CPO – A tale of two assets

We increasingly come across the need to save community, cultural and heritage property assets. The purposes and characteristics of the asset will determine the CPO power and the process to bring it within the domain of public ownership/control. **Stan Edwards** looks at Hastings Pier and London Road Fire Station, Manchester, both Listed Buildings, each impacted by CPOs under different powers with different outcomes. There is best practice to be derived from both, but will the promoters of future schemes take heed?

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity …

Charles Dickens – A Tale of Two Cities

Within the last few years, there have been two CPOs where investigations will provide a lamp unto the feet for others. One followed the rules to the letter, with a positive outcome, and the other did not, and with a negative result. Admittedly Hastings Pier (the Pier) and London Road Fire Station (LRFS) had differing characteristics and circumstances, but **both were Grade II Listed Buildings and perceived as being in need of being acquired compulsorily by state empowered authorities.**

First things first …

Knowing the shenanigans of some authorities throughout the UK, it is essential to repeatedly set out first principles:

General principles of law – statutory authority

The use of statutory authority for taking of a person's land and the destruction of his proprietary rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused, and that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles.[1]

Also, in the interpretation of statutes, there a presumption against an intention to interfere with vested property rights. In "legislative intention", where a statute is capable of more than one construction, the construction will be chosen which interferes least with private property rights.[2]

Additionally, the courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose.[3]

Last, 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 … Denning.[4]

Circular 06/04

It is useful to extract from the Circular[5] some fairly obvious guidelines for CPOs:

1. **Derivation of purpose**
   What defines purpose? Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority.[6]
2. **Purpose derives power**
   The purpose will determine the most specific power (Act) available, influencing the factors which the confirming Minister will want to take into account. Authorities should look to use the most specific power available for that purpose, and only use a general power where unavoidable.
3. **Power has extent and limitations**
   This is derived from the empowering Act. It is for the acquiring authority to decide how best to justify its proposals for the compulsory acquisition of any land under a particular power, and be ready to defend them.
4. **A compelling case in the public interest**
   A compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order *sufficiently justify interfering with the human rights* of those with an interest in the land affected. The order is to be justified in the public interest, at any rate at the time of its making, and that land should only be taken compulsorily

Hastings Pier, damaged by fire in 2010 Inset: Former London Road Fire Station, Manchester

where there is *clear evidence that the public benefit will outweigh the private loss*.

5. **Assessing the intention**
   The confirming Minister has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest is in the CPO land. The more comprehensive the CPO justification presented, the stronger its case is likely to be.
6. **Resource implications of the proposed scheme**
   In preparing its justification, the acquiring authority should provide as much information as possible about the resource implications of both acquiring the land and implementing the scheme for which the land is required. More importantly, the confirming Minister would expect to be reassured that it was anticipated that adequate funding would be available to enable the completion of the compulsory acquisition within the statutory period following confirmation.
7. **Impediments to implementation**
   In demonstrating that there is a reasonable prospect of the scheme going ahead, the acquiring authority will also need to be able to show that it is unlikely to be blocked by any impediments to implementation.

These are only extracts from Paras. 14 -22 of 06/04 and meant to be as pointers, they are in no way to be considered in isolation of the whole circular.

Listed Buildings (LBs)

The listing of buildings helps us acknowledge and understand our shared history, marking their cultural and heritage features, and bringing them under the consideration of the planning system regarding its future. There are three basic categories and usually we trust those who own them will be aware of their heritage duty. LBs may not be demolished, extended, or altered without special permission from the local planning authority (through consultation with the relevant central government agency). Owners are, in circumstances, compelled to repair and maintain LBs, and can face criminal prosecution in failing to do so, or by performing unauthorised alterations.

Specific CPO power - Listed Buildings in need of repair
Section 47 of the Planning (Listed Buildings and Conservation Areas) Act 1990 – (Listed Buildings Act – LBA)

Local authorities, the Secretary of State and English Heritage (EH) (in Greater London) have powers to compulsory acquire a listed building if necessary, for its long term preservation. The building must be in some disrepair, and the owner shown to be unwilling or unable to carry out the repairs himself and, in essence, show that the building will be better off in the ownership of the authority, or somebody else that the authority intends to hand it to. Compensation is paid to the owner.

Appendix K of the Circular 06/04[7] sets out the Sections 47, 48 and 50 of the LBA that relate to the CPO of a listed building in need of repair, service on the owner of a repairs notice, and inclusion in the order of

a direction for minimum compensation. EH advises that a repairs notice should be considered in cases where protracted failure by an owner to keep a listed building in reasonable care places the building at risk – for example, where a building is neglected so that the need for permanent repair has accumulated to the point where the building is at risk of serious harm. **A repairs notice should be intended to secure works for the long term preservation of the LB, and should not amount to restoration as opposed to preservation.** At least two months before making an order, the acquiring authority must serve a repairs notice on the owner under S.48, specifying those works considered reasonably necessary for the proper preservation of the building – the first step in the process. If, after two months, it appears that reasonable steps are not being taken for the proper preservation of the building, the authority, under S.47 LBA, can begin compulsory purchase proceedings to acquire the building from the owner. When a CPO made under S.47 LBA is submitted to the Secretary of State for Culture, Media and Sport (DCMS) for confirmation, a copy of the repairs notice must be included.

The Magistrates/Crown Court

Any person having an interest in a building to be compulsorily purchased may, within 28 days after the service of the CPO notice, apply to a Magistrates' Court (appeal Crown Court) in two ways:

1. **Section 47 (4) LBA –** for an order staying further proceedings on the CPO if the court is satisfied that reasonable steps have been taken for properly preserving the building.
2. **Under S.50 LBA –** for an order where the authority has included in the CPO as submitted for confirmation a "direction for minimum compensation" in that the authority is satisfied that the building has been deliberately allowed to fall into disrepair for the purpose of justifying its demolition and the development or redevelopment of the site or any adjoining site.

The S.47 (4) application could stay the CPO proceedings. The S.50 application does not stay proceedings, but the court may decide whether such direction is included in the CPO.

A local authority should notify the DCMS immediately they become aware of any application to a Magistrates' Court. Appendix K says, "*Depending on the circumstances, it may be necessary to hold the order in abeyance until such time as the court has considered the application.*"

Section 53 Management of listed buildings acquired under this Act.

Where an authority acquires any building or other land, they may make such arrangements as to its management, use or disposal as they consider appropriate for the purpose of its preservation being thought fit as to the management, custody or use of the building or land (NB Hastings).

So, in making a CPO…

It was the best of times – Hastings Pier

The empowering statute – Planning (Listed Buildings and Conservation Areas) Act 1990. Section 47.
The Order – The Hastings Borough Council (Hastings Pier) Compulsory Purchase Order 2012.
Time Line – Meaningful meetings between Trust and Hastings BC started in January 2009.
Order made – 19 March 2012.
Confirmed – 11 September 2012.

The building

The pier, designed by Eugenius Birch, was opened in 1872, and seen as an innovative design in that it was the first British pier not only to have a grand pavilion, but also to have it included as an integral part of the design. It was well used, including being the venue for various musical events in the 1960s /70s. The impacts of storms resulted in schemes of repair and refurbishment, but the storm damage of 2008 put two support columns in imminent danger. Immediate repairs were put in place, and when the remaining major tenant closed business, public access was further restricted. Immediate repairs were put in place, and when the remaining major tenant closed business, public access was further restricted. The owners failed to respond to appeals from the Hastings Borough Council (HBC) to repair, and the deterioration of the structure led to uncertainty of its future.

Players and parties

Many changes in ownership led to the pier being again resold in 2000, with the ownership passing to Ravenclaw Investments, an offshore enterprise, in 2004. In 2006, HBC, upon discovering that part of the pier's structure was unsafe, closed the pier to the general public. A pier tenant funded much of the repairs, enabling the majority of the pier to reopen in 2007. In the background the Hastings Pier & White Rock Trust (HPWRT) was established, to raise funds for their long term goal to acquire the pier and form a not-for-profit company to renovate, reopen and revitalise the pier as a community owned asset.

The HPWRT opposed any decision to demolish and clear the site of the structure, which would cost an estimated £4 million of local money. In 2009 a campaign petition launch concluded with members of the HPWRT advancing the urgency of a CPO to the council. It was estimated that repairs would cost in excess of £24million, with a similar amount needed to restore attractions to the pier head. EH were supportive in the proposals to save the pier.

Passion and prudence

Whereas HPWRT had passion and a will to succeed, HPWRT's CPO advisors realised that there was some way to go in relationship management before a CPO could be promoted, in that HBC did not want to proceed without funding and a partnership agreement in place – without which HBC could get saddled with an unbudgeted liability. The conditions were evolving for a straightforward case, but it could fail if process was not followed to the letter. Eventually, through productive iterative meetings between HPWRT and HBC, a CPO partnership was facilitated. This was on a structured cross contingency approach, in that HPWRT had a small window to obtain Heritage Lottery and other funding, and sought the most expedient way to bring this asset into public ownership. **All the stake holders eventually had buy-in to a combined joint project.**

HPWRT's project involves the heritage-led transformation of the pier, by restoring the substructure, deck and railings – and redeveloping the above deck, plus introducing new structural elements. A commercial programme involved the establishment of the People's Pier Company, a community-shareholder owned management company, run by an experienced leisure management team. They see the task as preserving the asset, an investment platform and a regeneration catalyst.

Power and possession

Ravenclaw Investments, who had ignored a repairs notice and fine, were seemingly not in a position to fund the multi-million pound repair. The LBA CPO power was therefore the specific way forward, fitting all the parameters. There was no extraneous land, and the focus was on the LB. HPWRT was concerned as to whether the LBA was the appropriate CPO route to take, given the length of time for the CPO to be confirmed, and that the T&CPA1990 should be used. The concern from the CPO process viewpoint was that the power and the process had to be as challenge-proof as possible, strictly following CPO guidelines and practice. A fire in October 2010 caused severe damage to the superstructure, but it remained a LBA CPO, in that EH assessment confirmed that the heritage value of the substructure remained. This formed the basis of the HPWRT submission for £8.75m to the Heritage Lottery Fund (HLF), to restore the substructure of the pier and renovate the remaining building. The only problem in CPO terms was funding/Order sequencing. HLF could not finally confirm funding until ownership and the promotion of a CPO requires certainty in terms of funding. With or without a challenge, **this would leave the Minister a decision as to a reasonable prospect that the scheme would proceed.** The DCMS are aware of the issue, and accept that it is a view to be taken. As it is, HBC were granted £100k toward emergency works by EH, the HLF Stage 1 development grant preceded, and the Stage 2 award followed the confirmation of the CPO.

There were other facets, in that HBC were aware of the details of the Hastings Pier Act 1985 and the subsequently dissolved Hastings Pier Limited issues, plus the pertinent maritime characteristics and regulations.

HBC followed all the procedures and obtained a confirmed CPO with the project proceeding. There had been no appeal to the Magistrates' Court, no lasting objection, and therefore no Public Inquiry. The secret of the approach to the CPO was cross-contingencies between the parties and an accepted plan.

It was the worst of times – London Road Fire Station

The empowering statute – Town & Country Planning Act 1990 (as amended) S.226(1)(a).
The order – City of Manchester (Former London Road Fire Station) Compulsory Purchase Order 2010.
Order made – 3rd August 2010.
Inquiry – 12th –19th April 2011.
Inspector's Report – 1st November 2011.
Decision letter – 28th November 2011.

The Building

The London Road Fire Station (LRFS) is in central Manchester, opposite Piccadilly Station and within an area defined as the Piccadilly Gateway, the Mayfield, Corridor Manchester and Piccadilly Initiative Regeneration Areas and the Whitworth Street Conservation Area. The building dates from 1901-1906, the work of architects, Woodhouse, Willoughby and Langham, built in Edwardian Baroque style as a fire and police station which also contained, amongst other things, a bank and coroner's court. It was added to the EH "at risk" register in 1998 in category 'E', and reclassified in 2002 to remain at 'C' in 2010 (a building in slow decay; no solution agreed – poor, part occupied).

Players and parties

The objection to the LRFS CPO was made in the name of Britannia Centre Limited, such being part of the Britannia Group, including Britannia Holdings Limited and Britannia Hotels (all hereinafter referred to as BH or Britannia). The acquiring authority was Manchester City Council (MCC). The LRFS was sold on closure as a fire station in 1986, and at the date of the CPO BH had owned the building around 26 years, with increasing dereliction setting in.

Power and possession

On review of the CPO from the Inspector's report, there had been much posturing and wrangling over time between MCC's Chief Executive and the BH group owner Alexander Langsam. Way back in 2005, Britannia asked if a CPO was likely, and the "cat and mouse" of possibilities and arguments in the Inspector's report make fine reading for insomniacs. Eventually it came down to MCC's frustrations in not being able to pin down BH's proposals to develop the LRFS as a hotel.

The decision to make the CPO in July 2010 was itself preceded by an "in principle" decision in 2009. In April 2010, MCC specifically warned that it would take into account the lack of BH signing an *Implementation Agreement* in making a final decision as to whether to make a CPO. It seems that in the absence of such, it was the final straw.

The CPO general power of S.226(1)(a) of the Town & Country Planning Act 1990 was used, appropriate for the regeneration purpose, rather than the LBA. This is where MCC correctly thought it would facilitate development, redevelopment or improvement. **Apparently the LBA conditions had not reached the "tipping point" for Sec.47 LBA CPO powers to be used,** provided that there was a development timetable. The Inspector noted from his inspection that although the LRFS shows clear signs of distress and decay, in places, it did not appear to be at the point where there was any danger of widespread structural failure.

A Repairs Notice under the LBA would have generated works necessary for the preservation of the building, that might not have secured redevelopment or a sustainable new use for the building, and involved a financial outlay in the region of £6-8 million. It may have represented a powerful incentive to BH to redevelop, to include works required by the Repairs Notice. There is always a judgment call for an acquiring authority in respect of whether S.47 LBA CPO should be used, given there is a possibility that the Magistrates/Crown Court could order to stay further proceedings on the CPO. There could have been arguments for using the LBA CPO solution, but it was clear that the intention of the secondary purpose of the CPO, the preservation of the building, could be secured by other means. The prime purpose was then regeneration.

Passion, prudence and pride

The CPO was unusual in that a scheme for the redevelopment of the LRFS as a regeneration-driven, conservation-conscious, four star hotel, as favoured by MCC, had been put forward by the Objector. BH, at the time of the CPO Inquiry, put forward that the MCC had failed to address Circular 06/04, and that Britannia was to be allowed a fair opportunity to implement the permission and building consent granted by MCC a month after the CPO was made! Britannia had stated that it had the commitment, resources and experience to redevelop the LRFS as a four star hotel, to secure the preservation and re-use of the building. MCC had no signed up developer or operator, no scheme, and BH advanced that this in itself would create delay and uncertainty to the very objectives MCC purported to pursue in proceeding with the CPO.

The decision

The Inspector's decision went against MCC basically because, apart from Britannia's proposal, there was no evidence of the prospect that MCC's proposal would proceed. The Inspector's report, in reflecting on the guidelines, points to BH's proposal, which could have been described as effectively the only game in town. **This least interfered with private property rights.** The Inspector concluded that the financial viability of the CPO scheme had not been demonstrated, and appeared questionable at best.

If MCC had another developer as partner and a scheme, the decision in Standard Commercial[8] regarding a council's ability to choose would have added much weight. As it was, the only party who had said they had the resources and scheme was Britannia. MCC had Argent's Letter of Intent, but it was no more binding than BH's letter put to the Inquiry!

Irritating to all is that, subsequent to the CPO decision, Britannia Hotels advised that they are unable to proceed with the development of the hotel, and could sell on the open market. Future statements on their ability perform will no doubt be held in this light.

The way forward

So, it seems that the MCC was right regarding BH and wrong in its approach to the CPO. Perhaps the selection of the T&CPA 1990 power was influenced by a concern that BH would have appealed to the Magistrates' Court if the LPA had been pursued and the CPO stopped in its tracks. **That would have meant a massive expenditure for BH to undertake repairs, as explained above.** As it is, the CPO was stopped in its tracks not because of the power but the lack of a compelling case in the public interest, and that there was not a reasonable prospect its scheme would proceed.

The building is probably now worse than at the time of the Inquiry. Perhaps, with a bit of thought and will, a rescue package for the building along the lines of that for Hastings Pier, using the arguments of Section 53 of the LPA, was the way.

Weight is added to this approach by the Localism Act 2011 and the registration of assets of community value. The Act does not confer CPO powers, but the government inserted Appendix KA into Circular 06/04, "*Exercise of compulsory purchase powers at the request of the community*", providing that authorities may receive and consider requests from the community, particularly voluntary and community organisations (by petition or otherwise) to use its CPO powers to acquire community assets that are in danger of being lost. Finance is to be an important factor, and local authorities must demonstrate funding of the total cost of the scheme either internally, or with a partial or full contribution from the requesting organisation.[9] To assess whether there is a compelling case in the public interest, local authorities should ask for such information that is necessary such as:

- the value of the asset to the community
- the perceived threat to the asset
- the future use of the asset and who would manage it (including a business plan where appropriate) any planning issues
- how the acquisition would be financed.

This list is not exhaustive, but the detail should be tailored to the circumstances. The approach aligns with Section 53 of the LBA and the cross-contingency route take by the HPWRT/HBC.

A community in Manchester is moving towards the "Friends of London Road Fire Station" Trust (FOLRFST), and MCC has much more resources to help a Trust than did Hastings BC. MCC may be concerned that running another CPO may be like backing up the Titanic for another go at the iceberg, but with an augmented focus and purpose towards preservation and restoration through regeneration, in the context of embracing the community management approach (through FOLRFST), has much to commend it .

There could still be the argument for promoting a S.47 LBA CPO, but probably the T&CPA (including perhaps community asset registration) is still the approach, if only to eliminate BH making a successful application in the Magistrates Court that reasonable (but costly) steps have been taken for properly preserving the building. Given that the repairs "tipping point" is close, BH may not wish to spend more on a physically and therefore financially wasting asset. However, in terms of the T&CPA approach, the Community Trust would bring not only an enhanced sustainable development dimension, but easily demonstrate the qualification under Section 226(1A) in terms of contributing to the economic, social and environmental wellbeing of the area. The greater consideration in respect of LRFS is not only its ongoing preservation, but a meaningful restoration programme involving lasting care, management, and even conditional disposal in a mixed use scheme that may include a hotel. The community orientated approach in Appendix KA was not formally available to MCC in 2010. The regeneration purpose was easily challenged, because MCC came empty handed to the CPO in terms of the scheme, and there are lessons that will have been learned. No matter which power is used, there has to be a necessary, well considered business and management plan outlined as indicated in Section 53 or Appendix KA. **Perhaps only dedicated private individuals and concerned communities may be the ones who truly care.** The community/ regeneration orientated CPO approach may be a lever for BH to sell, knowing that their victory was pyrrhic, in that they are sitting on an asset they say they are unable to develop, and is worsening in condition through the effluxion of time. It will also be interesting to see MCC's political footwork in engaging with FOLRFST!

These must be pointers for the acquisition of other community assets of all types. There are far, far better CPOs to do than we have ever done … ■

Footnotes:

1. Watkins LJ said (at 211-212): Prest v Secretary of State for Wales (1982) 81 LGR 193, 198
2. Blackstone
3. see Taggart, Expropriation, Public Purpose and the Constitution, in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC,* (1998) ed Forsyth and Hare, 91
3. Lord Denning MR *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198
5. ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down* 14 & 15
6. *Waters v Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5)*
7. ODPM Circular 06/2004 Compulsory Purchase and the Crichel Down Rules
8. *Standard Commercial Property Securities Ltd v Glasgow City Council* (No 2) [2006] UKHL 50, 2007 SC (HL) 33
9. See paragraphs 20 – 23 of Part 1 of the Memorandum to ODPM Circular 06/2004

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