system that they had observed working in Hong Kong before the handover, to represent the Government of Montserrat in the Court of Appeal of the Eastern Caribbean and subsequently before the Privy Council and then, last year, to advise the Kingdom of Bahrain on modernising its system for compulsory purchase of land (an extremely sensitive subject in Bahrain and made ever more so by the recently adopted written constitution with its protection of private property rights and guarantee of judicial independence). On all these occasions I was struck by the high regard in which English compulsory purchase law is held around the world. As one senior lawyer in Bahrain's Ministry of Agriculture told me, when there is a problem that their laws do not answer they turn to English case law.

So we have a fine tradition that needs protecting. It's not perfect. No system ever can be but are we now in danger of debasing some of the cornerstones of the system in the name of regeneration? My experience tells me that if we are not careful we will lose the trust of the public in the system.

I first became concerned about this a few years ago when, via the Bar Pro Bono Unit, I was sent some papers to advise on for a group of residents in Nelson, Lancashire who were days away from facing a compulsory purchase inquiry into the loss of over 400 perfectly habitable homes. Their homes were to be some of the first victims to be sacrificed on the altar of regeneration. I find it perplexing that in the early part of the 21st century a community such as Whitefield, acing against a threat to its very existence, is forced to rely on the pro bono goodwill of professionals to present the case in opposition to a compulsory purchase order without any form of legal aid. By comparison, the State (in the guises of the acquiring authority and the confirming authority) enjoys virtually limitless resources. What is worse, one of the less attractive parts of the judgment of Forbes J in *R (oao Elizabeth Pascoe) v First Secretary of State and English Partnerships and Liverpool City Council* [2006] EWHC 2356 (Admin) means that the appearance of barristers on a pro bono basis at the inquiry, even for a very limited period and without an adequate opportunity to prepare, was still enough, in the eyes of the court, to comply with the requirements of Article 6 of the ECHR.. The obvious conclusion must be that objectors have a stark choice – be wholly unrepresented and subsequently argue in court that there was an inequality of arms under Article 6 or else try to fully fund a

professional team. The former is extremely dangerous given the current judicial trend. The latter is most likely unattainable.

If the cards are so stacked in the favour of the acquiring authority throughout the compulsory purchase process can the citizen still look to the courts for a measure of protection?

To me the high water mark of judicial protection was the decision of the Court of Appeal in *Prest v Secretary of State for Wales and another* (1982) 81 LGR 193. In that case Lord Denning MR began in customary style with the wonderful remark: “Sir Brandon Rhys Williams is a doughty fighter. He is under attack in his own homeland. It is in the Vale of Glamorgan. You pass by it if you go by the main line from Cardiff to Bridgend. Also if you go by car along the new M4 motorway near the Miskin interchange. He and his forebears have been in those parts for over 300 years. They have a considerable estate there which they let out to tenant farmers. Yet they are now under threat. The Welsh Water Authority are about to seize 40 or so acres of their land.....”

Against that background Lord Denning MR held:

“I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid: see *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Forbes J. in *Brown v Secretary of State for the Environment* (1978) 40 P & CR 285...”

In the same case, Watkins LJ held:

“In the sphere of compulsory land acquisition, the onus of showing that a compulsory purchase order has been properly confirmed rests squarely on the acquiring authority and, if he seeks to support his own decision, on the Secretary of State. The taking of a person’s land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that the authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those principles to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.”

In this case the compulsory purchase order had been made in 1971, the inquiry held in November and December 1977 and the order confirmed in November 1978. Of course this was in the era of the Callaghan Labour Government, long before the notions of privatisation and public/private sector partnerships and PFI. Equally it was long before the advent of the Human Rights Act 1998 but one could be forgiven for noticing a similarity between those comments of Lord Denning MR and Watkins LJ and the provisions of Articles 8 and 1 of the First Protocol to the ECHR.

It did not take long for the courts to begin the process of reining in *Prest*. In 1988 (by now well into the era of Mrs Thatcher and privatisation) the Court of Appeal reconsidered *Prest* in the case of *De Rothschild and Eranda Herds Limited v Secretary of State for Transport and another* [1989] 1 EGLR 19. In that case, on behalf of the appellants, a certain Mr Jeremy Sullivan QC argued that there could be derived

five “special rules” that went beyond the usual *Wednesbury/Asbridge* grounds which applied whenever the court was considering a challenge to a compulsory purchase order. These could be summarised as:

- (i) The onus is upon the acquiring authority to justify a compulsory purchase order and upon the Secretary of State to justify his confirmation;
- (ii) A CPO should only be confirmed if it is decisively in the public interest to do so, or if there is a “compelling case” in the public interest;
- (iii) Any reasonable doubt as to the justification for a compulsory purchase order is to be resolved in favour of the owner of the affected land;
- (iv) If alternative land is available that is equally suitable for the purpose of the acquiring authority but which can be acquired without the use of compulsory purchase powers, the use of such powers cannot be justified;
- (v) At the very least it is for the acquiring authority to demonstrate that compulsory acquisition is necessary, and not for the landowner to demonstrate the converse.

In support of these “special rules” reference was made to general principles of constitutional law, including the Magna Carta and Article 1 of the First Protocol to the ECHR. More specifically, three reported cases were relied on. These were *Brown v , Prest* and, finally, Forbes J (once again) in *R v Secretary of State for the Environment ex parte Melton Borough Council* (1985) 52 P&CR 318.

Needless to say the Court of Appeal (Lord Justices Slade, Croom-Johnson and Ralph Gibson) rejected the notion of special rules and described both *Brown* and *Prest* as examples of challenges to the Secretary of State’s decision on conventional *Wednesbury/Asbridge* grounds.

Let us now move forward fifteen or more years, to the era of the Blair/Brown so-called New Labour governments that seem even more enthusiastic about private involvement in the public sector than Mrs Thatcher or John Major ever did. It is my own experience (but one I believe that is shared by the majority) that there has been an explosion in the use of compulsory purchase powers, primarily in the area of “regeneration”.

In 2001, Harrison J held in *London Borough of Bexley v The Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 (a case involving competing planning applications for supermarkets where one scheme required the use of a compulsory purchase order for one of the supermarkets but not the other) that the Court of Appeal decision in *De Rothschild* was authority for the proposition that the use of compulsory purchase powers could be justifiable in order to achieve a better scheme of development in the public interest than an alternative scheme put forward by an objector which did not require compulsory acquisition.

At the beginning of 2005 the High Court (Collins J.) rejected a challenge to the compulsory purchase order that enabled the new Arsenal FC stadium at Ashburton Grove to go ahead. In *Alliance Spring Co Ltd and others v The First Secretary of State* [2005] EWHC 18 the inspector had, in a lengthy report following a 14 day inquiry, recommended that the order should not be confirmed. The First Secretary of State disagreed and confirmed the order. The main submission by the claimants was that the real purpose of the scheme was to give Arsenal a new stadium and that this could not be properly regarded as a scheme to achieve a comprehensive regeneration of the relevant area. Collins J roundly rejected that submission.

Of course, one case did provide a salutary reminder to policymakers and acquiring authorities that their powers are not limitless. The end does not necessarily justify the means. In *R (oao Elizabeth Pascoe) v First Secretary of State and English Partnerships and Liverpool City Council* [2006] EWHC 2356 (Admin) a simple corruption of the statutory test under section 159 of the Leasehold Reform, Housing and Urban Development Act 1993 was enough to bring down a compulsory purchase order and its confirmation on an area of homes at Edge Lane, Liverpool.

This year, however, has provided a number of cases that suggest that the courts are becoming increasingly reluctant to intervene. In *Valerie Bennett v Secretary of State for Communities and Local Government and Bury MBC* [2007] EWHC 737 (Admin), Lloyd Jones J dismissed a challenge to a compulsory purchase order made pursuant to section 290(2)(b) of the Housing Act 1985 on the basis that the homes were deemed unfit for human habitation. One of the central arguments advanced on behalf of the claimant was that the local authority's declaration of the clearance area was unlawful in that it had failed to produce sufficient particulars of the unfitness of the individual properties and, in failing to identify specific breaches of section 604 of that Act before the clearance area was declared, had failed to give residents an adequate opportunity to remedy alleged defects. These arguments were rejected by the court. Amongst other matters, the judge ruled that whilst it would have been good practice to have provided affected householders with detailed reasons as to why their properties were considered unfit, there was no statutory duty to do so.

In *Michael McCabe and others v Secretary of State for Communities and Local Government* [2007] EWHC 959 (Admin) reliance was placed by the claimant on the decision of Forbes J in *Pascoe* to argue that land could not be taken under section 162 of the Leasehold Reform, Housing and Urban Development Act 1993 if that land "mostly" or "predominantly" fell within one or more of the statutory description. Goldring J rejected that submission. He held that the fundamental issue before the inspector was whether the land, taken as a whole, was predominantly or mainly ineffectively or under-used and that was enough.

Lisa Smith and others v Secretary of State for Trade & Industry and the London Development Agency [2007] EWHC 1013 involved a challenge by some members of the traveller and gypsy community to a compulsory purchase order of land that was part of the site of the 2012 Olympic Games. The judge, Wyn Williams J., rejected the challenge and held that the Secretary of State's decision to confirm the order was a justified and proportionate measure taking into account the full extent of the claimants' rights under Article 8 of the ECHR. Such a decision might be proportionate even though it did not amount to the least intrusive interference with the landowner's Article 8 rights. In this case the issue of proportionality had to be judged against the background of the parties' acceptance that an overwhelming case had been made for the compulsory purchase of the traveller sites for the stated objectives. Another Olympic compulsory purchase order case which produced a similar result is *John Sole v Secretary of State for Trade & Industry and the London Development Agency* [2007] EWHC 1527.

Another case involving the public sector assisting a private developer by compulsorily acquiring land belonging to a third party is *Hall and another v First Secretary of State and Hillingdon LBC* [2007] EWCA Civ 612. In that case British Airways was proposing to build a new headquarters complex on Green Belt land. Clearly it was contrary to normal Green Belt policy. Thus a number of associated planning benefits were offered. One was to create a substantial public park on an adjoining area. This was secured through a section 106 planning obligation. One clause in that obligation required British Airways to use its reasonable endeavours to acquire the freehold ownership of the claimants' land. This had been used forty years or more as a scrap yard. It was a completely lawful use. Neither

British Airways nor the Council had any specific proposals for the site. Negotiations were unsuccessful. Consequently the Council made a compulsory purchase order. In 2001 an attempt to challenge the legality of the resolution by the Council to acquire the land compulsorily was rejected by Collins J although he was critical of the delay in advancing the proposals. In due course an inquiry into the order was held and the order was confirmed.

The Court of Appeal acknowledged that it is well-established that a clear case is required, both under domestic law and under the ECHR, to justify depriving a private owner of his land in the public interest. As the circular points out, an order should only be made where there is a compelling case in the public interest and that the acquiring authority has to be sure that the purposes for which it makes the order sufficiently justifies interfering with the human rights of those affected landowners, having regard to Article 1 of the First Protocol of the ECHR – see *R (Clays Lane Housing) v Housing Corporation* [2005] 1 WLR 2229.

Despite this, the Court of Appeal rejected the appeal. It held that the Secretary of State had decided that the retention of the Halls' scrap yard business was not compatible with the planning objectives of the area and that this was a matter of planning judgment not open to legal challenge. And so a long established and entirely lawful business was wiped out.

The only conclusion that I can draw from all these cases is that, with the notable exception of *Pascoe*, the courts are not just unwilling to come to the assistance of affected landowners but have now shifted the balance away from the kind of task identified by Lord Denning MR and Watkins LJ to one where the judges see their role as assisting acquiring authorities even where the ultimate beneficiary is another private landowner. If I am right then I would submit that this is very depressing.

But there is a potential twist in the tail. In a little known Lands Tribunal decision – *Nelson v Burnley Borough Council* (2005) the claimants made a reference to the Lands Tribunal to determine the compensation payable to them by the local authority for the compulsory purchase of their buy to let property, a terraced house, on the basis that the house was structurally unstable and should be declared unfit for human habitation. The Lands Tribunal ruled, however, that the local authority's evidence did not prove that the property was unfit for human habitation. No structural survey was undertaken and the need to demolish had not been proved. The consequence of this may be that it would be justified to attack the evidential basis for those compulsory purchase orders that are based on the supposed condition of peoples' homes. All may not be lost!

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