

SCPA Training Event 2020

*Material Detriment, Betterment, Advance Payments
and Accommodation Works*

Wednesday 25th November 2020

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Please note that this event will be recorded.

Welcome and Introduction from the CPA Scotland Chair

Keith Petrie, FG Burnett; CPA Scotland Chair

Betterment and Material Detriment

Elaine Farquharson-Black, Brodies LLP; CPA Scotland Vice Chair
Karen Hamilton, Brodies LLP

COMPULSORY PURCHASE ASSOCIATION SCOTLAND TRAINING

BETTERMENT AND MATERIAL DETRIMENT

Elaine Farquharson-Black, Partner, Brodies LLP and Vice-
Chairman of CPA Scotland

Karen Hamilton, Partner, Brodies LLP

25 November 2020



ENLIGHTENED THINKING

BETTERMENT



Land Compensation (Scotland) Act 1963 –

- Compensation for compulsory purchase of land is to be paid on the basis of the open market value that a willing seller might be expected to realise (s12 rule 2)
- Compensation for compulsory acquisition is to be assessed disregarding any increase or decrease in value solely attributable to the underlying scheme of the Acquiring Authority (s13)
- Where, on the date of service of the notice to treat, the person from whom land is being acquired is also entitled in the same capacity to contiguous or adjacent land, there is to be deducted from the compensation for the land acquired any increase in the value of the contiguous or adjacent land which, in the circumstances described, is attributable to and which would not have occurred but for the scheme as defined (s14)

BETTERMENT

Legal Framework

Other statutes contain similar provisions:-

- Section 110(4) of the Roads (Scotland) Act 1984 –

“In assessing the compensation payable in respect of the compulsory acquisition of land by a roads authority under powers conferred by Section 104 or Sections 106 to 108 of this Act, the Lands Tribunal for Scotland – (a) “shall have regard to the extent to which the remaining contiguous land belonging to the same person may be benefited by the purpose for which the land is authorised to be acquired;... and the Land Compensation (Scotland) Act 1963 shall, in its application to a compulsory acquisition by a roads authority under any of the said sections, have effect subject to the provisions of this subsection.”

- Section 10 and Schedule 1, para 4, to the Housing (Scotland) Act 1987 (compensation where land is acquired for the provision of housing):

“The Lands Tribunal shall (except as provided in Section 15(1) of the Land Compensation Scotland Act 1963) have regard to, and make allowance in respect of, any increased value which, in their opinion will be given to other premises of the same owner by the demolition by the Local Authority of any buildings.”

- See also express provisions in private and local Acts e.g. the Zetland County Council Act 1974 which provided for the acquisition of land in connection with the construction of the Sullom Voe Oil Terminal.

BETTERMENT

Equivalence

- Horn v Sunderland Corporation [1941] 2KB 26

"The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss..."

BETTERMENT

Point-Gourde principle

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

“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.”

BETTERMENT

No scheme principle

- Directors of Buildings and Land v Shun Fung Ironworks Ltd [1995] 2AC 111

“A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which (the compulsory acquisition) forms an integral part. A loss in value attributable to the scheme is not to enure to the detriment of a claimant. The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gain should not. Had there been no scheme those losses and gains would not have arisen.”

BETTERMENT

Operation

- Only applies where the landowner has land remaining which is contiguous to the land which has been acquired (s14).
- Where the enhancement in the value of the Retained Land exceeds the compensation for the Acquired Land, then no compensation paid.
- 2 adjacent landowners, both of whom own land which has benefited from a scheme of public works, are treated differently, simply because one of them has had part of their land acquired for the scheme.
- Both landowners will have had to pay planning gain/developer contributions related to development on their remaining or adjacent land.

BETTERMENT

Direct connection to the scheme

- For set off or betterment provisions to apply it must be demonstrated that the increase in the value of the remaining land would not have occurred but for the scheme (*James Miller & Partners Ltd v Lothian Regional Council (No. 2) (1984 SLT (Lands Tr) 2)*).
- In deciding whether the increase in value of any retained land would not have occurred but for the scheme in question, it is important to identify what is the scheme to be taken into account.

BETTERMENT

What is the scheme?

- Waters v Welsh Development Agency [2004]1WLR 1304

The overriding guiding principle when deciding the extent of a scheme is to forward Parliament's objective of providing disposed owners with a fair equivalent for their land.

BETTERMENT

Six pointers

- No magical detailed formula, but Lord Nicholls identified six pointers in determining compensation:
 - 1) The Pointe-Gourde principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result.
 - 2) A valuation exercise that is unreal or virtually impossible is not fair and reasonable.
 - 3) A gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired should be viewed with caution.
 - 4) If applied as a supplement to Section 13 of the 1963 Act, the principle should be applied by an analogy with the statutory powers.
 - 5) The scope of intended works and their purpose will normally appear from the form of resolutions or documents of the Acquiring Authority, but this is not conclusive.
 - 6) When in doubt a scheme should be identified in narrower rather than broader terms.

BETTERMENT

Case law

- Portsmouth Roman Catholic Diocesan Trustees v Hampshire County Council [1980] 40P&CR 579
- Leicester City Council v Leicestershire County Council [1995] 70P&CR 435
- Waters v Welsh Development Agency [2004] 1WLR1304
- Esso Petroleum Company Ltd v Secretary of State for Transport [2008] RVR 351
- Persimmon Homes (Midlands) Ltd and Others v Secretary of State for Transport [2009] UKUT126
- J S Bloor (Wilmslow) Ltd v Homes and Communities Agency [2017] UKSC 12
- **Scotland's Rural College (SRUC) v The Scottish Ministers – Lands Tribunal for Scotland 04 February 2020**

BETTERMENT

Planning

- Have to determine the planning status of both the Acquired Land and the Retained Land in the no-scheme world.
- Hard to do.
- Onus on Acquiring Authority to demonstrate that Retained Land has benefited.
- SRUC – LTS concluded that the spatial strategy of the structure plan would have been the same in the no-scheme world.
- Strong pre-existing housing requirement was driver for economic growth, not the AWPR.

MATERIAL DETRIMENT



WHAT IS SEVERANCE? – EXAMPLE 1



WHAT IS SEVERANCE? – EXAMPLE 2



The law :-

- TCP(S)A `97, Sch. 15, para 20
- AL(AP)(S) A `47, 2nd Sch, para 4
- LCC(S)A 1845, ss.91, 92
- LC(S)A 73, ss. 49 - 52
- Private Act

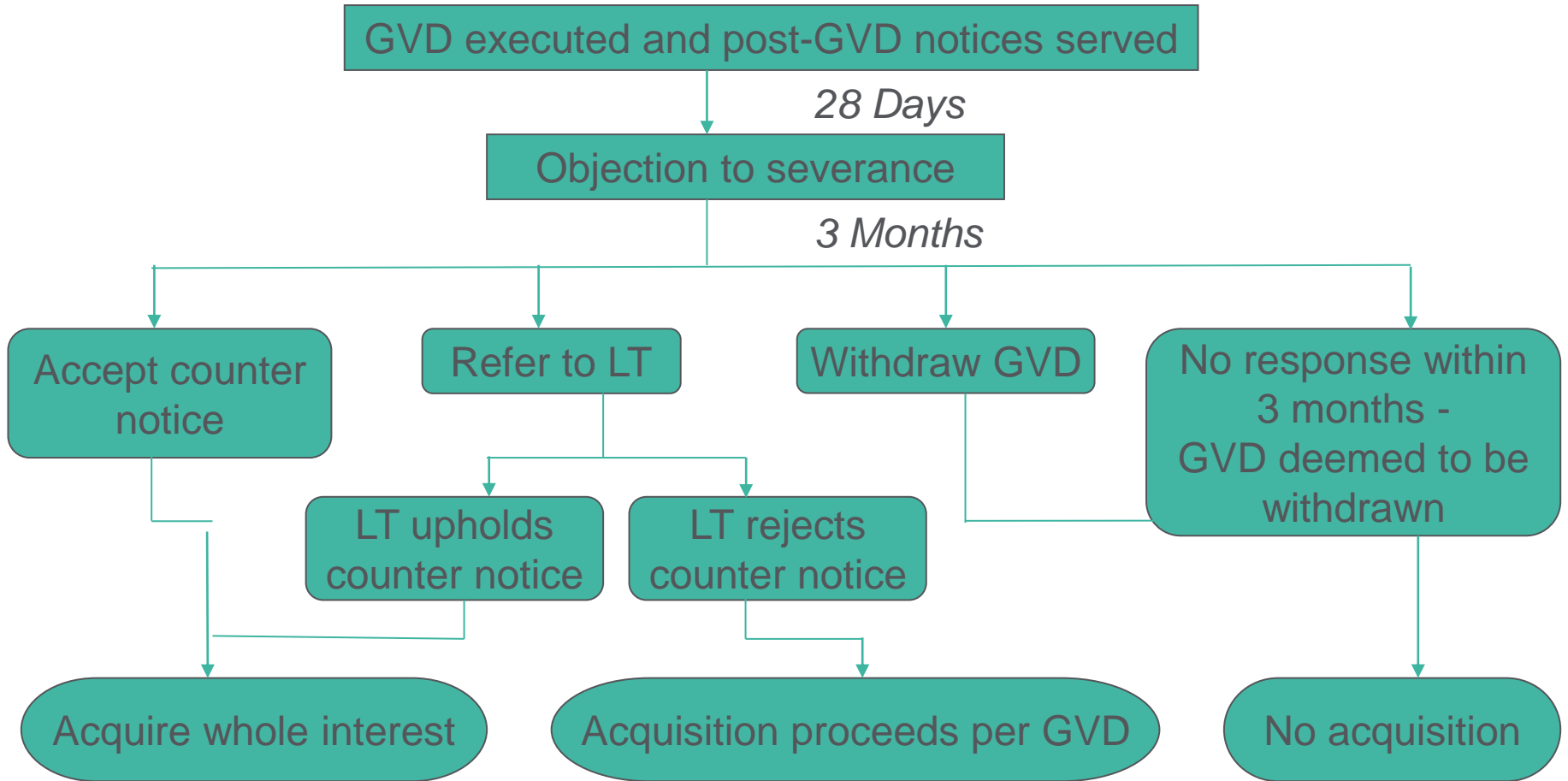


NOTICE OF OBJECTION TO SEVERANCE WHERE LAND ACQUIRED BY GVD

Entitlement arises where “part only of a house, building or factory, or of a park or garden belonging to a house acquired. (TCPISA’97, Sch. 15, para 20)

- Qualifying interest
- Test:
 - House, building or factory – “without material detriment”
 - Park or garden – “without seriously affecting the amenity or convenience of the house”

OBJECTION TO SEVERANCE (COUNTER NOTICE)

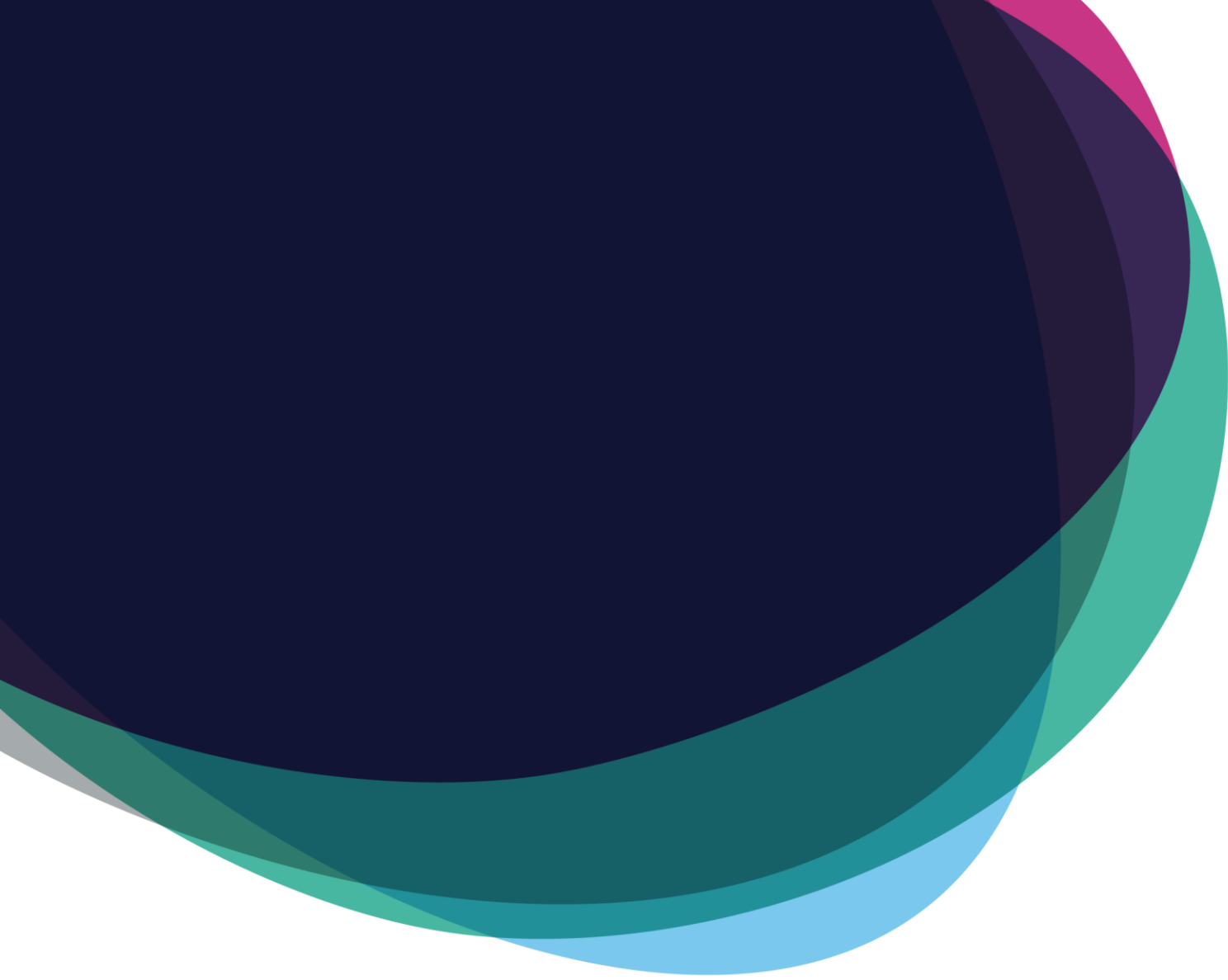


McMillan v Strathclyde Regional Council 1984 S.L.T. (Lands Tr.) 25

- Test :-
 - whether after severance the remaining land would be less useful or less valuable in some significant degree when compared with pre-acquisition state
- Significant factors:-
 - Heel of footpath 15ft closer to front wall of property
 - Onerous title condition

Aberdeen City Council v Morrison 2014 S.L.T. (Lands Tr) 113

- Key factors:-
 - The loss of a portion of the garden;
 - The fact that the road carriageway would be brought nearer to the house as a result of the development; and
 - That traffic volumes on the road would increase



ENLIGHTENED THINKING

Question & Answer Session

Advance Payments of Compensation and Accommodation Works

Dougie Bowers, Valuation Office Agency

Keith Petrie, FG Burnett; CPA Scotland Chair

Scottish Compulsory Purchase Association Presentation on (a) Advance Payments and (b) Accommodation Works

A Joint Presentation

by

Dougie Bowers and Keith Petrie

Background/Introduction

- Surveyors and lawyers have been involved with real estate that has been subject to compulsory purchase for over 150 years now.
- During this time, they have been advising acquiring authorities regarding the instigation and promotion of compulsory purchase orders (CPOs) and in the assessment and negotiation of financial compensation as a consequence of the compulsory purchase of interests in real estate.
- This presentation deals with two issues viz. Advance Payments of Compensation and Accommodation Works

Advance Payments

- Advance Payments of Compensation (AP) were introduced under the Land Compensation (Scotland) Act 1973
- Subsequent changes to the AP system were introduced under the Planning and Compensation Act 1991
- AP were (and still are) principally designed to alleviate financial hardship- but there are other advantages
- Acquisition of real estate interests by way of compulsory purchase is unique in Scotland - as an interest can be legally acquired by an acquiring authority on an agreed date but at that time **NO money changes hands**

Advance Payments

S 48 LC(S) A 1973 - Right to advance payment of compensation

(1) Where an acquiring authority have taken possession of any land the authority shall, if a request in that behalf is made in accordance with subsection (2) below, make an advance payment on account of any compensation payable by them for the compulsory acquisition of any interest in that land.

(2) Any request under this section shall be made by the person entitled to the compensation (hereafter referred to as “the claimant”), shall be in writing, shall give particulars of the claimant’s interest in the land (so far as not already given pursuant to a notice to treat) and shall be accompanied or supplemented by such other particulars as the acquiring authority may reasonably require to enable them to estimate the amount of the compensation in respect of which the advance payment is to be made.

(3) Subject to subsection (6) below, the amount of any advance payment under this section shall be equal to 90 per cent. of the following amount, that is to say—

(a) if the acquiring authority and the claimant have agreed on the amount of the compensation, the agreed amount;

(b) in any other case, an amount equal to the compensation as estimated by the acquiring authority.

Advance Payments

- Whilst negotiations of the claim may have commenced (or indeed may not have commenced), the acquisition by CPO extinguishes all rights and interests in the affected property and thus triggers the claim for compensation
- An acquiring authority will require a compensation claim form (which normally forms part of the General Vesting Declaration documentation) to be completed and submitted - which can further delay the commencement of negotiations
- An application for an Advance Payment can only be applied for once vesting has occurred

Advance Payments

- Early valuer involvement is important – it will help the acquiring authority make an informed estimate
- This benefits the authority by improving the accuracy of Land Cost Estimates and better cash flow
- This also benefits the claimant by maximising the compensation received at an early stage in the process
- In some cases this might allow the case to be put to one side until the final position is apparent
- Both sides will therefore benefit from professional advice

Advance Payments

- Very rarely is a claim for compensation a straight-forward matter and, inevitably, it will take some time for a settlement to be achieved - this may be some months or indeed years
- Equally, there may be differences in opinion between the acquiring authority and the claimant over the amount of compensation due and again this will lead to delay in a settlement being achieved
- Further, either or both parties may not be able to accurately determine the amount of compensation due at the commencement of the claim - this will be especially so with complicated “disturbance” claims and part-only acquisitions where the Injurious Affection element of the claim may not be able to be accurately quantified until after the public work is operational

Advance Payments

- The application for an AP is lodged with the acquiring authority (there is no prescribed form) by way of a letter and the acquiring authority has three months within which to process, assess and make the payment – provided it has sufficient information to make the assessment. There is, however, no penalty if the AP is made later than the statutory three month period
- An AP is an assessment (**NOT** an offer) of the likely compensation due and 90% thereof is paid. The assessment is wholly within the domain of the acquiring authority although the claimant can make representations as to what the amount should be; there are claw-back provisions should there be an over-assessment

Advance Payments

- If there is a mortgage or other form of loan secured over the property, then the claimant must inform the acquiring authority as the lender has “first dibs” on receiving all, part or none of the AP. The acquiring authority will contact the lender to determine its attitude to the receipt of the AP monies and no AP will be made until the lender’s position has been formally clarified.
- Also prior to an AP being made, the acquiring authority will issue a receipt document which requires to be signed-off by the claimant as well as wishing the claimant’s nominated bank account details to which the AP monies will be paid.

Advance Payments

- The 1991 Act introduced the concept of multiple applications for an AP; thus, as negotiations progress or a scheme becomes clearer, it may be possible to more accurately determine the amount of compensation due and “top-ups” can be applied for if the acquiring authority is of the view that more compensation is due relative to the previous AP assessment
- There are (at least) two further advantages in applying for an AP. Firstly, whilst statutory interest is payable on outstanding compensation amounts, since 2009 the rate of interest has been 0% - as it is 0.5% BELOW the Bank of England base rate.

Advance Payments

- Secondly, 90% of the Surveyor's fee is eligible for reimbursement. The Surveyor may have been involved in the case/claim for a considerable period of time prior to the compulsory purchase of the affected property but the reimbursement of the (reasonable) fee by the acquiring authority can only be made once vesting has occurred.

Accommodation Works

- There is no mention of Accommodation works (AW) in any of the Acts of Parliament that deal with CPOs/compensation assessments
- However, AW have been around for at least the last 35 years and arise where there is a part-only acquisition of a property.
- The provision of AW are designed to (a) ameliorate the (adverse) effects of a public work on the affected property and (b) partly reduce the amount of compensation payable under the Injurious Affection and/or Disturbance elements of such a claim

Accommodation Works

- Where there is a part-only compulsory acquisition, the affected property owner is entitled to claim compensation not just for the open market value of the land acquired but also for any reduction in the open market value of the retained property this is known as Injurious Affection
- The amount of Injurious Affection may be able to be reduced by the claimant undertaking appropriate works to the affected property eg. planting screening/hedging/trees, revising accesses, erecting new fencing and gates, altering services such as water or electricity

Accommodation Works

- The reasonable costs of these works would form part of the compensation claim but it may be more cost-effective for the contractor appointed to construct the public work to also construct these works i.e. works which accommodate the claimant; accordingly practice has developed whereby in many public work schemes, AW will be offered/provided by the acquiring authority.
- The acquiring authority may also be undertaking works within the land acquired to mitigate the (adverse) effects of the scheme eg tree planting, sound barriers. These works are called Scheme Works as they are constructed within the acquired land; Accommodation Works are works undertaken on the claimant's retained property.

Accommodation Works

- SOME larger schemes have schedule B works – these are not accommodation works – they are works done by the claimant but with the cost reimbursed by the authority as part of the compensation
- The need for these works may still need further discussion as they are part of the compensation so need to be considered “in the round”

Accommodation Works

- The future repair/maintenance of Scheme Works rests with the acquiring authority whilst the responsibility for repair/maintenance of for AW rests with the claimant.
- AW, if offered by an acquiring authority, will be discussed and negotiated with the claimant and ultimately the provision of AW can range from “gold-plated” AW to no AW with everything in between.

Christies of Scotland Limited (Applicants) v Scottish Ministers (Respondents)

<http://www.lands-tribunal-scotland.org.uk/decisions/LTS.COMP.2014.22.html>

118. We have some sympathy with the applicants in that it is undisputed that “agreed” accommodation works were not carried out by the respondents. We think senior counsel for the applicants was correct to categorise this as part of a disturbance claim. However, in our opinion it is necessary for the applicants to establish either that the work requires to be carried out in order reasonably to mitigate loss, or that land has been devalued further by the absence of the works. There is no evidence which would allow us to quantify diminution in value. That leaves the question whether the works as quantified are still required reasonably to mitigate loss so that the need for the works can properly form part of a disturbance claim.

119. The applicants did not give evidence to the effect that they intended to do the works themselves as a practical necessity. We are unable to infer from the evidence that the works are reasonably required to mitigate losses. We do not know what those losses might be... Turning to the tracks, we do not agree that what would be “normal” agricultural fields (if they were to be restored as such) are in effect devalued because the tracks, which have some base material, are not tarmacked as they were previously. Those tarmac tracks were for the purpose of the previous nursery business, which we infer would have had relatively greater vehicular use, but which is no longer in prospect. The part of the site in question has potential only for agriculture and we heard no evidence that tarmac needed to be laid for this purpose. So we do not think there is a disturbance element capable of quantification.

Question & Answer Session

Thank you for attending today's event.

We look forward to seeing you all very soon!

In the upcoming days, you will receive an email which will include your post-event documentation. This email will include the following: CPD, online Questionnaire and a link to the event recording.



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We look forward to seeing you all very soon!

This event has now finished.