A pressing case for reform: compulsory purchase and the no scheme world.

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Rarely can there have been a case which has prompted the two highest courts in the land to send out a clear signal to Parliament to urgently reform the law. In the recent decision in Waters and others v Welsh Development Agency [2004] UKHL 19 the House of Lords was faced with deciding one of the most intractable problems of compulsory purchase law, the so-called “Pointe Gourde principle”.

One of the many problems with compulsory purchase law is that it is a complex, fragmented and obscure body of law. Even worse, as Lord Nicholls observed, some of the modern statutory provisions defy ready comprehension.

Yet compulsory purchase has long been recognised as an essential tool in a modern democratic society. Without it how would have such important items of infrastructure such as railways or motorways have been built? Hand in hand with the power to compulsorily acquire an owner’s land is the obligation to pay full and fair compensation.

Compulsory purchase powers have been undergoing a major revival in recent years. This is partly due to the importance placed by successive governments on regenerating our towns and cities for which the ability to compulsorily acquire land is fundamental to many projects. It must therefore be a major concern that when this case was before the Court of Appeal Carnwath LJ was moved to comment:

“The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case law, as has been necessary in this case. There can be few stronger candidates on the statute book for the urgent reform, or simple repeal, than section 6 of and Schedule 1 to the [Land Compensation Act 1961]”
The appeal concerned the basis on which compensation should be assessed for the compulsory acquisition of 225 acres of farmland belonging to the claimants. The background to the compulsory purchase was the creation of the Cardiff Bay Barrage, a project that itself had a fairly long and problematic gestation period. It was a controversial proposal that attracted much opposition. One reason for this was that it would destroy the inter-tidal mudflats in the Taff/Ely estuary which was a designated site of special scientific interest. The project only proceeded after the government had given an assurance that suitable new wetland habitats would be constructed to replace those obliterated by the construction of the barrage. Several sites were investigated and rejected before 1000 acres of low lying farmland, including the claimants land, some ten miles up the coast from the barrage was identified. It was to be developed so that within five years it would qualify for Special Protection Area status. The land was acquired by way of a compulsory purchase order.

The central issue in this case was whether the claimant was entitled to compensation based upon the argument that the land had a particular value consequent upon its indispensable status vis-a-vis the barrage.

In any ordinary land transaction at arm’s length in the open market the seller would normally expect to realise any enhanced value possessed by the land because its location makes it especially valuable to a particular buyer or class of buyer. For example, the land may have a particular value to an adjoining landowner. Thus if a house has a market value of, say, £250,000 as a house it may nevertheless have a greater value of, say, £400,000 as an annex to an adjoining nursing home or hotel. If so then the willing seller could reasonably expect to benefit from this characteristic and consequently the house has a market value of £400,000. The same principle applies when assessing value for the purposes of compulsory purchase compensation but with one important qualification. This is that enhancement in the value of the land attributable solely to the particular purpose for which it is being compulsorily purchased, and the acquiring authority’s pressing need of the land for that purpose, are to be disregarded.

This qualification is a longstanding one. Over the years the courts considered it to be implicit in the undefined expression “value” to be found in the Land Clauses Consolidation Act 1845. When granting a power to compulsorily acquire land for a particular purpose Parliament cannot have intended to increase the value of the land to be acquired thereby forcing the acquiring authority to pay compensation greater than the amount the owner could have got for his land in the open market. Similarly the special need of the acquiring
authority for the land should also be disregarded. Thus a distinction is drawn between the value of the land acquired to the owner and its value to the acquiring authority. It is necessary to separate from the market value of the land any enhancement in value which is attributable solely to the presence of the acquiring authority in the market as a purchaser of the land in exercise of its statutory powers. Crucially it is important to note that, for this purpose, it is not the existence of a power to compulsorily acquire the land which increases the value of the land. What may increase its value is the use to which the acquiring authority proposes to make of the land it is acquiring. Therefore, when identifying any enhancement in value which must be disregarded, it is necessary to look beyond the mere existence of the power of compulsory purchase and identify the use proposed to be made of the land under the scheme for which the land is being taken. This leads to the concept of the “scheme”.

The central issue in this appeal related to the decision in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 which established the principle that compensation for compulsory purchase cannot include any increase in value which is entirely due to the scheme underlying the acquisition – the so-called “no-scheme rule” and extended to other land which is being acquired as an integral part of a single scheme. This reflected the fact that before the Second World War identifying a particular scheme was not difficult for it was easily defined in the relevant authorising Act or Order. Problems only really began to emerge with the advent of the modern planning system and the construction of new towns where the powers were much less detailed but more far-reaching in character. Thus identifying the extent of the scheme became more problematic and gives rise to serious valuation difficulties.

In 1961 Parliament passed section 6 of the Land Compensation Act 1961 to the effect that the value to be attributable to development, or the prospect of development, of land other than the subject land is to be disregarded in a variety of circumstances specified in Part 1 of the First Schedule. These are: that the other land and the subject land are within the same compulsory purchase order, within an area of comprehensive development, within a site designated under the New Towns Act 1946, a town development area, an urban development area or a housing action trust area. Unfortunately this section is full of gaping holes with the result that the courts were driven to conclude that the statutory code was not exhaustive and that the *Pointe Gourde* principle or rule still applies. Lord Brown felt that there was little purpose in considering whether the rule had survived the 1961 Act partly because it had
been relied on in so many cases that to abandon it now would create as many difficulties as it would solve.

However the continued application of the *Pointe Gourde* rule raises issues of fairness to the extent that Lord Nicholls commented that “in some cases the application of the *Pointe Gourde* principle has become too wide-ranging”. This is an aspect of compulsory purchase law and procedure that the Law Commission has already recommended should be changed. However, until the law is changed by Parliament, this appeal provides the most up to date judicial guidance on how the *Pointe Gourde* rule is to be applied.

The effect of this appeal is to confirm that the *Pointe Gourde* rule still applies. Therefore compensation for the compulsory purchase of land could not include an enhancement in value of that land where the increase was entirely due to the scheme underlying its purchase, and the need of the acquiring authority to acquire that land as part of the scheme should be disregarded.

A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory purchase of the land is an integral part of the scheme, the *Pointe Gourde* rule applies. The extent of a scheme is often said to be a question of fact, but selecting those facts of key importance for determining the ambit of the scheme is not simple. In this case the use of the claimants’ land can be viewed in two different ways: for use as a nature reserve, or for use as a nature reserve to compensate for loss of the Taff/Ely tidal mudflats. The question of which of these purposes is to be regarded as more appropriate when identifying the scheme with regard to the *Pointe Gourde* rule is a matter for the Lands Tribunal’s judgment.

In exercising its judgment the Tribunal should also have regard to the purpose of the *Pointe Gourde* rule, which is to separate the “value to the owner” from the “value to the purchaser” so that the owners receive fair compensation but no more than that. Lord Nicholls offered a number of useful pointers:

(1) The *Pointe Gourde* rule should not be pressed too far, but should be applied in a manner which achieves a fair and reasonable result;

(2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible;

(3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market value of comparable adjoining properties which are not being acquired;
(4) When applied as a supplement to the section 6 code the *Pointe Gourde* rule should be applied by analogy;

(5) The scope of the intended works and their purpose will appear in the formal resolutions or documents of the acquiring authority; and

(6) When in doubt a scheme should be identified in narrower rather than broader terms.

In this appeal the facts demonstrated that the claimants’ land was an integral part of the barrage scheme and was acquired to meet a need generated by that project even though it had not been identified as such at the outset. Thus, for the purpose of the *Pointe Gourde* rule the acquiring authority’s need to acquire the land to compensate for the loss of the tidal mudflats was to be disregarded.

Clearly some may feel that this decision still leads to an unfair result for the claimants. Their Lordships expressed their collective dissatisfaction with the current state of the law. Rightly they took the view that the solution more properly lay with Parliament following completion of the comprehensive review undertaken by the Law Commission. With compulsory purchase enjoying something of a renaissance it is only to be hoped that new legislation will not be far away.