

## Pull out all the stops

Section 17 applications have been revived by *Spirerose*, but the decision has raised problems. *Robin Purchas QC* and *Michael Redman* suggest that steps need to be taken before any wholesale reform of compensation law. Illustrations by *Tim Marrs*

On Thursday 30 July 2009, the Judicial Committee of the House of Lords gave judgment for the last time. One of those judgments concerned the law and practice of compensation, and their lordships were not shy in leaving their mark before crossing Parliament Square to take up residence in the former Middlesex Guildhall building as justices of the Supreme Court.

Their lordships' decision in *Spirerose Ltd (in administration) v Transport for London* [2009] UKHL 44; [2009] 1 WLR 1797 has left those practising compensation law with a number of problems. Unless these are addressed, the settlement of compensation cases is likely to be more prolonged, expensive and uncertain. Such drawbacks look set to continue for some time because there appears to be little appetite to conduct a wholesale reform of compensation law.

That being the case, this article considers the use of arbitration and regulatory reform to: (i) accommodate the effects of the judgment so as to reduce the time and financial burdens that claimants and acquiring authorities would otherwise face; and (ii) smooth the path to the Lands Tribunal (LT), now renamed in law but not in practitioners' parlance as the Lands Chamber of the Upper Tribunal.

### **Spirerose judgment**

In its judgment in *Spirerose*, the House of Lords overturned decisions given by the LT at first instance and by the Court of Appeal on appeal.

The LT had been prepared to assume that planning permission would have been granted in the absence of compulsory purchase proposals if that could be established on a balance of probability. This approach largely negated the need for applications for a certificate of appropriate alternative development pursuant to section 17 of the Land Compensation

Act 1961. Under this, a claimant can apply to the local planning authority for a certificate establishing the planning position that would have existed in the absence of compulsory purchase. The LT and the Court of Appeal had in effect established an arrangement of "one-stop shopping", whereby planning and compensation issues could be dealt with in the same forum. The House of Lords overturned this arrangement. It decided that in the absence of statutory planning assumptions, including a section 17 certificate, the LT should value only the chance of obtaining planning permission.

*Spirerose* has thus revived the importance of making a section 17 application and, where the claimant or the acquiring authority want to challenge the terms of the certificate, appeals to the secretary of state. This raises a number of issues that do not necessarily assist in providing an expeditious and straightforward assessment of appropriate compensation.

### **Role of local planning authority**

When assessing an application for a certificate of appropriate alternative development, local authority members and officers have to deal with a hypothetical rather than an actual planning situation. Experience shows that this gives rise to concern over whether, as a general rule, they have the appropriate training and possess the knowledge to make such decisions, in particular because these applications are not, for most authorities, an everyday occurrence.

The local planning authority has to decide which classes of development would be appropriate if it does not propose to acquire the land in question under compulsory purchase powers. The section 17 certificate does not have to specify the nature, quantum and form of the development, although authorities will

often use their powers to establish the parameters of a likely development by imposing conditions subject to which a certificate may be granted.

The specifics of the permission may well be central to a valuation, whether on a comparable or residual basis or, as is frequently the case, both. Moreover, the role of a section 106 obligation under section 17 is unresolved, although in practice the secretary of state on appeal has included the provision of a section 106 obligation as a term of the grant of the certificate.

The confusion that can result in practice is illustrated in the reported cases. For example, in *Staley Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] 1 EGLR 167, it was not clear from the face of the certificate what area was covered; the LT had to unravel this. In *Spirerose*, the claimant submitted a planning application that was treated as a section 17 application; although the grant of a section 17 certificate was recommended, albeit with the wrong date, no certificate was ever issued in that case.

### **Relevant date**

The relevant date for determining a section 17 application will usually be the date on which the notice of the making of the compulsory purchase order (CPO) was published or the date of the relevant legislative instrument; this can be many years before the valuation date.

In many cases, circumstances and policy will have changed between the publication of the notice and the valuation date on which the compensation is to be assessed. Taking the earlier date is argued to be advantageous in that planning can be assessed without regard to the effect of the acquisition proposals. ▶

However, it is often the case that the latter will have long preceded the formal publication of the application for the relevant powers. The character of the neighbourhood may have changed dramatically between the date on which the CPO was published and the valuation date. This can result in what might be regarded as a conflict with the principle of equivalence, whether resulting in increased or reduced compensation as against the claimant's actual loss arising from the expropriation.

An example of such unfairness was evidenced in *Spirerose*. In 1993 (the relevant date for section 17 purposes), the only acceptable use would have been for employment, whereas in December 2001 (the valuation date), the site was suitable for mixed-use development. If a section 17 certificate could have been given with a relevant date of 2001, the compensation would have reflected the position as it would have been had planning permission been obtained for the alternative use before the conjectured sale on the open market. Why was this not part of the claimant's actual loss for the purposes of compensation?

### Three-stop shopping

Instead of the practice of one-stop shopping that existed before the House of Lords decision, there may now be a three-stop shopping procedure before compensation is settled.

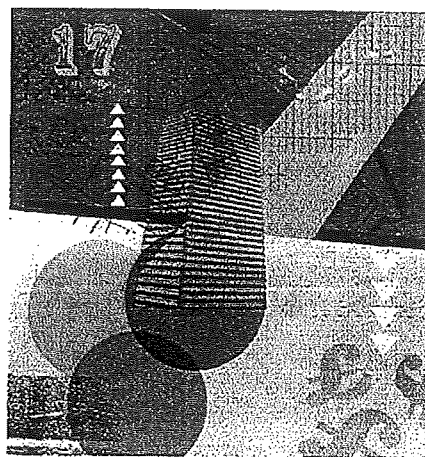
A claimant may have to apply to the local planning authority for a section 17 certificate. If the claimant or acquiring authority appeal against the planning authority's decision, the claimant may have to make a case before the secretary of state. Having obtained a certificate, it may need to argue the compensation case before the LT together with any planning issues that have not been resolved by the section 17 procedure. These will include issues as to hope value and questions under section 9 and possibly section 6 of the 1961 Act.

The use of three forums can only increase the costs incurred and the time taken to resolve compensation claims and will potentially prejudice the prospects for settlement.

### Reform of compensation law

The role of a section 17 certificate needs to be considered in the context of the wholesale reform of the law of compulsory purchase and compensation.

The previous government was unable to justify the use of parliamentary time to address this issue. Consequently, compensation law will no doubt remain as it is for some considerable time. It is to be hoped that the coalition government will consider reforming this area of law. In the meantime, however, it needs to give thought



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to how the section 17 procedure can be made to work more effectively.

In *Towards a Compulsory Purchase Code: (1) Compensation* (Law Com 286), the Law Commission recommended a modified procedure for section 17 certificates. It suggests that an application should be made to the local planning authority, which would provide an opinion on the classes of appropriate alternative development and a general indication of any conditions, obligations or requirements to which the permission would reasonably have been expected to be subject.

The claimant or acquiring authority would have a right of appeal to the LT from the local planning authority's decision. The LT would have the power to direct that the appeal be determined as part of the reference or that the hearing should take the form of a local inquiry before a planning inspector, with the inspector being given delegated power to determine the appeal on the LT's behalf.

There may be merit in providing that the application should go to the LT in the first instance in that it disposes of one tier. If this were thought too radical, the claimant could opt to apply directly to the LT at first instance rather than waiting for an appeal. Where appropriate, inspectors could be appointed as temporary members of the LT or as assessors.

### Way forward

Appropriate procedures can be introduced without the need for primary legislation.

#### ● LT as arbitrator

One approach would be to encourage the parties to appoint the LT as arbitrator to

decide the amount of compensation. An arbitration agreement could: (i) provide for the LT to decide section 17 issues; (ii) allow it to give an indication of the conditions, obligations and requirements to which the hypothetical permission would have been expected to be subject; and (iii) provide for a relevant date that is more in line with the valuation date.

The difficulty may lie in persuading the parties to sign such an arbitration agreement, especially where changing the relevant section 17 date could have a significant bearing on the award of compensation. The Compulsory Purchase Association could propose a model arbitration provision that the promoters of schemes involving compulsory purchase would be expected to accept if required to do so by the claimant.

#### ● Regulatory reform

Alternatively, an order could be made, under the Legislative and Regulatory Reform Act 2006, enabling the law to be changed by way of statutory instrument in order to remove burdens on parties, including those involving administrative inconvenience and obstacles to efficiency.

Such an order could provide for a section 17 application to be made to the LT, which would be given the power to determine the application or to provide for a planning inspector to determine it with delegated authority following a local inquiry. If the local planning authority were to remain as an alternative body to determine section 17 issues, the order could provide that the LT should entertain the appeal rather than, as at present, the secretary of state. It could also clarify that a section 17 certificate may set the parameters of any development that would have been approved in the absence of compulsory purchase.

#### Increased benefits

Unless steps are taken to simplify the procedures and reduce the multiplicity of bodies that would otherwise become involved in the determination of compensation disputes, *Spirerose* could have the effect of making the assessment of compensation more expensive and time-consuming.

In the absence of a wholesale reform of compensation law, the practical steps considered above could help to encourage the greater use of the LT to determine the question of alternative development. This could bring with it benefits in the cost, speed and effectiveness of the resolution of compensation claims and the prospects for settlement.

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