ISSUES PAPER

COMPULSORY ACQUISITION OF LAND

(LRC IP 13 - 2017)

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GLOSSARY

The following abbreviations are used throughout this Issues Paper

A1P1 – Article 1 of Protocol No.1 of the ECHR

CPO – Compulsory Purchase Order

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EIA – Environmental Impact Assessment

EIS – Environmental Impact Statement

1845 Act – *Lands Clauses Consolidation Act 1845*

1919 Act – *Acquisition of Land (Assessment of Compensation) Act 1919*

1960 Act – *Local Government (No.2) Act 1960*

1966 Act – *Housing Act 1966*

2000 Act – *Planning and Development Act 2000*

2006 Act – *Planning and Development (Strategic Infrastructure) Act 2006*

BACKGROUND TO THE ISSUES PAPER AND THE ISSUES RAISED

Introduction

This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.[1] It concerns a review of the current law on compulsory acquisition of land with a view to the clarification, reform and consolidation of the principles and rules that underlie the process. It has been suggested that the current CPO processes (of which there are over 70) may be unnecessarily complex, lengthy and costly and the purpose of the project is to determine whether a fairer, more effective and efficient system could be put in place. The current law emanates from many different pieces of legislation, and different rules apply depending on the type of compulsory purchase order (CPO) involved, whether for housing, railways, roads or other infrastructure such as gas pipelines. In addition, while the most commonly used CPO powers are based on legislation enacted by the Oireachtas, such as the *Housing Act 1966* and the *Planning and Development Act 2000*, some of the relevant legislation predates the foundation of the State, including the *Lands Clauses Consolidation Act 1845* and the *Acquisition of Land (Assessment of Compensation) Act 1919*.

The project is wide-ranging in scope and therefore this Issues Paper contains 23 issues on which the Commission seeks views. The issues are laid out chronologically, in the order they arise as the CPO process progresses. Without wishing to give priority to any of the 23 issues, the Commission considers that a number might be regarded as being of particular importance to address. These are: establishing the purpose of a CPO (Issue 9); the role of third party objectors (Issue 10); the CPO notice to treat and the date when the property is valued (Issue 14)); the power of entry before payment (Issue 15); the principles and rules to be applied to assess compensation (Issue 16); the rights of neighbouring landowners (Issue 17); the arbitration process (Issue 18); and the consolidation of CPO legislation (Issue 23).

The following 23 issues are addressed in the Issues Paper.

Issue 1: Guiding principles: after a brief overview of the CPO process, this issue discusses the protection of property rights under the Constitution of Ireland and the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR). This includes an analysis of the proportionality test used to assess legislation, such as CPO legislation, that seeks to restrict or limit the property rights of the landowner. The Commission seeks views as to whether it may be beneficial to include a list of general principles in any future CPO legislation, which acquiring authorities or

[1] Law Reform Commission *Fourth Programme of Law Reform* (LRC 110-2013), Project 8.

decision-makers would have to consider when making decisions relating to the compulsory acquisition of land.

Issue 2: What interests in land can be acquired: This issue raises the question as to whether there should be any restriction on the land that can be acquired once the system operates in a proportional manner. There is scope, however, to consider operating different CPO systems based on the type of land and landowner, as opposed to the functions of a certain acquiring authority. This suggested approach would include modifications of the procedure for homeowners and business owners in the event of certain hardship. This issue also explores the possibility of altering the current systems in order to account for the compulsory acquisition of entire plots of land, as opposed, for example, to acquiring strips of land for a road.

Issue 3: Agreement between the landowner and the acquiring authority: This issue asks whether there should be a legislative provision requiring the acquiring authority to attempt negotiations before serving notice of the CPO.

Issue 4: A power to request information: This issue explores the provisions in the *Housing Act 1966* and the *Planning and Development Act 2000* (the 2 most commonly used Acts for CPO) that require an occupier to give information about the landowner to the acquiring authority. It is an offence not to do so, or to do so in a knowingly misleading manner. An alternative approach may be to place the onus on the acquiring authority to carry out its own investigation of title.

Issue 5: Power to enter land to assess its suitability: this issue covers the instances in which a representative of the acquiring authority enters on the landowner's land in order to perform surveys, make plans, take levels, excavate and examine the subsoil. It is arguable that this should remain in place in order to offset the potential disproportionate interference that could arise if an acquiring authority acquired land without knowing that it was suitable for the proposed purpose. The question is also raised as to whether statutory guidance should be available to assist judges of the District Court in determining if entry should be prohibited on any grounds.

Issue 6: Terminology: the term "compulsory purchase order" could be interpreted as implying an element of finality and or suggesting that a sale, rather than an acquisition, is involved. The Commission asks whether the current terminology should be amended to "compulsory acquisition application" or "compulsory acquisition notification" when it is sent to An Bord Pleanála and a "compulsory acquisition order" only when it has been confirmed by the Board.

Issue 7: Advertising and notifying affected landowners: this involves sending notices to the landowners, lessees and occupiers, and publishing a notice in a local newspaper of the intention to CPO the land. There may be scope to alter the timelines and, depending on the approach adopted in relation to third party objectors (discussed in Issue 10), whether it is necessary to expand the service of notices to adjacent landowners.

Issue 8: What to do when landowners cannot be identified: this issue discusses how the notice is served and the offence of removing such a notice from the property of a landowner subject to a CPO. One potential reform canvassed is to provide for the confirmation of the CPO following a reasonable line of enquiry and the deposit into an independent financial institution of the compensation that is determined by an arbitrator.

Issue 9: Establishing a purpose for the CPO: this issue considers the purpose provided by the acquiring authority in making a CPO. The "particular purpose" required for a CPO has been interpreted by the Irish courts as meaning a statutory purpose, such as "development." This has resulted in a very broad approach being taken by acquiring authorities and a lack of specificity, which is relevant in terms of making a substantial objection, determining compensation, the requirement of applying for planning permission, public private partnerships and self-realisation. This issue explores whether such an interpretation may lead to a disproportionate interference with the landowner's right to property.

Issue 10: Standing to object, including third party objectors, grounds for objection, the time limit to object: this issue discusses the objection procedure where An Bord Pleanála must determine whether or not to confirm a CPO. It asks whether objections that are based on hardship should be taken into consideration, especially in relation to more vulnerable members of society. The Commission also asks whether the opportunity to object should be extended to third party objectors, including what consideration should be given to any costs incurred by a third party objector as a result of seeking independent expert opinions.

Issue 11: The jurisdiction of a body to hear and determine objections: this issue considers the power of the inspector in his or her advisory role in carrying out an oral hearing in advance of a decision by An Bord Pleanála. The Commission asks whether there is a case for reviewing the timelines involved or the implementation of statutory guidelines for the inspector's powers during an oral hearing, including the weight afforded to the various grounds for objections.

Issue 12: Advertising and notifying the outcome of the confirmation hearing: on this issue, the Commission asks whether notification of the outcome could be expanded to any person who made a written objection, as opposed to those who appeared at the hearing.

Issue 13: Special rules for judicial review of the decision by the confirming body: there are some time limit inconsistencies surrounding this issue, such as the date on which the CPO becomes operational arising before the deadline by which an application for judicial review must be made. In order to offset the increasing requirement for judicial review, one potential solution may be to appoint a legal professional to An Bord Pleanála when a CPO is being assessed, in order to assess the proportionality of the interference with property rights.

Issue 14: Notice to treat and the valuation date: this issue discusses the time limits in which the notice must be served, the valuation date and the time limit by which

progress on the CPO project should be made. It could be argued that the current system is not compatible with the equivalence principle (putting the landowner in the same position, in so far as money can do, as if the CPO had not been made); therefore one possible reform canvassed is that the valuation date and the date of the payment of compensation would be the same.

Issue 15: Entry power before the assessment of compensation and the interest rate payable: this issue explores the entry upon and development of the land without compensation being paid, which may result in a landowner being unable to mitigate his or her loss, especially where an entire property is acquired. The Commission also asks whether there is need to reform the basis on which the interest rate is paid in CPO cases.

Issue 16: Principles and rules for the assessment of compensation: this issue analyses the right to compensation and the principles and rules applied where the issue goes to arbitration. There are 5 main headings under which compensation may be determined: market value, disturbance, damage, severance and injurious affection. Disturbance promotes the equivalence principle, reimbursing the landowner for incidental financial losses incurred as a result of the CPO. A drop in land value due to the severance of the land is also considered. Damages as a result of works carried out in the development of the land are undoubtedly necessary; injurious affection covers the drop in value of the land as a result of the development itself. A question arises as to whether neighbouring landowners should be allowed to make a claim for injurious affection, where they are affected. The Commission also asks whether the compensation rules, which were initially enacted in 1919 (and have been amended in 1963, 2000 and 2006), are in need of updating and revision.

Issue 17: Neighbouring landowners: as an alternative to the suggestion regarding injurious affection in Issue 16, an additional claim could extend to neighbours for the devaluation of their land as a result of the development. This may in some instances be offset by the increased value caused by some CPO developments (for example, being located close to a new light rail or metro system). This issue explores the landowner's and neighbouring landowner's claims for nuisance by treating the acquiring authority as any other landowner. There is currently a defence of statutory authority that prevents the majority of claims that are made in response to works carried out in carrying out a CPO.

Issue 18: Arbitration: currently, a single arbitrator determines CPO compensation. The Commission asks whether this could be reformed to mirror the system in the *Minerals Development Act 2017*, which involves a 3 person panel, comprising 2 property arbitrators and a legal professional.

Issue 19: Determining Title: The legal professional in the panel suggested in Issue 18 could be tasked with determining title where there is a dispute about this: this could be both a time and cost efficient measure. It could be considered particularly important to shorten any potential delays given both the severity of the interference with the landowner's rights and the potential pressing need to acquire the land.

Issue 20: **payment from compensation of sums due to the Revenue Commissioners:** this issue discusses section 1002 of the *Taxes Consolidation Act 1997* and the power of the Revenue Commissioners to make an attachment order on the compensation determined by an arbitrator. The Commission seeks views as to whether the fact that the land is compulsorily acquired should be reason enough to exclude the compensation from the remit of these orders, or whether it should be a consideration when determining whether or not to grant such an order.

Issue 21: Costs: the costs incurred by a landowner are generally paid by the acquiring authority, provided the amount of compensation determined is above the amount of the unconditional offer made by the acquiring authority. The Commission asks whether costs could be awarded to the landowner regardless of the amount awarded, given that the acquiring authority will determine if the land is suitable and engage experts to assess such suitability. The Commission asks whether an amount could be offered to the landowner before the CPO is made, in order to provide for the commissioning of an independent assessment; or whether An Bord Pleanála could be charged with appointing such experts.

Issue 22: Disposal of land: this issue discusses how land that has been compulsorily acquired is treated as land sold, given that the landowner enjoys no special position on disposal by virtue of the CPO. The lack of a specific purpose (see Issue 9, above) may also lead to excess land being acquired which will have to be sold on. There is no right of first refusal for the original landowner and the land may be sold for any "capital purpose".

Issue 23: Consolidation of CPO legislation: this issue describes the varied nature of the current legislation on CPOs. There are over 70 statutory powers to compulsorily acquire land, some of which are grounded in legislation from the mid-19th century. Each time a new CPO system is enacted, it involves minor to major modifications, and this has led to legal uncertainty. The Commission asks whether it is appropriate to consolidate into a single CPO Bill the current law, together with any reforms that may emerge from this project, and whether this would facilitate a more accessible and efficient CPO process.

The Issues Paper also contains 2 Appendices. **Appendix A** describes each piece of CPO legislation, the authority granted power to CPO, the provision in the legislation that grants the CPO power and the nature of that power. **Appendix B** describes the results of a survey carried out in 2008 of 38 bodies with the power to CPO and the frequency with which the power was exercised in 2008.

ISSUE 1

COMPULSORY ACQUISITION, PROPERTY RIGHTS AND GENERAL PRINCIPLES

Overview of the main compulsory purchase processes

1.01 The compulsory acquisition of land involves its acquisition from a landowner by an acquiring authority (for example, a local authority or a statutory body such as the IDA) other than by agreement. This land is taken in order to develop it for public use such as housing, roads, business parks, railways, or other infrastructure, including electricity and gas.[2] Many states, both common law and civil law, have statutory systems in place for the compulsory acquisition of land.[3]

1.02 One of the most commonly used systems for the compulsory acquisition of land is for housing. Section 76 (and the Third Schedule) of the *Housing Act 1966* (referred to in this Paper as the 1966 Act) prescribe the powers of housing authorities/local authorities to compulsorily acquire land. Section 10 of the *Local Government (No. 2) Act 1960* (referred to in this Paper as the 1960 Act) extends these powers to local authorities for purposes other than housing. Part 14 of the *Planning and Development Act 2000* (referred to in this Paper as the 2000 Act) can also be used by local authorities to compulsorily acquire land. The process begins with the acquiring authority issuing a Compulsory Purchase Order (CPO), to which the landowner or landowners may object. If so, An Bord Pleanála, which is the confirming body for every CPO made under these 3 Acts,[4] decides whether it is necessary to hold an inspector's oral hearing into the matter; if such a hearing takes place, the inspector makes a recommendation to An Bord Pleanála. The Board either confirms, or declines to confirm, the CPO. Only when the CPO is confirmed does it become effective, leading to the acquiring authority serving a Notice to Treat on the landowner, followed by the determination of the amount of compensation payable to the landowner, if necessary by arbitration. Figure 1 below (which follows paragraph 1.07), reflects in graphic form the most commonly used systems for compulsory

[2] The leading Irish text on this area is Galligan & McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013). The Commission has had the advantage of the analysis in that text in preparing this Issues Paper. The Commission is also extremely grateful for the assistance of Michael McGrath BL in the early stages of this project. The Commission remains fully responsible for the content of this Issues Paper.

[3] In a number of jurisdictions, the relevant law is referred to as "expropriation" (in many European civil law jurisdictions), "eminent domain" (in the United States of America) and "resumption" (in Australia). On the law in 15 European jurisdictions, see Sluymans, Verbist and Waring (eds), *Expropriation Law in Europe* (Wolters Kluwer, 2015). On Australian law, see Jacobs, *Law of Compulsory Land Acquisition* 2nd ed (Thomson Reuters, 2015).

[4] An Bord Pleanála is also the confirming body for CPOs under the *Public Health (Ireland) Act 1878*, the *Local Government (Ireland) Act 1898*, the *Local Government Act 1925,* the *Water Supplies Act 1942,* the *Local Government (Sanitary Services) Act 1964,* the *Derelict Sites Act 1990,* the *Roads Acts 1993* and *1998* and the *Dublin Docklands Development Authority 1997.* See also Appendix A of this Paper.

acquisition, using the CPO process, including the process before and after compensation is determined. (Figure 2, at paragraph 16.04, below, sets out the steps involved in the compensation process under the *Acquisition of Land (Assessment of Compensation) Act 1919*.)

1.03 The CPO-based process set out in the 1966 Act could be described as a relatively modern process for the compulsory acquisition of land. This CPO process was developed in the United Kingdom in the 20th century in a series of Acts that replaced the 19th century system – contained in legislation such as the *Lands Clauses Consolidation Act 1845* (referred to in this Paper as the 1845 Act) – and the 1966 Act is broadly modelled on the UK 20th century model.

1.04 While the 1966 Act, and other Acts that use the CPO process, can therefore be said to be relatively modern in approach, an important distinction between the UK and Irish systems of compulsory acquisition is that when the UK legislation was reformed in the 20th century, when the CPO model was adopted, the 19th century legislation was repealed and replaced.[5] In Ireland, while the 1966 Act followed the UK CPO model, no comparable exercise to repeal and replace the 19th century legislation has occurred to date. Thus, in Ireland the 1845 Act remains in force and continues to have some effect, though of decreasing significance. The 1845 Act is a kind of "framework" Act that sets out standard compulsory acquisition clauses that could then be incorporated, with or without modifications, into a subsequent piece of legislation on compulsory acquisition of land. While the 1966 and 2000 Acts follow the 20th century CPO model of compulsory acquisition, they also incorporate some provisions whose origins can be traced to the 1845 Act. To that extent, while the 1845 Act remains an important source for the general outline of compulsory acquisition statutory schemes, it is also in many respects redundant because the specific statutory schemes, notably those using the CPO model can, and do, depart from the approach in the 1845 Act.

1.05 Another important matter to note when comparing the current Irish CPO system and the UK CPO system is that the UK system has undergone ongoing review in the early part of the 21st century. This has included a comprehensive review of English law on compulsory acquisition completed by the Law Commission of England and Wales,[6] and a similarly comprehensive review of Scots law by the Scottish Law Commission which, at the time of writing (December 2017), is in progress.[7] Nonetheless, although the UK system has been reformed in significant respects, these reforms retain important elements of the 19th century approach, notably concerning the principles and rules concerning compensation: in that respect, the Irish system remains

[5] On English law, see Roots, Humphries, Fookes and Pereira, *The Law of Compulsory Purchase* 2nd ed (Bloomsbury Professional, 2011) and Barnes, *The Law of Compulsory Purchase and Compensation* (Hart, 2014).

[6] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation: Final Report* (Law Com No.286, 2003) and Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (2) Procedure: Final Report* (Law Com No.291, 2004). The proposal in these Reports to enact a single piece of compulsory purchase legislation was declined in 2005 by the British Government, primarily on the grounds of the complexity involved: see Waring, "Expropriation Law in England" in Sluymans, Verbist and Waring (eds), *Expropriation Law in Europe* (Wolters Kluwer, 2015), at 152.

[7] Scottish Law Commission, *Discussion Paper on Compulsory Purchase* (SLC DP No.159, 2014).

relatively close to the UK system. In addition, since the 1966 Act has adopted the CPO model used in UK legislation, the CPO process in Ireland and the UK remain quite similar. For these reasons, while there are important differences in detail, the UK system and the case law that derives from it remains relevant to an analysis of the position in Ireland, and this Issues Paper thus includes significant references to UK case law in particular. In addition, as discussed below, Irish law must also be considered against the background of the constitutional provisions on property rights and the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR).[8]

1.06 There are over 70 compulsory acquisition statutory systems in place in Ireland (see Appendix A of the Paper). Most of these are based on the CPO model, though with differences between them that range from minor to major. This Issues Paper does not seek to explore all these schemes in detail, and is confined to discussion of some key issues that appear to arise in the most commonly used systems. The question as to whether these individual systems should be replaced by a single CPO scheme will be considered by the Commission in preparing the Report for this project, taking into account the responses to Issue 23, which concerns consolidation of the current CPO legislation.

Survey of CPO applications and decisions

1.07 In relation to the general operation of the CPO process, it may be useful to refer to a survey carried out in 2008 of 38 bodies with CPO powers (see Appendix B of this Paper). A total of 234 CPOs from those bodies were identified, of which 72% were confirmed by the relevant body, 25% were in progress and 3% had been withdrawn or refused. In preparing this Issues Paper, the Commission examined the list of CPOs submitted (by local authorities only) to An Bord Pleanála in 2017.[9] As of 6 December 2017, 69 CPOs had been submitted by local authorities. Of the 58 that had been decided by An Bord Pleanála, 54 had been approved and 4 had been withdrawn by local authorities. 100% of the CPOs that had been submitted, and not withdrawn by the local authorities, had therefore been confirmed. It is worth noting that in 60% of the CPOs made, there had been no objections submitted. Of the remaining 40% in which objections had been made, it would appear from the available data that none were sufficient to prevent the CPOs being confirmed.

[8] For an overview of the influence of UK law and of the Constitution, see Galligan and McGrath, Compulsory Purchase and Compensation in Ireland: Law and Practice 2nd ed (Bloomsbury 2013) and Walsh, "Expropriation Law in Ireland" in Sluymans, Verbist and Waring (eds), *Expropriation Law in Europe* (Wolters Kluwer, 2015), at 277ff.

[9] Source: www.pleanala.ie.

The CPO Process

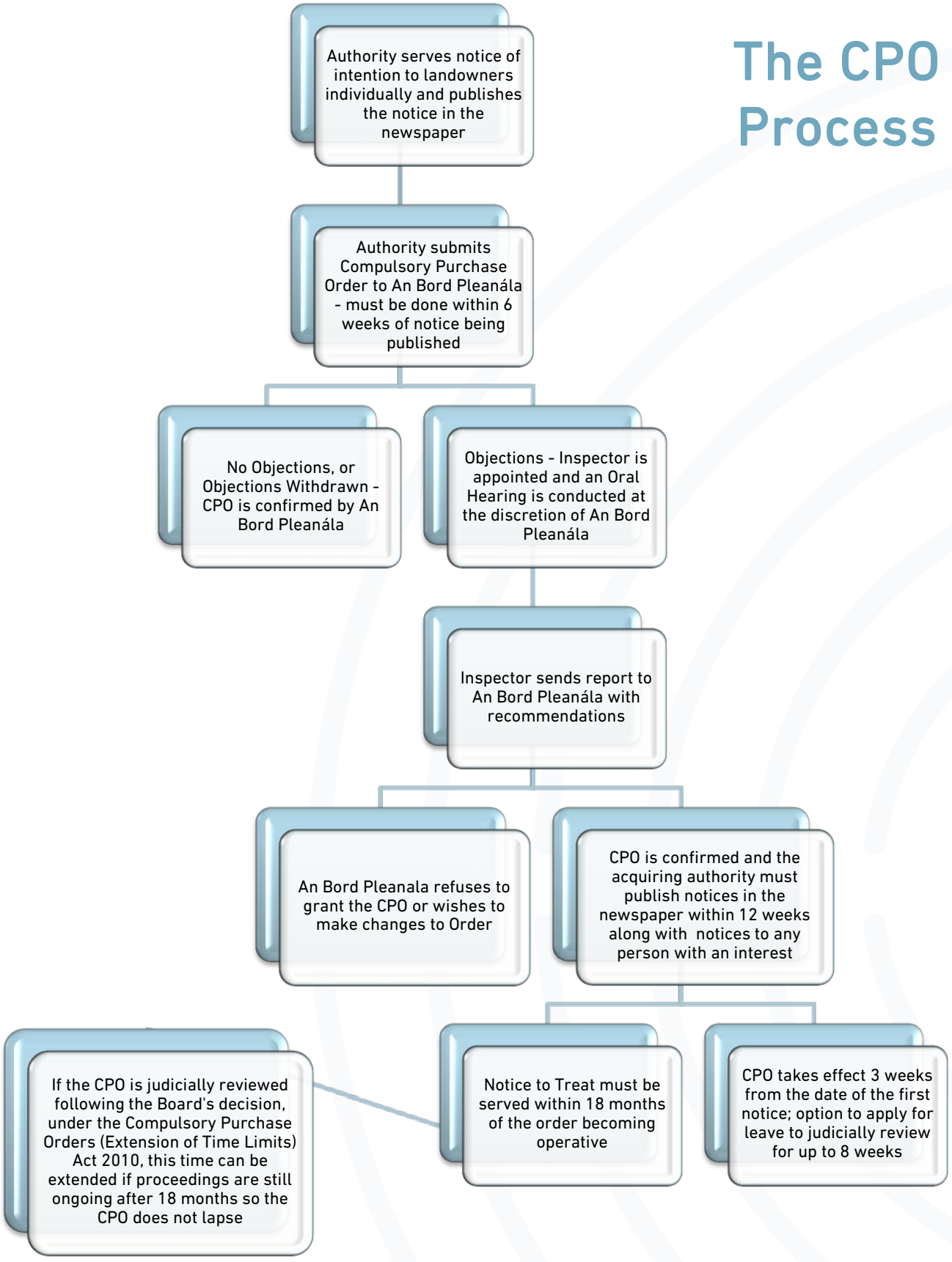


Figure 1

1.08 The CPO process clearly involves the restriction of landowners' property rights. With regard to relevant principles, including those in the Constitution and the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR), a key issue is to what extent this restriction can be justified by reference to the exigencies of the common good or by reference to public interest requirements. The Commission now turns to this, with a view to distilling a set of guiding principles of relevance to compulsory acquisition of land.

Property Rights in the Constitution of Ireland (Bunreacht na hÉireann)

1.09 In *In re the Health (Amendment)(No.2) Bill 2004*[10] the Supreme Court held that the "right to the ownership of property has a moral quality which is intimately related to the humanity of each individual. It is also one of the pillars of the free and democratic society established under the Constitution".[11] In acknowledging that the right to private property is a natural right, the Supreme Court in *Buckley v Attorney General*[12] held that human beings, by virtue of their human personality cannot be deprived of the right to own property by any positive law, though this is of course subject to the regulation of that right including by compulsory acquisition legislation that meets the relevant constitutional requirements, as discussed below. Although the importance of property rights has been repeatedly reiterated by the courts, there has been considerable discussion surrounding the nature of property rights, in particular the extent to which Article 43 of the Constitution regulates that right. Article 43 acknowledges the right of individuals to private ownership of property and provides that the Oireachtas is prohibited from enacting legislation that would abolish that right. Stemming from this fundamental conception, the Court in *Buckley* rejected the Attorney General's argument that Article 43 only inhibits a complete abrogation of the right to property within the State, rather than from individuals.[13] However, the right is not absolute and under Article 43, the exercise of the right may be "regulated" by the principles of social justice and the State may "delimit" the right with a view to reconciling its exercise with "the exigencies of the common good". Article 40.3.2 also provides for a right to private property and this doubling of efforts has led to a body of case law on the right to property generally as opposed to the right to own individual possessions. Article 40.3.2 provides that the State shall, as best it may, protect the property rights of every citizen from unjust attack and, in the case of injustice done, vindicate those rights.

1.10 In *Blake v Attorney General*[14] the High Court (McWilliam J) held that Articles 40.3.2 and 43 should be read in conjunction with each other, with reference to the preamble so as to have full regard to the "principles of social justice, exigencies of the common good, the principles of justice generally and the attainment of true social order".[15] This case involved controlled rents and the restriction on landlord's possession of

[10] [2005] 1 IR 105.
[11] *Ibid* at 201-202.
[12] [1947] IR 67.
[13] *Ibid* at 82.
[14] [1982] IR 117.
[15] *Ibid* at 124.

their property due to statutory restrictions imposed during World War I.[16] The plaintiffs claimed that such legislation represented an unjust attack on their property rights. The Supreme Court held that on one hand Article 43 "is an Article which prohibits the abolition of private property as an institution but at the same time permits, in particular circumstances, the regulation of the exercise of that right and of the *general* right to transfer, bequeath and inherit property".[17] On the other hand, it held that Article 40 deals with a citizen's right to a particular item of property.[18] The Court actively rejected the decision of the Supreme Court in *Attorney General v Southern Industrial Trust*[19] which held that there was no differentiation between Articles 40 and 43. In the case before it, the Court found Article 40 to be applicable; therefore, the test was that of "unjust attack".[20]

1.11 This finding was confirmed in *Dreher v Irish Land Commission*[21] where the Supreme Court held that any state action that is authorised under Article 43 and conforms to that article cannot by definition be unjust for the purpose of Article 40.3.2.[22] Therefore, the proportionality test that is instilled in Article 43 is similarly infused in Article 40.3.2 but for a compulsory purchase order, the test is whether or not the CPO constituted an unjust attack. Similarly, in *O'Callaghan v Commissioners of Public Works in Ireland*[23] the Court held that the term "unjust attack" envisioned an interference which endangers or is injurious to the right to property. It cannot be justified, it found, under other provisions of the Constitution. Therefore, if an act is held to constitute an "unjust attack", an assessment of proportionality under Article 43 will not render that attack just. In considering whether the attack was unjust, the Court held that Article 43 ought to be read in conjunction with Article 40.3, so as to give effect, insofar as possible, to both provisions.

1.12 In *Blascaod Mór Teo v Commissioners of Public Works in Ireland,*[24] the High Court (Budd J) also held that Article 43 should be read in conjunction with Article 40.3, and that the determination of what constitutes social justice will depend on the individual facts of each case. The Court, in following *Dreher,* held that any state action that is authorised by Article 43 and that passes the tests in that Article must be necessary for the common good and cannot, by definition, constitute an unjust attack on property rights under Article 40.3.2. It went on to state that a restriction of an individual's property rights that is manifestly unjust is unlikely to be regarded as consistent with social justice or as warranted by requirements of common good.[25] The Constitutional Review Group in 1996 recommended that it would be preferable,

[16] These restrictions were continued until 1966. The rents were fixed at such a low price that in some cases, the landlord would not make a profit if there were even minor repairs.
[17] *Ibid* at 135 (emphasis added).
[18] *Ibid* at 135.
[19] (1957) 94 ILTR 161.
[20] [1980] IR 117 at 137.
[21] [1984] ILRM 94.
[22] This was upheld in *O'Callaghan v Commissioners of Public Works in Ireland* [1985] ILRM 364, *Madigan v Attorney General* [1986] ILRM 136 and *In re the Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105.
[23] [1985] ILRM 364
[24] [1998] IEHC 38.
[25] [1998] IEHC 38, at paragraph 152.

in any new formulation of Article 43, to provide for a more structured and objective method of judicial analysis.[26] While it is important to understand the foundation from which a challenge may be mounted, Hogan, in 1997, submitted that it appeared clear "that we have arrived at the position whereby the actual language of Article 40.3.2 and Article 43 does not really matter" and that the workable judicial methodology of the proportionality doctrine is more significant.[27]

"Exigencies of Common Good" and "Social Justice"

1.13 The concept of the common good and social justice is the first hurdle in determining whether an action constitutes a disproportionate interference with property rights or an unjust attack on same. More specifically, with regard to CPOs, the acquiring authority must acknowledge the purpose for which the land is required. That purpose cannot solely benefit private parties. There must be an element of public benefit. In *Blascaod Mór,* the High Court held that "exigencies" has a connotation of more than "useful", "reasonable" or "desirable". Rather, this term entails that something is "necessary" and implies the existence of a pressing social need. This reiterates the jurisprudence of the ECtHR. The notion of necessity is linked to that of a "democratic society". In *Tuohy v Courtney*[28] the Supreme Court held that the test should also balance competing interests, those of the individual and the common good. It held that the role of the Court in making such an assessment is not to "impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack".[29] In *In re the Planning and Development Bill 1999*[30] the Supreme Court held that it is "peculiarly the province of the Oireachtas to seek to reconcile in this area the conflicting rights of different sections of society and that clearly places a heavy onus on those who assert that the manner in which they have sought to reconcile those conflicting rights is in breach of the guarantee of equality".[31] A measure cannot be regarded as necessary in a democratic society based on tolerance and broadmindedness, unless it is proportionate to the legitimate aim being pursued. Furthermore, when the exigencies of the common good are used to justify restrictions on the exercise of the rights of private property, it should be remembered that the protection of this constitutional right is one of the objectives that needs to be secured as part of the common good.[32] This final point is an important one; it is worth noting that the separation of the common good and the individual may be too extreme in certain instances, forgetting that the latter is a member of the former.

[26] The Constitution Review Group, *Report of the Constitution Review Group* (Dublin, Stationery Office, 1996) at 358.
[27] Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32(1) IJ 373, "Indeed, it might not be too much to say that the courts have now jettisoned all but the most superficial reliance on the actual text".
[28] [1994] 3 IR 1.
[29] *Ibid* at 47.
[30] [2000] 2 IR 321.
[31] *Ibid* at 358.
[32] *Ibid* at paragraph 150.

1.14 The terms themselves are general in nature and it has been cause for conversation whether the courts or the Oireachtas should determine their meaning. In *Pigs Marketing Board v Donnelly Ltd*[33] it was argued that the prohibition on the defendants from purchasing pigs at amounts other than those calculated by the plaintiffs was unconstitutional. The High Court (Hanna J) found that the Oireachtas must be the judge of whatever limitation, as envisioned by paragraph 2 of Article 43, is to be enacted as this would only delimit the exercise of the right to property rather than abolish it. It further held that if the law is contrary to the common good, "whatever that may mean, it must be clearly proved, and I repeat that an Act is deemed to be constitutional until the contrary is clearly established".[34] The presumption of constitutionality is a running theme among cases concerning CPO legislation. There is no doubt that there is a significant deference to the Oireachtas in matters of policy, which has extended to matters of social justice and the common good. The Court also determined that it could not define "social justice" as a matter of law[35] as it is not "a constant quality, either with individuals or in different States…in a Court of law it seems to me to be a nebulous phrase, involving no question of law for the Courts but questions of ethics, morals, economics and sociology, which are, in my opinion, beyond the determination of a Court of law, but which may be, in their various aspects, within the consideration of the Oireachtas, as representing the people, when framing the law".[36]

1.15 Barrington has noted that "a judge, by his training, does not possess any particular qualifications for assessing questions of social and economic policy and there is no reason to believe that a Judge's decision on such matters would be better than that of a politician. Judges have often been advised, therefore, to avoid involving the courts in questions of social or economic policy. But they have seldom needed this advice; their instinct is to avoid such involvement".[37] In *Dreher v Irish Land Commission,*[38] the Supreme Court held that what is social justice must depend on the circumstances of the case. In the same case, the Court held that there may be instances in which "social justice" does not require the payment of any compensation upon a compulsory acquisition of land, and that this could be justified as being required by the exigencies of the common good. The Court however, did not expand on this

[33] [1939] IR 413.
[34] *Ibid* at 423.
[35] It held that "it cannot be the old standard of the greatest good of the greatest number, for, at the present day, it may be considered proper that the claim of a minority be made paramount on some topic" and that opinions on its definitions will differ even more acutely than on the question of "good government". The phrase "peace, order, and good government of the State" is used in Article 12 of the *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922*, and was relied upon by the plaintiffs. The High Court held that it would be impossible to give an analytical definition of these words based on any known principle of law, as if it were to be determined by the court, it would depend on the individual view of each particular Judge, or body of Judges, on the theory of government and their knowledge of political science, *Ibid* at418. He continues to assert that "it seems to me to be a vague phrase, a kind of political shibboleth, the meaning and application of which has changed and will continue to change from one generation to another". Further, at 421, it held that "the phrases seem to me to be in the nature of political, economic or sociological tags, used in common language with different meanings by different people and devoid of any legal connotation whatever".
[36] *Ibid.*
[37] Barrington, "Private Property Under the Irish Constitution" (1973) 8 IJ 1, at 4, quoted by Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31(1) DULJ 1.
[38] [1984] ILRM 94.

statement or point to any examples of such instances, other than to confirm that the facts of the case before it did not reflect such an instance.

1.16 In *Buckley and Ors (Sinn Féin) v Attorney General,*[39] it was argued that the determination of what constitutes the "exigencies of the common good" is a matter for the Oireachtas, but this argument was rejected by the Supreme Court. It held that if this were the case, it would have been expressly removed from the remit of the courts, as had been done in Article 45 which is the provision on Directive Principles of Social Policy which are expressly not cognisable by the courts. Notably, in determining the reasons for separating the individual's right to property rights (Article 43) and the principles of social policy (Article 45), it has been argued that "the individual aspect of property was made a matter of enforceable right, whereas its social aspect was left to the discretion of the legislature, not on the basis of any desire to sanctify private ownership, but rather because of the feared economic implications of social principles in a constitutional context where the State rather than individual owners, was regarded as responsible for securing social justice".[40] In *O'Brien v Bord na Móna,*[41] the Supreme Court stated that "in each case, the person exercising the function is determining whether the constitutionally guaranteed rights of the citizen in respect of his private property should yield to the exigencies of the common good".[42] However, the Supreme Court in *Clinton v An Bord Pleanála*[43] held that this statement did not address the standard to be applied by an administrative body when considering the making of a CPO.[44]

1.17 In *In re the Planning and Development Bill 1999,*[45] the Supreme Court held that "it can scarcely be disputed that it was within the competence of the Oireachtas to decide that the achievement of these objectives would be socially just and required by the common good".[46] The "novel" approach of the Oireachtas in the matter of planning was found to be entirely within its competence. The Court concluded "that the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to the legislation dealing with controversial social and economic matters".[47] This approach is certainly reflective of a higher level of deference to the Oireachtas. However, the Court did not actively state that the determination of the common good is beyond the scope of the Court's jurisdiction.

1.18 It may be argued that the threshold that the authority must pass before it can be said to be achieving the "common good" is rather low. The common good could be seen as any benefit to either an identifiable group (such as in a social housing estate) or a

[39] [1950] IR 67.
[40] Walsh, "Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise" (2011) 33(1) DULJ 86.
[41] [1983] IR 255.
[42] *Ibid* at 270.
[43] [2007] 2 ILRM 81.
[44] The test that applies to the judicial review of administrative decisions shall be discussed in detail in Issue 12.
[45] [2000] 2 IR 321.
[46] *Ibid* at 349.
[47] *Ibid* at 358.

non-identifiable group (such as the building of a motorway). The issue that arises however, which will be discussed further below, is that, when a CPO is being made, the purpose that must be noted as the reason for the CPO can be something as general as "development" or "to give effect to the functions given to a statutory body" under acts of the Oireachtas. Therefore, what must be determined is whether development in the abstract sense serves the common good which is a particularly low threshold to reach. Again, it is important to reiterate that this is only part one of a 4-part test that must be satisfied in order for the CPO to be considered constitutional.

The Proportionality Test

1.19 It has been argued that the wording of fundamental rights provisions is only significant insofar as it affords express or implied protection to the right in question.[48] Beyond this, is it argued that the actual text loses its meaning and significance, to the point that one can say, with confidence, that the actual results of cases are determined to a far greater extent by the accumulation of constitutional experience than by the actual text of the Constitution itself.[49] Specifically, it was found that Articles 43 and Article 40.3 are so inherently subjective and open-textured that their interpretation is replete with difficulties. To counter these difficulties, the courts began to adopt a proportionality test in order to satisfy the constitutional text. In *Iarnrod Éireann v Ireland*[50] the Supreme Court held that the proportionality test applies equally to Article 40. While appreciating that such a test has "undoubted merit" by "providing an objective stricture, it does not eliminate the substantial element of subjective judicial appraisal which still remains".[51] In *Heaney v Ireland,*[52] the High Court (Costello P), following the analysis of the Supreme Court of Canada in *R v Chaulk*,[53] set out the approach to proportionality, which has been applied by the Supreme Court in subsequent cases such as *Cox v Ireland*.[54] The Court held that the objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right.[55] It must relate to concerns that are pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

1. Be rationally connected to the objective and not be arbitrary, unfair or based upon irrational considerations;

2. Impair the right as little as possible; and

[48] Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32(1) IJ 373.
[49] *Ibid.*
[50] [1996] 3 IR 321 at 361. The Supreme Court held that "if the State elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an 'unjust attack' within the meaning of Article 40, s.3, sub-section 2".
[51] *Ibid*. Hogan contends that "it must not be supposed that the adoption of the proportionality principle solves all the problems in this area, since courts in differing jurisdictions purporting to apply this principle have reached widely differing conclusions on whether a given set of circumstances will amount to a disproportionate interference with property rights". See also, Foley, "The Proportionality Test: Present Problems" (2008) 1 JSIL 67 at 75.
[52] [1994] 3 IR 593.
[53] [1990] 3 SCR 1303.
[54] [1992] 2 IR 503.
[55] [1994] 3 IR 593 at 607.

3. Be such that their effects on rights are proportional to the objective.

1.20 It has been submitted that the Irish courts have neglected the second and third aspects of the proportionality principle.[56] It has also been argued that recent case law indicates that Irish courts only offer a cursory scrutiny of the impact of restrictions upon property rights, which merely amounts to an assertion that the effects on individual rights are minimal and are proportionate to the legislative aim being pursued;[57] and that there has been an increasing tendency on the part of the courts to assess the proportionality between the means and the objective pursued, rather than the proportionality between effects and objectives.[58] There has arguably been a tendency among the Courts to assess a CPO on the basis of its conformity to the legislative provisions whereby, any submissions based on an interference with the landowner's property rights will arguably only be found to succeed if the acquiring authority has extended its power beyond the legislative provisions, as was seen in *Reid v Industrial Development Agency.*[59] It is argued that the Court gives considerable deference to the presumption of constitutionality and the double construction rule as was evident in *Clinton v An Bord Pleanála*[60] (discussed below). In *Crosbie v Custom House Dock Development Authority,*[61] the High Court (Costello J) found that the legislation governing the compulsory acquisition of land "has in effect concluded that the public good which is to be achieved by urban renewal requires the limitations on the objector's constitutionally protected rights".[62]

1.21 In *In re the Planning and Development Bill 1999,*[63] the Supreme Court noted that the relationship between Articles 40.3.2 and 43 has not been free from difficulty, and held that the approach in *Blake* could not be followed without reservations.[64] However, these reservations did not seem to alter the current approach but rather, it held that no proportionality assessment would be required in the absence of an established common good.[65] This was supported by the Supreme Court in *In re the Health (Amendment)(No.2) Bill 2004,*[66] which found where the aim pursued was purely that of the State's financial interest, there was no need to examine any argument based on the principle of proportionality. Any interference without any legitimate objective in favour of the common good is therefore sufficient to constitute

[56] Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31(1) DULJ 1.
[57] *Ibid.*
[58] Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008), at 152, quoted *Ibid*.
[59] [2015] 4 IR 494. This case is discussed in further detail below; it involved section 16 of *the Industrial Development Act 1986* and the Supreme Court held that such a provision did not permit the IDA to create land banks.
[60] [2007] 2 ILRM 81 at 100.
[61] [1996] 2 IR 531.
[62] *Ibid* at 544. In responding to the plaintiff's submission that the acquiring authority should provide a substantive or actual purpose, the Court held that the acquiring authority "had good reasons for not doing so and it was not required by statute so to do". The High Court did not engage with the constitutionality or the proportionality of this procedure but rather, stated that because it was permitted by the legislation, there was no need to examine the issue further.
[63] [2000] 2 IR 321.
[64] *Ibid* at 348.
[65] *Ibid,* the Court held that in an extreme case where the Oireachtas implemented a confiscation process without social justification, no inquiry would be called for as to whether the legislation also confirmed to the requirements of Article 43. Where the State contends that a certain piece of legislation is required in the exigencies of the common good, an inquiry must commence whereby the proportionality of the restrictions or delimitations to the ends sought to be achieved must be objectively viewed.
[66] [2005] 1 IR 105.

an unjust attack on the individual's property rights. However, it is argued that constitutional property rights, as interpreted by the courts, do not focus on the means in which the objective is achieved as long as the crux of the action, taken or proposed, can in some way be considered in the common good. This is explored in Issue 9, below. A pro-public interest approach may see improved infrastructure and access, more social housing and amenities but only at the expense of the individual landowners. In response to the conflicting opinions about whether the proportionality test favours the individual[67] or the public interest;[68] it is submitted that the principles set out in the proportionality test favour the individual but the application by the judiciary has favoured the public interest.

Extensions of the Proportionality Test

1.22 In relation to compulsory acquisition, the High Court (Budd J) held in *Blascaod Mór* that in order to ascertain the constitutionality of a legislative provision, the Court must ask:

1. Whether this delimitation, the restriction on the rights of the enjoyment of private property, is in accordance with the principles of social justice; and,
2. Whether the delimitation (in this case, involving expropriation with compensation) is necessary in order to reconcile the exercise of the plaintiff's property rights with the exigencies of the common good.[69]

In *In re the Health (Amendment) (No.2) Bill 2004*[70] the Supreme Court set out the following test to determine whether a piece of legislation is repugnant to the Constitution:

1. Examine the nature of the property rights at issue;
2. Consider whether the Bill consists of a regulation of those rights in accordance with the principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good;
3. In light of its conclusions on these issues, consider whether the Bill constitutes an unjust attack on those property rights.

The Right to Compensation

1.23 There is no express constitutional right for compensation in Article 43 of the Constitution, but such a right has been found to be an implied right in order to balance the interests involved. It could be argued that the existence of compensation should not be sufficient to offset the interference with the individual's right. However,

[67] Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32(1) IJ 373. "This, perhaps, is only to be expected, since the nature of judicial review is that the courts are required to focus on the operation of the law as it affects the individual plaintiff and do not, generally speaking, have the capacity to examine how such a law impacts on the public at large".

[68] Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31(1) DULJ 1, "When Irish judges undertake proportionality analysis in the property rights context, they place substantial weight on the public interest asserted by the legislature. Their scrutiny of the impact of restrictions on property rights is often cursory, amounting merely to an assertion that the effects on individual rights are minimal and proportional to the legislative aim being pursued".

[69] *Blascaod Mór Teo v Commissioner of Public Works in Ireland* [1998] IEHC 38, at paragraph 149.

[70] [2005] 1 IR 105.

it seems that the absence of compensation following a deprivation (as opposed to control) of property will almost always constitute an unjust attack. In *Blake v Attorney General,*[71] controlled rents were fixed at a low price and the landowners were losing significant amounts of profit due to rising inflation. The High Court (McWilliam J) found the provisions to be unconstitutional as they arbitrarily selected a group of citizens to deprive of their property, without compensation, review procedures, or limitation on the period of deprivation.

1.24 There was also no explanation of what common good the legislature sought to achieve through enacting the legislation given that the emergency state that existed during World War I (1914-1918) had long since passed. In applying the proportionality test, it held that the relevant factor is the distinction between the prohibition of the use of property to the injury of others and the requisition of property for the benefit of others.[72] Any restrictions shall constitute an unjust attack if they "render ineffective the exercise by the owners of the houses and dwellings" [73] of their individual property rights. In the matter of any legitimate aim pursued, the Court noted that the legislation actively excluded acts that aimed to establish social housing for workers. Nor was the means of the tenant tested before he or she could qualify for the ground rents. In order to escape the labelling of unjust, the Court held that the legislation would have had to provide adequate compensation which it did not.[74]

1.25 In *O'Callaghan v Commissioners of Public Works in Ireland*[75] a preservation order was made in respect of a national monument on the plaintiff's land. The plaintiff argued that the order was unlimited in time, and was not counter-balanced by the payment of compensation. The Supreme Court found that the order did not deprive the owner of his ownership nor of his right to use the monument in a manner that was consistent with its preservation. The prohibition upon destroying the monument, however, did constitute an attack on his property rights. Under such a reading, the Court found that the legislation was neither arbitrary nor selective as it applies to all national monuments wherever situated and whoever owns them. The absence of compensation could not be considered unjust given the substantial notice given to the plaintiff of the restriction before his purchase and the common duty to preserve such monuments.

1.26 In *In re the Planning and Development Bill 1999,*[76] the Supreme Court held that the right to be compensated for the market value of the land is generally recognised, but that this right is not absolute.[77] This case involved a statutory requirement, set out in the 1999 Bill, and since enacted in Part V of the *Planning and Development Act 2000*, which would reserve a percentage of the land used for residential development for the provision of affordable housing. Essentially, local housing authorities could

[71] [1982] IR 117.
[72] *Ibid.*
[73] [1980] IR 117 at 137.
[74] *Ibid* at 138.
[75] [1985] ILRM 364
[76] [2000] 2 IR 321.
[77] *Ibid* at 350.

compulsorily acquire up to 20% of the developer's property while only paying the use value of the land on the date of transfer, with interest, as opposed to market value.[78] The aim was to integrate people of different social backgrounds into the same housing development. This arrangement was incorporated into the approval of planning permission for such developments. Counsel in defence of the 1999 Bill argued that it sought a legitimate aim and provided for compensation, albeit, below market value. They argued that the housing crisis had been caused by an increased population and changes in society; and failure to meet the increased demand for social housing would have implications for wage demands and consequent economic dislocation and would also threaten social cohesion. The fact that compensation was less than market value arose from a surrender of some of the enhanced value of the property, which had arisen on the basis of a planning regime intended for the benefit of the community as a whole. The landowner did not suffer an actual financial loss but only a loss of potential future profits. In *O'Callaghan,* a key feature appeared to be the applicant's foreknowledge of the restriction on his land. In respect of the 1999 Bill, the landowners would be informed before developing the land that such a percentage was due, and for what price. The Supreme Court, in upholding the constitutional validity of the 1999 Bill, held that "there can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated as a level equivalent to at least the market value of the acquired property".[79] However, it held that there were special considerations in relation to planning legislation which causes individuals to acquire or inherit land subject to the general restrictions that such legislation imposes. Given the nature of the legislation, the aims pursued, the pressing social need at stake for housing and the foreknowledge of the developer, the Court held that the scheme passed the proportionality test.

European Convention on Human Rights

1.27 Article 1 of Protocol 1 of the ECHR (A1P1) acknowledges that "every person" is entitled to the peaceful enjoyment of their "possessions", and that no person can be deprived of their possessions, except in the public interest and subject to "the conditions provided for by law and by the general principles of international law". This provision is similar in nature to Article 43. It also provides that this right does not impair the right of a State to enforce such laws as it deems necessary, in order to control the use of property "in accordance with the general interest." Article 43 and A1P1 thus appear broadly consistent with one another. It is also the case that both have been held to apply to corporate bodies as well as individuals.[80] However, the use of the word "possessions" instead of "property", would seem to reflect an article more in line with the specific nature of property of Article 40.3 as opposed to the

[78] For developments in existence before the 1999 Bill, the developers would be paid the greater of either the site value or the mount paid by the developer for the land. For land that was inherited or gifted before the 1999 Bill, the landowner would be paid market value.

[79] *Ibid* at 352.

[80] Galligan and McGrath comment that "a natural person can do everything save what the law forbids; and artificial legal person can do only what the law allow". The two commentators also note that the acquiring authority would be seen as an artificial legal person. Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed. (Bloomsbury 2013) at 7.

general protection of property under Article 43. However, it is clear that A1P1 protects both.

1.28 A1P1 provides for a much broader coverage of interference with an individual's tangible property. It has been found to cover not only physical expropriations but also severe reductions in value (value expropriations) due to State action or inaction. In *Sporrong and Lonnroth v Sweden*[81] the European Court of Human Rights (ECtHR) set out the main principles of A1P1. The ECtHR held that the Article comprises 3 distinct rules:

1. The peaceful enjoyment of property (the first sentence of the first paragraph);
2. The deprivation of possessions (the second sentence of the first paragraph); and
3. The control of the use of property in accordance with the general interest (the second paragraph).

1.29 The Court also held that before considering whether the first rule was complied with, it must determine which of the last 2 rules are applicable.[82] Deprivation, control or an interference with the individual's right to the peaceful enjoyment of his or her possessions will not be sufficient to find a violation. The Court will need to assess whether there has been a sufficient balancing of the rights of the individual with the public interest. The manner in which this is done is to question the following:

1. Was there a lawful interference with the right?[83]
2. Was such an interference made in the pursuit of a legitimate aim?
3. Were the means chosen to achieve the aim exercised in a proportional manner?
4. Was the interference necessary in a democratic society; was there a pressing need for such an interference?
5. Is there a margin of appreciation that would permit the State sufficient discretion to determine its own operational standard?

1.30 In *Papamichalopoulos v Greece,*[84] the Court held there had been a *de facto* expropriation of the applicant's land. It based this finding on the fact that the applicant was unable to enter, use, bequeath, sell, mortgage or gift the land. This judgment may be questionable for a number of reasons. While the Court found that there had been a violation of A1P1, it did not provide a full outlay of the violation test,

[81] Application no. 7151/75, 7152/75.
[82] *Ibid* at61.
[83] In *James v United Kingdom* Application No. 8793/79., the Court reiterated that the terms "law" or "lawful" in the Convention do not merely refer back to domestic law but also relate to the quality of the law, requiring it to be compatible with the rule of law", at paragraph 67.
[84] Application No. 14556/89.

as noted above. The interference in this case was particularly severe[85] and would have undoubtedly have passed such a test; however, the absence of a more thorough exploration may have damaged the legitimacy of the outcome. In terms of proportionality, there was no compensation, the applicant was refused access for 12 years and no alternative lands were provided to the applicant as an exchange, despite the availability of such. This case diverges from the norm in finding that the applicant had only suffered a *de facto* deprivation despite not being to enter on the land, let alone use or sell it. By contrast, *Sporrong* concerned applicants who maintained occupation of their land and could, in theory, still sell the land; however, they had a lower likelihood of success given the seemingly imminent expropriation. This, however, was considered by the Court to be a control of the right, as opposed to a *de-facto* deprivation.

Time and Uncertainty

1.31 In the *Sporrong* case, Stockholm City Council was granted an expropriation permit in respect of the first and second applicant's land in order to build shopping centres, construct a viaduct and widen the streets. There was a 5 year time limit within which the expropriation might be effected and proceedings for the fixing compensation must begin. However, this was extended and the applicants' land was subject to the permit for 23 and 8 years respectively. Their land was also subject to a prohibition on construction for 25 and 12 years respectively. Following this time, the Government cancelled the permit and the expropriation never took place, without any provision for compensation. Unlike *Papamichalopoulos,* the effect of the expropriation permit was that it left the owner's right to sell, let or mortgage his or her property intact. While the first applicant never tried to sell the property; the second applicant attempted to do so 7 times but the prospective buyers withdrew once they consulted the city authorities. She also had difficulty finding tenants.[86] Most notably in the Irish context, the applicants argued that they were uncertain about being reimbursed for expenses incurred in maintaining the property, and would arguably had issues if they attempted to obtain mortgages.[87] Under the *Housing Act 1966*, which is discussed in more detail below, the arbitrator does not have to have regard to any increase in valuation following the notice to treat. This applies to both market value and improvements and alterations carried out by the landowner. The Government argued that such permits were an intrinsic feature of town planning.

1.32 The Court held that in the absence of a formal expropriation, it must look behind the appearances and investigate the realities of the situation complained of,[88] since the Convention is intended to guarantee rights that are practical and effective.[89] It was

[85] In this case, the applicant had his land expropriated and given to the Navy Fund who subsequently built a holiday resort for its officers and their families. The legitimacy of this aim and the existence of a pressing need for such a development is immediately questionable. The national authorities and courts informed the Navy Fund that the land should be returned to the applicant but it refused, along with any access to the land.
[86] *Ibid* at 22.
[87] *Ibid* at 58.
[88] *Ibid* at 62.
[89] *Ibid* at 63.

unable to accept the Government's position given that the permits significantly reduced the possibility of using the land. It also found that the uncertain nature of the time limits imposed made the applicant's property rights "precarious and defeasible".[90] However, the reduction of the possibility of disposal, while causing the right to lose its substance, did not cause it to disappear altogether.[91] Therefore, the prohibitions on construction could not be considered as a deprivation but rather, a control of the right. Going further than *Papamichalopoulos,* the Court held that it must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[92] Given that the applicants were left in complete uncertainty as to the fate of their properties and were not entitled to have any difficulties which they may have encountered taken into account, the Court held that there had been a violation of A1P1. The applicants "bore an individual and excessive burden" which could only have been effectively balanced if they had had the option to seek a reduction of the time limits or to claim compensation.[93] The time endured and the lack of compensation in respect of a control of the right to property was therefore, sufficient to find a violation.

1.33 This case provides further international perspective for an Irish issue, whereby the authority can effectively create land banks for future use, which is provided for by the courts' broad definition of purpose under section 213(3) of the 2000 Act. The only time limit is the service of the notice to treat, and the date 6 weeks after the first claim is made after which, the CPO cannot be rescinded. There is no time limit within which the authority must enter the land and begin development, and no provision for compensation for any such delay. This is compounded by the fact that the land becomes unattractive for the purposes of sale or lease as its use will be inevitably limited, if not extinguished, by the CPO. However, the excessive time limits or lack of finite time limits have not been of grave concern among the European Court of Human Rights (ECtHR). The Court in *Katte Klitsche de la Grange v Italy*[94] held that 8 years was not excessive, in particular since the decision, which concerned the sensitive area of town planning and the protection of the environment, could have important repercussions on the Italian case law concerning the distinction between a right and a legitimate interest. Therefore, there had been no violation of Article 6 of the Convention, which protects the right to a fair trial.

Value Expropriations and Foreseeability

1.34 Aside from physical expropriations, the ECtHR has also considered "value expropriations" where, due to the actions of the public body, the land value is reduced to a fraction of its previous worth, but ownership of the land is retained. In *Fredin v Sweden*[95] the County Administrative Board (CAB) offered to redeem the applicant's

[90] *Ibid* at 60.
[91] *Ibid.*
[92] *Ibid* at 69.
[93] *Ibid* at 73.
[94] Application No. 12539/86
[95] Application no. 12033/86.

permit to exploit gravel on their property for approximately 50,000 Swedish kroner but the applicants did not accept this offer. The CAB then granted the applicants permission to build a quay for ship-loading equipment, provided that they lodge costs for the restoration of the pit. The CAB then revoked the applicant's license and as a result, rendered the applicant's land almost worthless, with a loss of approximately 28-31,000,000 kroner. The applicant argued that the revocation of the permit to exploit gravel on their property constituted a violation of A1P1.

1.35 The Court held that there was no formal expropriation of the applicant's property. As the revocation of the permit was done without compensation and made the future of the applicant's business uncertain, the Court found that it amounted to control over the land as opposed to deprivation.[96] This follows the position in *Sporrong* in which the lack of compensation and an uncertainty of position was sufficient to find a violation. However, the Court could not agree with the applicants that the decision to revoke the license had been unlawful or arbitrary.[97] It held that it was not provided with any evidence by the applicants to suggest that an aim, other than abating environmental concerns, was being pursued. This was despite the fact that the CAB sought to obtain the permit in 1980 for its own use. The Court also held that the State enjoyed a wide margin of appreciation in relation to enforcement mechanisms seeking to achieve the object of the law in question.[98] It noted that the applicants made their investment 7 years after the legislation was enacted which permitted the revocation of such permits; therefore, there was a reasonable foreseeability that they could lose their permit. The decision to grant permission to build a quay contained an explicit statement that such permission did not imply that any decision had been taken in relation to future gravel exploitation. Therefore, the Court held that the decision was not disproportionate and there had been no violation of A1P1.[99] The potential foreseeability, despite the uncertainty it imposed, was therefore, sufficient to offset the lack of compensation. This reference to foreseeability, while diverging slightly from *Sporrong,* ties in with the decisions in *O'Callaghan v Commissioners of Public Works in Ireland*[100] and *In re the Planning and Development Bill 1999.*[101]

1.36 This case can be contrasted against *Katte Klitsche de la Grange v Italy,*[102] in which the applicant's plan for the development of a park was approved by the District Council of Tolfa on the condition that he was bound to accept any modification required by law in the public interest. Similar foreseeability was available to the applicant as it was in *Fredin.* He had built the park and sold a number of plots when the District Council amended its land use plan, excluding the applicant's land from land zoned for residential construction. The applicant argued that the change in plan was only lawful in the public interest and no such interest had been asserted by the

[96] *Ibid* at 47.
[97] *Ibid* at 49-50.
[98] *Ibid* at 51.
[99] *Ibid* at 55-56.
[100] [1985] ILRM 364
[101] [2000] 2 IR 321.
[102] Application No. 12539/86.

council.[103] The Court found that the mere approval of the plan amendment was sufficient to restrict the applicant's exercise of his right to the peaceful enjoyment of his possessions. It considered such an interference to be a deprivation of the applicant's property rights, rather than control. This is in contrast to the approach in *Fredin,* whereby the significant devaluation of the applicant's land was considered to be a control of the property right rather than a deprivation. It is also important to note that there was the element of foreseeability in both cases. The Court in *Katte* concluded that, because not all of the applicant's land was subject to the building prohibition and the land-use prohibition was of "limited duration", that of 5 years, the restrictions were only temporary. Therefore, it held that there had not been a *de facto* expropriation and the "balance between the interests of the community and those of [the applicant] was not upset".[104] Therefore, the Court found that there had been no violation of A1P1. The difference between control and a *de facto* deprivation in terms of outcome is difficult to ascertain from the case law. A finding that the applicant has suffered a deprivation of his or her property does not appear to lead to a higher standard being imposed upon the authority in proving the necessity and proportionality of the interference.

"Public Interest"

1.37 *James v United Kingdom*[105] was referenced in *In re the Planning and Development Bill 1999*[106] and has facts similar to those in *Blake v Attorney General*.[107] The applicants owned property, which they used for long-term leases agreements.[108] Under the English *Leasehold Reform Act 1967,* individuals, regardless of their means, were eligible for low rents on long-term leases. Subsequent amending legislation provided for, what was essentially, a right to compulsorily acquire the property by the long-lease agreement holder.[109] Also, the price was fixed as the landowners were advised that they had no grounds for disputing the right of any of

[103] Along with a claim under A1P1, the applicant argued that the changing of the plan without a public interest aim constituted a violation of Article 18 which provides that any restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. This was deemed inadmissible at Commission level and not challenged before the Court.

[104] *Ibid* at 48

[105] Application No. 8793/79.

[106] [2000] 2 IR 321.

[107] [1982] IR 117.

[108] There were two types of long leases. The first was a building leas, where the lease holder paid a ground rent fixed by reference to a bare site and made an undertaking to build a house on the site and then to deliver it up in good repair at the end of the lease. The second was a premium lease where the leaseholder pays a capital sum or premium for a house provided by the landlord, and thereafter, a rent. Such a lease may contain an obligation to carry out substantial repairs, alterations, additions or improvements to an existing property.

[109] The tenant could sell the lease to a third party within the duration of the lease and the new tenant will acquire all the accompanying rights and obligations. The lease operated as a "wasting asset" whereby, the value of the lease diminished for the landlord while it increased for the tenant. At the end of the lease, the tenant's interest ceased with no right to compensation for improvements or repairs made by the tenant. However, if the tenant exercises his or her right to acquire the property, he or she may institute a procedure that would exclude such improvements or repairs from the valuation, making it cheaper for them to purchase the property. The applicants were subject to 80 instances of acquisition by long term leaseholders, only 3 of which involved a leaseholder who had built the house themselves. The houses were only continuously occupied by the leaseholder or his or her family for the full duration of the lease in 6 cases. In 34 cases, the tenant's occupancy period was less than 8 years.

the tenants to acquire the freehold.[110] The applicant argued that such acquisitions constituted a violation of A1P1 given that the legislation interfered with agreements made between the applicant and the leaseholder, before it was enacted. Thus, there was no foreseeability. It frustrated the expectations with which the applicants entered into the agreements. It also compelled the applicants to sell their properties against their will, and only to serve private interests. It deprived them of the market value of their land without providing an appeal mechanism. The Court considered that the exercise of the legislation constituted a deprivation of the applicant's possessions.

1.38 However, the most noteworthy aspect of the case was the extremely broad view of public interest that was taken, with the Court finding that the compulsory transfer of property from one individual to another "may, depending on the circumstances, constitute a legitimate means for promoting the public interest".[111] It continued, "neither can it be read into the English expression "in the public interest that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking".[112] This may be considered to be at odds with the general understanding of the term "public" and the need for the law to be clear and not operate entirely in abstraction, especially when fundamental rights suffer from such interference. This conception would dilute the need to prove a pressing necessity on the part of the acquiring authority and resist adequate protection of the rights of the individual. The Court held that any policy calculated to "enhance social justice" may be considered to be in the public interest.[113] The applicants had argued that the use of "public interest" in the first paragraph and "general interest" in the second paragraph demonstrated an intention to refer to different concept, granting the State more latitude in control then deprivation of an individual's land. This argument was rejected by the Court, which held that no fundamental distinction could be drawn between the two interests.[114] However, as mentioned above, a legitimate aim alone will not protect a member state from a finding of a violation.[115] The requisite balance will not be found if the individual seeking to enforce his or her rights is forced to bear an "individual and excessive burden".[116]

1.39 The applicants argued that such a balance could only be achieved if it could be shown that there was "no other less drastic remedy".[117] This approach, the Court held,

[110] The unencumbered freehold value of the properties varied between £44,000 and £225,000, whereas the price paid by tenants varied from £2,500 to £111,000. Some tenants then resold the property at full market value at a profit. In one instance, a profit of 636% was made.

[111] *Ibid* at 40. It continued, "no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties".

[112] *Ibid* at 41.

[113] *Ibid.*

[114] *Ibid* at 43.

[115] *Ibid* at 50 the Court held that "not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

[116] *Ibid.*

[117] *Ibid* at 51.

would lead to a reading of strict necessity into the Article, which the Court did not believe was warranted. It held that "the availability of alternative solutions…constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a fair balance".[118] It also held that the national authorities were in a better position than the Court to determine what could be considered the public interest. Therefore, as legislation permitting expropriation will generally involve consideration of political, economic and social issues on which the opinions within a democratic society will differ, the national authorities should be afforded a wide margin of appreciation.[119]

Right to Compensation

1.40 The Court in *James* was forced to determine whether a right to be compensated for a deprivation of property existed. It held that the taking of property in the public interest without the payment of compensation would possibly be justifiable in exceptional circumstances, but such circumstances did not arise in this case.[120] The taking of property without payment of compensation related to its value will normally constitute a violation of A1P1 but that is not to say that there is a right to be compensated in all circumstances. Legitimate objectives of public interest such as those pursued in measures of economic reform designed to achieve greater social justice may call for less than reimbursement of full market value.[121] The applicants also argued that they suffered a loss as a result of the delay between the date of valuation and payment on completion of the transaction. Such delays varied from 1-13 years with 34/80 instances taking less than 8 years. Given that the applicant was entitled to bring a complaint of delay to the competent tribunal, the Court held that there was no violation of A1P1. This is particularly relevant to the date of the valuation of the property's market value in the Irish system being the date of the service of the notice to treat. This shall be discussed in depth in Issue 13.

1.41 With regard to all of the above, the Court determined that there had been no violation of A1P1. Although this case only concerned itself with damages for the delay in payment of compensation, it appears that the absence of compensation in respect of the deprivation of land should automatically amount to a violation of A1P1. However, a difficulty could arise when the existence of compensation is perceived to automatically balance the competing rights and interests in favour of the acquirer. To find that just compensation is sufficient to justify the interference is to ignore that the interference must also be in the service of a legitimate aim and be performed in response to a pressing social need.

1.42 In *Akkus v Turkey,*[122] the applicant's land, along with 17,000 other persons land, was expropriated in order to build a dam on land, which was, at the time of the hearing,

118 *Ibid.*
119 *Ibid* at 46-47.
120 *Ibid* at 54.
121 *Ibid.*
122 Application No. 19263/92.

under water. The applicant applied for an increase in compensation,[123] which was also to take the rate of inflation (70%) instead of mere interest (30%) into account, which was awarded. The applicant argued that the delay in the National Water Board playing the additional compensation violated her right to peaceful enjoyment of her possessions. She complained that the authorities had calculated her compensation on the basis of the value her land had had when it was expropriated or when the court proceedings were commenced. She was paid 4 years and 4 months after the proceedings commenced and 17 months after the Court of Cassation granted her cross appeal for the enhanced amount. The Government argued that that the price paid was reasonable and exorbitant amounts, such as those claimed by the applicant, would hinder the development of schemes designed for the public interest. It submitted that the State should be afforded a wide margin of appreciation in setting and applying interest rates, which were an integral part of their policy for the creation and management of public services.[124]

1.43 The Court reiterated that the adequacy of compensation would be diminished if it were paid without considering the manner in which it could be reduced in value, such as unreasonable delay.[125] The Court will also take into account abnormally long delays that lead to financial loss for the landowner, putting him or her into a position of uncertainty.[126] The Court concluded that the deferring of payment for 17 months rendered the compensation "inadequate and consequently, upset the balance between the protection of the right to property and the requirements of the general interest".[127] There had therefore been a violation of A1P1. The dissenting judgment countered the majority's argument by submitting that human rights should not be used as an effective instrument in the fight against inflation.

1.44 In *Lithgow v United Kingdom,*[128] the applicants argued that they had been grossly undercompensated, and that this violated their rights under A1P1. Their interest in a shipbuilding company was nationalised in order to bring the companies under greater control to ensure accountability. Compensation was to be paid on the basis of the 6 month average of the value of the securities, before it was announced that the companies were to be acquired. The value of unquoted securities was valued in the same manner by an arbitrator in the absence of agreement. The valuation date for the base value of the company was, under English legislation, at the date on which possession is taken or the date that compensation is agreed, whichever is the earlier. The Government was essentially using the *Pointe Gourde* system[129] whereby any increase in value due to the announcement of the underlying scheme should not be included in the compensation amount, which was to be paid in the form of government stock. Interest was to accrue from the vesting day and the rate was to be

[123] A valuation of the land determined the land to be worth between 3,200 and 3,500 Turkish Liras (TRL) per square metre whereas the amount paid was between 800 and 850 TRL.
[124] *Ibid* at 26.
[125] *Ibid* at 29.
[126] *Ibid.*
[127] *Ibid* at 30.
[128] Application No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81.
[129] Discussed in detail in Issue 16, 16.62.

determined by the Treasury. A stockholder's representative was appointed to each company; however, as the applicant noted, this person was not obligated to seek the shareholder's consent before agreeing to compensation. The applicants had no standing in the negotiations. The Arbitration Tribunal was made up of 3 individuals, to include a legally-qualified president and 2 others with experience in business and finance. The Tribunal could not question the statutory framework.

1.45 The Court held that the applicants had clearly been deprived of their property. It held that the obligation to pay compensation derives from an implicit condition in A1P1 read as a whole as opposed to the "public interest" requirement alone.[130] The Court reiterated that the non-payment of compensation for the taking of property is justifiable only in exceptional circumstances. It submitted that legitimate objectives of "public interest" such as measures aimed at economic reform or social justice may justify less than market value. The protection of the right to property it affords would be "largely illusory and ineffective" in the absence of compensation.[131] It held that compensation is a "material" consideration in the assessment of whether a fair balance has been struck.[132] The Court also found that it would be artificial to divorce the decision of nationalisation from the determination of compensation, "since the factors influencing the latter will of necessity also influence the former".[133] It held that the accrual of interest from the vesting day provided some shelter against inflation until the date of payment and the payment was made promptly after vesting day.[134]

1.46 As the applicants remained entitled to dividends on the acquired securities between vesting day and the date of payment, they had not suffered a loss. This is in contrast to a family home who may be forced to move and attempt to mitigate their losses without receiving compensation. The Court found, 9 years before the dissent in *Akkus* that the exclusion of any allowance for inflation was within the State's margin of appreciation. With regards to the valuation process, it held that the valuation of major industrial enterprises is a far more complex task than the valuation of an individual possession being compulsorily acquired.[135] As such, a general compensation scheme would be difficult to maintain and meet the needs of each shareholder. The Court held therefore, that the State had not acted in a disproportionate manner and there had been no violation of A1P1. It is important to note that this case regarded shares as opposed to a family home or business. Issues such as mitigation, time limits for compensation and increased value are the subject of greater reliance in such cases. Shares are intangible assets which can arguably be transferred, sold or bought with minimal disruption to a landowner's day-to-day life. A stricter standard should be afforded to individual's homes and livelihoods. Also, it is not possible to compulsory acquire shares under Irish law.

[130] *Ibid* at 109.
[131] *Ibid* at 120.
[132] *Ibid.*
[133] *Ibid* at 122.
[134] *Ibid* at 144-145.
[135] *Ibid* at 121.

State failures

1.47 In *Tomina v Russia,*[136] the applicants were the owners and occupiers of apartments sold to them by a joint stock company who took over all the administrative buildings that were privatised from a State-owned enterprise. 9 years later, the Commercial Court deemed the privatisation agreement null and void and sought the return of title of the applicant's property. A couple of the applicants[137] sought damages from those that sold them the apartment, but the sellers could not be found. The applicants claimed that the deprivation of their property despite being found to be bona fide purchasers of the property, constituted a violation of A1P1. They argued that by approving the privatisation agreement, the municipality had shown an intention to divest themselves of the land. The Government claimed that the deprivation had been provided for by law, and the apartments were required, in the public interest, for the assignment to certain individuals in connection with their employment. The Court did not find it necessary to determine if the interference was lawful or pursuing a legitimate aim given the extreme disproportionality.[138] The relevant points were that the applicants had bought the property in good faith, the validity of their title was verified and the municipality had itself approved the privatisation. It held that any mistakes made by the State must be borne by the State and the errors must not be remedied at the expense of the individual landowner.[139] This would echo the higher standard that was found to exist in *Stran Greek Refineries and Stratis Andreadis v Greece.*[140] It was of significant relevance that there was a complete lack of compensation or replacement premises. As the burden on the applicant was individual and excessive, the authorities had failed to strike a fair balance and therefore, there had been a violation of A1P1. It found that the best redress would not be compensation but rather, the restoration of the applicants' title to the property.[141]

1.48 In *Stran Greek Refineries,* the applicant was a company that entered into a contract with the State. However, the State did not fulfil its obligations.[142] The applicant sought compensation in lieu of the expenditure incurred.[143] In response, the State enacted legislation that rendered the State's contract with the applicant outside of the arbitration tribunal's jurisdiction while the arbitration proceedings were ongoing. It also provided that arbitration awards already determined within the time stated shall no longer be valid or enforceable. The Court held that the legislation enacted resulted in a *de facto* deprivation of the applicant's possessions. The Court held that the contract was preferential to the applicants and prejudicial to the national economy.

[136] Applications No. 20578/08, 21159/08, 22903/08, 24519/08, 24728/08, 25084/08, 25558/08, 25559/08, 27555/08, 27568/08, 28031/08, 30511/08, 31038/08, 45120/08, 45124/08, 45131/08, 45133/08, 45141/08, 45167/08 and 45173/08.

[137] Application No. 45173/08.

[138] *Ibid* at 38.

[139] *Ibid* at 39.

[140] Application No.13427/87.

[141] *Ibid* at 49.

[142] The applicant was in liquidation as a result of a breach of contract with the State. The contract involved the building of a crude oil refinery at a cost of $76 million. The State undertook to purchase a plot of land for the construction of the refinery and authorised the applicant to import $58 million to finance the scheme. The State failed to fulfil its obligation and refused to revoke a police order prohibiting the continuation of the work.

[143] To include the return of a cheque for approximately $830 million that it lodged as security for the proper performance of the contract

Therefore, the legislation enacted sought to cleanse public life of the disrepute and could be considered to be pursuing a legitimate aim. However, the Court held that it would be "unjust" to invalidate each legal relationship that was entered into during the Greek dictatorship. Although it considered the oil refinery to be a benefit to the economic infrastructure of the country, it concluded that the legislation had upset the balance between the applicant's rights and the public interests. Therefore, there had also been a violation of A1P1. The element of foreseeability and the indefinite length of the interference could arguably have played a part in the violation in this case which shows a progression from *Fredin* and *Katte.* It may also be relevant that the State not only interfered with the applicant's claim for compensation but was the party responsible for the claim in the first instance. This may demonstrate a heightened standard when a State is forced to right its own wrong.

Possible list of guiding principles

1.49 The case law and legal principles laid out above reflect the approach that should be taken when considering whether a CPO is consistent with an interference with a person's property rights under the Constitution or the ECHR. These principles could be summarised as follows:

In any decision regarding the compulsory acquisition of land, the following shall be considered:

(a) Every natural and legal person has both the general right to property and the right to own, use and control specific possessions.

(b) These rights may be controlled or delimited, in particular, in the following circumstances -

  (i) the acquiring authority may interfere only where it is in pursuit of a legitimate aim which seeks to further the common good and not solely private interests;

  (ii) the means by which the legitimate aim is achieved must be rationally connected to the aim pursued and must not be arbitrary, unfair or based on unreasonable considerations;

  (iii) the interference must be proportionate, whereby the means by which the legitimate aim is achieved must extend only insofar as is necessary to achieve the aim; and

  (iv) the interference must arise from a pressing social need.

(c) The conduct and if appropriate, personal circumstances of the landowner.

(d) The nature of the land to be sought to be acquired, to include consideration such as –

  (i) the amount or portion of the land being acquired;

  (ii) the purpose for which the land is currently being used;

  (iii) the specific suitability of the land in order to achieve the specific purpose for which the land will be used.

(e) The public interest in upholding the integrity of the planning and development system.

(f) In determining the level of compensation following a CPO, regard shall be had, in particular, to the principle of equivalence and the restoration of the landowner's original position.

1.50 The Commission therefore seeks views as to whether such principles should be incorporated into any future legislation concerning the compulsory acquisition of land, as such a list could assist decision makers and acquiring authorities when making a CPO or determining levels of compensation.

QUESTION FOR ISSUE 1

1. Do you consider that CPO legislation should incorporate a list of guiding principles in order to assist acquiring authorities and decision makers when making a CPO or determining levels of compensation? If so, do you consider that the guiding principles in paragraph 1.49 are suitable for this purpose?

Please type your comments (if any)

ISSUE 2

WHAT INTERESTS IN LAND CAN BE COMPULSORILY ACQUIRED?

2.01 Galligan and McGrath[144] note that, at common law, it is impossible to acquire "land" but, rather, only interests or an estate in land. They comment that the definitions of "land" should be read as meaning an estate in land or a tenancy of land, and that any "other rights" should be interpreted so as to only refer to incorporeal hereditaments. With regard to State land, it should be noted that specific statutory authorisation is required before any compulsory acquisition can take place. In *Murphy v Wicklow County Council,*[145] the High Court (Keane J) found that "any concept of State sovereignty in Ireland is inconsistent with the compulsory acquisition of its assets by a subordinate authority". This point, however, was not addressed when the case was appealed to the Supreme Court.

The 1845 and 1878 Act

2.02 Under the 1845 Act, "land" is described as any messuages, lands, tenements, and hereditaments of any tenure. Suffern states that "although "lands" are defined to include "hereditaments", this is to be understood as meaning *corporeal* hereditaments only. A right of way or other easement cannot be acquired under th[e 1845] Act.[146] Section 92 provides that no landowner shall be required at any time to sell or convey only a part of any house, building or manufactory if he or she is willing to sell and convey the whole of the property. Under the *Public Health (Ireland) Act 1878 Act*, land is extended to include "buildings" and "easements".[147] Section 10 of the 1878 Act also adds "any land covered with water or any water or right to take or convey water".

The 1960 Act

2.03 Section 10 of the 1960 Act provides for the compulsory acquisition of "any land, whether situate within or outside" the functional area of the local authority. "Land" in general under the 1960 Act includes water, and any estate or interest in land or water and any easement or right in, to, or over, the land or water. Section 10(6) provides that "land" under section 10 shall specifically include any interest or right over land granted by or held from the local authority acquiring the land. Section 10(4)(d) provides the power to a local authority to extinguish a public right of way

[144] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 117.
[145] [1999] IEHC 225.
[146] Suffern, *The Law Relating to the Compulsory Purchase and Sale of Lands in Ireland* (Ponsonby 1882) at 103.
[147] Section 2 of the 1878 Act.

over the land to which the order relates or over land adjacent to, or associated with, the land.

The 1966 Act

2.04 Section 76 of the 1966 Act provides for the right to compulsorily acquire land. "Land" is defined as including water and, in relation to the acquisition of land, includes any interest or right in or over land or water (including an interest or right granted by, or held from, the authority acquiring the land). Section 83 of the Act provides that upon the completion by a housing authority of the acquisition, otherwise than by vesting order, of any land for the purposes of the Act, the authority may vest all private rights of way and all rights of laying down, erecting, continuing or maintaining any pipes, sewers, drains, wires or cables on, under or over that land (together with the contents of those pipes, sewers, drains, wires or cables) and all other rights or easements in itself without any conveyance or transfer.

The 2000 Act

2.05 Section 213(2)(a) of the 2000 Act provides the power to a local authority to acquire any land, easement, way-leave, water-right or other right including any substratum of land permanently or temporarily, by agreement or compulsorily. Land under the 2000 Act includes any structure and any land covered with water (whether inland or coastal). Section 213(4) of the 2000 Act provides that any reference to "purposes" in section 10(1)(a) of the 1960 Act shall be construed as including purposes referred to in 213(2) of the 2000 Act.

The Nature of the Legislation

2.06 Another consideration may be whether there should be different schemes depending on the amount of land or nature of the land acquired. For example, strips of land in order to build roads are arguably different and less burdensome than acquiring entire properties. Also, the road plan, by its nature, will arguably have been the subject of heightened consideration, causing the acquisition to be more site-specific than that of a housing development. There may also be scope to differentiate schemes based on the landowner, especially where he or she may be in a more vulnerable position. The differences between acquiring a business and acquiring a home may also be accounted for, with regard to:

1. The importance of location with regard to certain businesses and how relevant that might be to its success (also this is already considered in relation to compensation for disturbance of goodwill);
2. The location of schools and other local amenities that would need to be changed such as medical practitioners, including mental health facilities;
3. The location of nearby relatives for elderly or dependant landowners; and
4. The constitutional protection of the home that is evident in the exercise of search warrants and the requirement of spousal permission before sale.

The 2000 Act contains a provision excluding dwellings (that are lawfully inhabited) from the remit of the power to compulsorily acquire a protected structure.[148] It has also been argued that the constitutional protection of corporate property rights in development land, often owned by offshore trusts, on the same formal legal basis as people's individual gardens has become an absurdity in contemporary society.[149]

2.07 It might be argued that a fully comprehensive provision that encapsulates all land and easements would represent the most cost effective and least time-consuming model, as any process that leads to an uncertain and piecemeal acquisition could only lengthen and complicate the process. If land is held to be specially required for the common good and the process by which the land is acquired is legitimate and proportionate, then there may be little benefit in limiting the size of the land or right that may be acquired. However, there may be a benefit in distinguishing between various lands, based on the purpose for which they are used. Currently, the differentiation in compulsorily acquisition systems focuses on the land, the right or the wayleave being acquired. There is an argument for a shift that would see compulsory acquisition legislated for in a manner that would differentiate the systems based on the types of landowners, the nature of the properties (such as family home or business) and the amount of land being acquired. There is also scope for taking into account the urgency with which the land must be acquired, in a manner similar to the Belgian system.[150]

[148] Section 71(1)(b) of the 2000 Act provides that a planning authority may acquire, by agreement or compulsorily, an protected structure situated within its functional area if, in the case of a compulsory acquisition, the structure is not lawfully occupied as a dwelling house by any person other than a person employed as a caretaker.

[149] Kenna, "Land Law, Property, Housing and Environment Law" in Kilkelly, *ECHR and the Irish Law* 2nd ed (Jordan Publishing 2009) at 173. He also notes, at 195, that the respect for home and family life is likely to prove a fertile area of ECHR rights development in the areas of the environment, housing and property. See the general discussion above in Issue 1.

[150] There are three Acts that deal with compulsory acquisition in Belgium, the *Ordinary Expropriation Act of 17 April 1835, the Expropriation Act in Urgent Circumstances of 10 May 1926* and the *Expropriation Act in Very Urgent Circumstances of 26 July 1962.*

QUESTIONS FOR ISSUE 2

2(a) Do you consider that, provided the remainder of the compulsory acquisition process adequately protects the landowner's right to private property, there should be any interests in land that should not be compulsorily acquirable, either in general or in any specific instance?

2(b) Do you consider that the compulsory acquisition system should take into consideration the varying types of properties and landowners involved in the acquisition in the manner discussed above?

Please type your comments (if any)

ISSUE 3

AGREEMENT BETWEEN THE LANDOWNER AND THE ACQUIRING AUTHORITY

3.01 There is no statutory obligation to attempt to facilitate an agreement between the landowner and the acquiring authority under the 1966, 1960 or 2000 Acts. However, there are modified systems, such as the CPO system under the *National Asset Management Agency Act 2009*, which provide that before the National Asset Management Agency compulsorily acquires land it must first make a reasonable attempt to acquire the land by agreement.[151]

3.02 Section 6 of the 1845 Act allows for such an agreement but does not consider negotiations before the initiation of the CPO to be mandatory. This was reflected in the *Blascaod Mór* case.[152] This case concerned the *An Blascaod Mór National Historical Park Act 1989* which granted the power to compulsorily acquire certain parts of the Blasket Islands. In particular, it prevented the acquiring authority from compulsorily acquiring the land from anyone who owned the land, or their descendants, before 1953 given that the evacuation of the last 20 inhabitants of the Blasket Islands took place in November 1953.

3.03 In the early 1970s an American-Irish dual citizen, Taylor Collings, began to purchase properties from the former inhabitants. In January 1972, he sold half of his interest to Philips Brooks and the other half to Peter and James Callery. Before transferring his land to Mr Peter Callery, Mr Collings worked energetically on restoring old buildings and even employed an islander to assist him in the preservation of the properties. He and his wife also provided accommodation and facilities by way of a guesthouse for visitors to the island. They did this entirely using their own money; no financial assistance was provided by the State. Mr Callery then took over their responsibilities. In 1973, overtures were made by the Commissioners of Public Works in Ireland (commonly called the Office of Public Works) in respect of purchase of lands on the island but a meeting with Peter Callery and an official proved inconclusive. The High Court (Budd J) found it significant that Mr Callery was instrumental in maintaining the island in respect of the ongoing works, and in particular the restoration of buildings. However, this offer was then, and since, refused by the Commissioners. In April 1984, the Commissioners of Public Works indicated that they intended to acquire all of the lands on the island and to develop them in the national interest.

[151] Section 158(3) of the *National Asset Management Agency Act 2009*.
[152] *An Blascaod Mór Teo v Commissioners of Public Works in Ireland* [1998] IEHC 38.

3.04 The State never made an offer to buy the land. The Court noted that from the evidence, it was suggested that the first 4 plaintiffs were prepared to sell all their commonage and most of their other lands voluntarily and to cooperate in relation to the restoration of houses, some of which they had preserved and kept in a usable condition for twenty years. At no stage did the Department of the Gaeltacht or any other State agency write to the plaintiffs setting out the reasoning behind the need for the acquisition of the plaintiff's land for a national historic park or seeking their cooperation in respect of this objective. In 1985, the plaintiffs wished to sell the land but were asked to defer the sale by the Foundation (a private association), with the expectation that an offer would be forthcoming. No offer was made and instead *An Blascaod Mór National Historical Park Act 1989* was enacted granting the power to compulsorily acquire the plaintiffs' land. The plaintiffs were served with notice of the CPO in March 1991. The 1989 Act was subsequently found to be unconstitutional.

QUESTION FOR ISSUE 3

3. Do you consider that a statutory obligation should be enacted requiring the acquiring authority to enter into negotiations with a landowner before making a CPO?

Please type your comments (if any)

ISSUE 4

POWER TO REQUEST INFORMATION

The 1966 Act

4.01 Section 4 of the 1966 Act provides that a housing authority may, by written notice, require the occupier of any land or any person receiving rent for the land to send particulars of the estate, interest or right he or she possesses and the name and address of every person who, in his or her knowledge, has any estate or interest in, or right over, or in respect of, such land. This information must be provided within 21 days of the service of the notice. Any person who fails to submit such particulars, or knowingly submits false or misleading material shall be guilty of an offence. The penalty for such an offence is a fine not exceeding €2500.[153] There is no defence of ignorance of such a notice under this section.

The 2000 Act

4.02 Section 8 of the 2000 Act requires the occupier of any structure or other land, or anyone in receipt of rent for the land, to give the particulars to a local authority, of the estate, interest, or right, by virtue of which he or she occupies, or receives rent for, the land. This must also include the name and address (so far as they are known to him or her) of every person who to his or her knowledge has any estate or interest in the land. This must be given within 2 weeks of the authority providing its written request. Every person who fails to give such information or who knowingly provides false or misleading written information shall be guilty of an offence.

4.03 It is arguably good practice to leave the onus upon the landowner to produce his or her title. One could argue that it should not be the responsibility of the occupier to provide information of other interest holders, especially where there is the potential for committing an offence. There is also the possibility that the occupier would have outdated or false information which would inevitably slow the process down. Any information provided by the occupier would undoubtedly have to be confirmed through an examination of title regardless. On the other hand, this provision may provide a useful source of information that is easily attainable. It could be argued that a statutory basis for a concurrent examination by the acquiring authority could be enacted, which could ease any perceived burden on the occupier to provide the information.

[153] Originally the fine was in the amount of £25 but this was increased to £1000 by the *Housing (Miscellaneous Provisions) Act 1992*. The maximum fine of £1000 appears to be a class C fine not exceeding €2500 as provided by the *Fines Act 2010*.

QUESTION FOR ISSUE 4

4. Do you consider that an occupier should have a statutory duty to provide information to an acquiring authority regarding the ownership of the land, or should there be a statutory duty on the acquiring authority to carry out an examination of title instead of, or in addition to, the obligation on the occupier to provide information?

Please type your comments (if any)

ISSUE 5

POWER TO ENTER LAND FOR THE PURPOSE OF ASSESSING ITS SUITABILITY

The 1845 Act

5.01 Under section 84 of the 1845 Act, the acquiring authority shall not enter any lands unless it secures the consent of the owners and the occupiers. There is an exception whereby entry is permitted if the authority has paid compensation to the landowner (the receipt of which will be considered proof of conveyance and will release all interests in the estate under section 17), or have deposited the money paid into the Bank of Ireland. [154] Section 84 provides another exception, namely that of the need to survey and take levels of the land, to probe or bore to ascertain the nature of the soil and to set out the line of the works. This may be done without consent, provided that the authority gives no less than 3 days and no more than 14 days' notice before entry. This approach sets a limit on the entry period.

The 1960 Act

5.02 Section 13 of the 1960 Act provides the power for an officer or agent of a local authority to enter any land at all reasonable times between 9am and 6pm for the purposes of ascertaining whether the land is, or is not, suitable for acquisition by the authority. The purposes of such entry will, in particular, include surveying, making plans, taking levels, making excavations and examining the depth and nature of the subsoil. Entry under this section is permitted with the permission of the occupier or owner, or by providing at least fourteen days' written notice of the intention to enter. Once the notice of intention to enter has been served, a person in receipt of such notice may apply to the District Court to prohibit such entry. Section 13(8) provides that any person who, by act or omission, obstructs an officer or agent of a local authority from entering, shall be guilty of an offence, and shall be liable on summary

[154] This was previously the Court of Exchequer under section 74 but became the Bank of Ireland under section 19 of the 1851 Act. The deposit was to be paid into the bank in the name and with the privity of the Accountant General of the Court of Chancery of Ireland to the credit of the parties interested in the land but was subject to the control and disposition of the Court. Under Section 77 of the 1845, where such a deposit has been made, the cashier of the Bank shall give the acquiring authority a receipt for such money and that shall act as permission for the acquiring authority to execute a deed poll under the hands and seals of the authority and such deed poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the acquiring authority. All the estate and interest in the land for which the purchase money and compensation has been deposited shall then vest in the acquiring authority, who shall be entitled to immediate possession of the land. Any party making claim to the deposit money may apply by petition to the Court to distribute according to the respective titles, estates or interests of the parties making a claim or to invest the money in the public funds. Order 77, rule 28 of the *Rules of the Superior Courts 1986* (SI No.16 of 1986), as amended by the *Rules of the Superior Courts (Order 77 Amendment) 2005* (SI No.51 of 2005), provides that money lodged in the High Court pursuant to section 69 of the *Lands Clauses Consolidation Act 1845,* and under any statute incorporating section 69 of the 1845 Act, shall be placed in the records of the Accountant to the credit of *ex parte* the promoters of the undertaking.

conviction to a fine, which shall continue for every day on which the offence is continued.

The 1966 Act

5.03 Section 117 of the 1966 Act permits an authorised person[155] to enter on the land at all reasonable times for any purposes connected with the Act, but more specifically, to perform surveys or a valuation, either with consent or given 14 days' notice. A person who has been given such notice may apply to the District Court for an order prohibiting such entry which the court may approve if it "thinks [it] proper" to do so. There are no guidelines for the court to use in determining whether such entry is to be prohibited. Any person, who by act or omission obstructs an authorised person in the lawful exercise of the powers conferred by section 117, shall be guilty of an offence.

The 2000 Act

5.04 Section 252 of the 2000 Act permits entry to an authorised person[156] between the hours of 9am and 6pm or, during business hours, where a premise is normally open outside of those hours, for any purpose under the Act. The authorised person is authorised to do all things reasonably necessary for the purpose for which entry is made, and in particular, may survey, carry out inspections, make plans, take photographs, take levels, make excavations, and examine the depth and nature of the subsoil. The authorised person must either obtain written consent from the occupier or owner or give at least 14 days' written notice. Any person in receipt of such a notice may apply, no later than 14 days after being served with the notice, to the District Court to prohibit the authorised person from entering. If an owner or occupier refuses entry, the authority may apply to the District Court for an order permitting the entry. Under section 252(8), an authorised person may enlist the assistance of a member of the Garda Síochana to assist in the exercise of the power to enter, should he or she envision an obstruction. Every person who, by act or omission, obstructs an authorised person in the lawful exercise of the powers conferred by the section shall be guilty of an offence.

Right to Compensation for Damage

5.05 Under the 1854 Act, the landowner must be compensated for any damages done to the land by the acquiring authority. Under section 89, if the acquiring authority does not comply with the entry requirements of section 84, the authority shall be liable to pay the landowner £10 above whatever compensation for damages is due. If the authority remains on the land, the authority shall be subject to £25 for every day it or its contractors remain on the land. However, there is a defence under this section specifically, if the authority had a *bona fides* belief that it was entitled to enter the

[155] Section 117(8) provides that "authorised person" means a person who is appointed by the housing authority to be an authorised person for the purposes of the section. It does not provide any criteria in order to become an authorised person.

[156] An authorised person means a member of the Board or a person who is appointed by a local authority, the Minister or the board to be authorised person for the purposes of this section.

land. Under the 1960 Act, a person who suffers damage by any entry under this section shall, if he or she submits a claim within 6 months, be entitled to compensation.[157] No such provision is included under the 1966 Act. Section 201 of the 2000 Act provides that if a person has suffered damage by virtue of entry under section 252, he or she shall be entitled to claim compensation.

5.06 In *Rooney v Department of Agriculture,*[158] a pre-independence Irish case, the plaintiff sought an injunction arguing that certain persons, at the direction of the defendant, entered her land unlawfully. As a result of the damage done, it was rendered unfit for its original purpose. The relevant legislation empowered the defendant to enter upon the land in order to increase the food supply of the country, but only where such supply was immediately required and where the use of the land was unreasonably withheld. There were no provisions for compensation for entry onto Irish land under the relevant legislation. While the Master of the Rolls and, on appeal, the Court of Appeal dismissed the plaintiff's claim for an injunction, it was also suggested that it would be difficult to see why the plaintiff would not be entitled to compensation as the courts could not see how any person could be accused of unreasonably withholding lands for which he or she is to receive no compensation. It also held that it would be impossible for any right to compensation to be destroyed by the legislation.[159] If such a case were to arise today, a claim for compensation would also be made against the background of the protection of property rights under the Constitution and the ECHR (discussed in Issue 1, above).

Conditions concerning entry on lands

5.07 In *McKeen v Meath County Council,*[160] the High Court (Barron J) held that a judge of the District Court had erred in prohibiting Meath County Council from entering the plaintiff's land under section 13(5) of the 1960 Act to assess its suitability as a cemetery. The plaintiff argued that the Council should be prohibited on the grounds that there were alternative sites available for a cemetery, that other lands had previously been donated by her family for the site of the current cemetery and that the lands in question had been planted under an EU funded scheme which might be jeopardised as a result.

5.08 The High Court held that the judge of the District Court had erred in prohibiting entry on the ground that the Council had not considered alternative sites: this was not a matter that came within the Court's discretion under the 1960 Act, which was confined to considering the particular property and not other lands. The Council had argued that the conditions that could be imposed upon entry by the District Court were issues such as time of entry, date of entry and nature of the work to be carried

[157] Section 13(6) of the 1960 Act. Section 13(7) provides that "in default of agreement, the amount of any compensation payable by a local authority under this section shall, if the amount claimed in respect thereof does not exceed fifty pounds, be determined by the District Court or, in any other case, be determined by arbitration under the Acquisition of Land (Assessment of Compensation) Act 1919 (as amended by subsequent enactments) as if the compensation were the price of land compulsorily acquired".

[158] [1919] IR 302.

[159] *Ibid* at 309.

[160] [1997] 1 IR 299.

out. The High Court did not accept that this constituted an exhaustive list of conditions to be considered. Although it did not provide such a list, the Court added that another example was if an applicant could establish that entry was for a purpose outside the remit of section 13 of the 1960 Act. The Court also noted that it was implicit in the presumption of constitutionality that section 13 of the 1960 Act enjoyed that the power of entry would be exercised in accordance with the right to fair procedures, one of the unenumerated rights under Article 40.3.

5.09 In *Muller v Shell E&P Ireland Ltd,*[161] the Supreme Court held that the defendant company was in civil contempt of an order of the District Court, which had prohibited the company from entering the applicant's lands, held in commonage, under the *Gas Act 1976*. The company had wished to enter the lands for the purposes of assessing it for a CPO application. The only requirement under the 1976 Act was for the company to provide the landowner with 14 days written notice, which it had not done. On this basis, the District Court had made an order prohibiting entry until all the requirements in the 1976 Act had been met. The company, instead of complying with the order of the District Court, purchased a 1/62 of a share in the commonage lands. It then entered the land and carried out observations and surveys without applying to vacate the order of the District Court, which it might have done based on its newly-acquired property rights. The District Court found Shell in contempt of the order prohibiting entry. On case stated, the High Court (Kearns P) held that the order made in the District Court did not prohibit entry for all purposes but rather merely those for the purposes of the 1976 Act. It concluded that based on the company's co-ownership rights, the District Court could not prohibit their entry. On further appeal, the Supreme Court held that the company was in contempt. The Court, in acknowledging the lack of action taken to fulfil the notice requirements in the 1976 Act and the absence of any application to allow entry after buying a portion of the commonage, found that certain activity on land owned in common by one owner of an undivided share without the consent of another owner of an undivided share could amount to trespass.[162] It also held that the notice required by the 1976 Act triggered the entitlement of a person to enter. As it was evident that the company acknowledged the need for consent, it had circumvented the law in order to enter. The Supreme Court concluded that the purchase of the commonage share did nothing to dilute the District Court order and allowed the appeal.

5.10 For a number of years there has been a policy in place connection with CPOs related specifically to facilitate national roads projects in which local authorities, in order to control the level of appeals against CPOs and the refusal of farmers to permit entry onto their lands distribute "goodwill payments" to landowners.[163] In return for such payments, the landowners would not obstruct the CPOs made to facilitate national roads projects. Between 2007 and 2011, these payments were previously set at €5,000 per acre in addition to the overall market value of the transaction. In 2012,

[161] [2010] IEHC 238, [2017] IESC 42.
[162] [2017] IESC 42 at paragraph 23.
[163] Hilliard, "Farmers to receive €9m in 'goodwill payments" *The Irish Times* 4 February 2016.

these payments were terminated when capital investment in road development came to a virtual halt in the aftermath of the economic and fiscal Great Recession. Between 2007 and 2011, the State spent €30 million on these payments, in addition to the €1.4 billion cost to the State for land purchased under the National Development Plan.[164] The payments were reintroduced in February 2016 at a reduced cost of €3,000 per acre, following negotiations with the Irish Farmers' Association. The payments will apply retrospectively to 2012 and will cost the State approximately €9 million in back payments. A goodwill payment is considered part of the purchase price and is, therefore, subject to capital gains tax. The net cost is therefore approximately €2,000 per acre.

5.11 One possible reform in this respect would be to provide statutory guidance to determine the validity of an entry for CPO purposes. Arguably, a landowner should be properly compensated for any damage caused on his or her land as a result of such assessments. In relation to the supplementary payments to individual groups of society, a few points could be made. Apart from the public purpose that will be served in the development following a CPO, it may also be important to be mindful that in the vast majority of cases the State funds these developments; thus, a public purpose could be said to be served by maintaining adequate but not excessive compensation payments. It could also be argued that it is important not to base additional payments on certain types of CPOs or on certain types of landowners where such a person may be in an elevated position of power due to their standing within an association as opposed to an individual landowner. It is arguably important that such payments are not relied upon to supplement deficient compensation awards. This is discussed in further detail in Issue 16, below.

5.12 Issue 13 discusses how entry onto land that includes a dwelling before compensation is paid could potentially be unconstitutional in view of the protection given to the dwelling in Article 40.5. On the other hand, entry for the purposes of assessing the land's suitability could be considered as a mechanism through which another potential interference could be prevented. Such entry arguably pursues a legitimate aim, that of identifying a specific purpose and special suitability of the land that would justify its acquisition. Such an aim could be seen as adequately assessing the use of the land in order to prevent a more significant interference at a later stage, that of taking land where alternatives would be better suited. Should testing not take place, the acquiring authority may acquire the land without knowing the specific purpose for which the land is suitable, and may go through the arduous process of making a CPO and arbitration, only to realise that the land is unsuitable. One opinion may be that a correlation between the forced entry and a more specific purpose being used when making the CPO could be the most effective means of safeguarding an individual's property rights in the least restrictive manner.

[164] Labanyi "State spent €30m on goodwill payments for roads" *The Irish Times* 21 March 2012.

QUESTIONS FOR ISSUE 5

5(a) Do you consider that CPO legislation should include specific examples in which entry upon land in order to assess its suitability would be unlawful?

5(b) Do you consider that a period of 14 days notice is sufficient to override the consent of the landowner?

Please type your comments (if any)

ISSUE 6

TERMINOLOGY

6.01 For the majority of CPO systems, the acquiring authority firstly makes a compulsory purchase order. At this stage, the "order" consists of an application to be approved by An Bord Pleanála once the appropriate procedure is followed, rather than an effectual order. The form of a CPO under the *Housing Act 1966* is set out in the *Housing Act 1966 (Acquisition of Land) Regulations 2000* (SI No. 454 of 2000). The 1845 Act (except for sections 127-132, which deal with the sale of superfluous land), the 1919 Act and Article 20 of the Second Schedule of the *Housing of the Working Classes Act 1890,* remain incorporated into the form by clause 1(a) of the Schedule.

6.02 There is an arguable case for a change in terminology as it could be argued that the current system is misleading. The initial order is not a confirmed or effectual order, yet the word "order" could be construed as implying a sense of finality. The word "purchase" implies that there is a sale involved in the process, and is arguably in contradiction with the word "compulsory" given that there is no option for agreement under the order. Therefore, it may be argued that a more accurate term may be a **compulsory acquisition application** or **compulsory acquisition notification** which would then be referred to as a **compulsory acquisition order** once confirmed.

QUESTION FOR ISSUE 6

6(a) Do you consider that the term "compulsory purchase order" should be replaced by "compulsory acquisition application", "compulsory acquisition notification" or some other alternative term when the initial application to compulsorily acquire land is being sent to the confirming body?

6(b) Do you consider that the term "compulsory purchase order" or "compulsory acquisition order" or some other alternative term should be used only where the compulsory purchase or acquisition has been confirmed?

Please type your comments (if any)

ISSUE 7

ADVERTISING AND NOTIFYING AFFECTED LANDOWNERS

The 1845 Act

7.01 Once the authority decides to make a CPO, it must notify the relevant landowners. Under section 18 of the 1845 Act, the acquiring authority, having made diligent inquiry, must give notice to all parties interested in the lands being taken, and shall, by such notice, demand the particulars of their estate and interest in the lands and also give notice of its intention to compensate those with a valid interest in the land. The 1845 system combines the processes of the oral hearing and the assessment of compensation. The arbitrator was in effect both the inspector and the arbitrator.

The 1851 Act

7.02 Section 4 of the *Railways (Ireland) Act 1851* provides that when an authority is authorised to make a railway it shall make maps, plans and schedules of the lands required and of the intended works for accommodating adjoining lands. These maps, plans and schedules shall be deposited in the office of the Commissioners of Public Works in Ireland and also with the clerk of the peace in every county affected by the railway. Once the arbitrator is appointed, under section 8 of the 1851 Act, the authority shall publish notice of the appointment along with notice of the intention to acquire the land with the clerk of the peace and poor law unions. It shall also be published in the *Dublin Gazette,* along with another newspaper that is circulated in the county in which the lands are situated, once a week for 4 weeks.

The 1966 Act

7.03 Under the Third Schedule of the 1966 Act, section 76(4) provides that, before submitting the CPO to An Bord Pleanála, the housing authority shall publish, in one or more newspapers circulating in their functioning area, a notice stating that such an order has been made and naming a place where a copy may be viewed along with a map of the land. The authority must also serve notice on every owner, lessee and occupier, specifying the time and manner in which objections can be made.

The 2000 Act

7.04 Under the 2000 Act, the authority must also circulate the notice to all relevant landowners, lessees and occupiers (except tenants who occupy the land for a month or less). This notice must state the timeline and the manner in which objections can be made before the CPO is submitted to An Bord Pleanála. There is no statutory time

limit for objections, aside from the fact that a month, at the very least, must be given to the landowner to raise such an objection. The notification procedure serves 2 purposes. The first is to display the intention to acquire the land. The second is to give the landowner forewarning of the requirement to furnish the particulars of his or her claim to the acquiring authority.

7.05 The Commission is not aware of any issues with the publication and notification of the making of the order, but seeks views on this. The extent to which a failure to abide by these provions will render a CPO invalid is unclear.[165] In addition, the Commission seeks views as to whether there should be a statutory time limit to the call for objections.

[165] In *Clinton v An Bord Pleanála* [2005] IEHC 84 at 87, the High Court (Finnegan P) stated: "Over the years, many compulsory purchase orders have been imperfectly drafted but that does not mean they are invalid. Obviously, if there is a serious substantive defect, a CPO may be quashed but not every imperfection leads to that result". It is unclear if the Court takes a *de minimis* approach in relation to CPOs, in that, it is unclear whether violation of the notifications or time limits will be sufficient to quash a CPO. It would appear that the High Court (Kelly J) took this view on the validity of notices in *An Blascaod Mór Teo v Commissioners of Public Works in Ireland* High Court 18 December 1996. The regulations made by the Minister prescribed forms in which the notification of the CPO would have to be displayed. Form No. 1(b) requires that immediately under the heading "Compulsory Acquisition of Land" there should appear the following: "To occupier of land described in the Schedule hereto". The notice which was served did not contain these words. Apart from this omission, the notice conformed precisely to what was prescribed aside from the absence of the legend "Description of the land proposed to be acquired" although it did then go on to describe the lands in question. The Court, following the Supreme Court in *Monaghan UDC v Alf-a-bet Promotions Ltd* [1980] 1 ILRM 64, held that "the objection which is taken here to the omission of the words which I have set out above is entirely technical and of little substance. I am of the opinion that this objection is "so trivial, or so technical and of little substance. I am of opinion that this objection is 'so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially and therefore adequately, complied with" at 14.

QUESTIONS FOR ISSUE 7

7(a) Do you consider that there are there any issues that need to be addressed concerning the publication and notification process in relation to CPOs? If so, please specify.

7(b) Do you consider that there should be a statutory time limit within which objections should be sent to the confirming body? If so, please specify.

Please type your comments (if any)

ISSUE 8

WHAT TO DO WHEN LANDOWNERS CANNOT BE IDENTIFIED OR LOCATED

The 1845 Act

8.01 Under section 19 of the 1845 Act, all notices shall be served personally on the landowner or left at their last usual place of abode, if any such place can be found after diligent enquiry. If the landowner cannot be found, the notice shall be left with the occupier of the land or, if there is no occupier, the notice shall be affixed upon some conspicuous part of the land. Under section 58, in circumstances in which a landowner cannot be identified, the compensation shall be determined by a practical surveyor who is appointed by 2 justices. The modern CPO schemes only incorporate sections 69-83 however, section 64 provides that where a landowner cannot be identified or found and the amount of compensation due has been ascertained by the surveyor, and deposited into the Bank "under the provisions herein contained", the individual who subsequently claims ownership and wishes to challenge the amount determined by the surveyor may do so, by applying to the Court of Chancery.

The 1966 Act

8.02 Section 3 of the 1966 Act provides for the service of notices in one of the following ways:

1. Where a person's name cannot be identified through reasonable inquiry, it may be addressed to "the owner" or "the occupier";
2. Where it is addressed to him or her by name, by delivering it to him or her;
3. By leaving it at the address at which he or she ordinarily resides or, in cases in which an address for service has been furnished, at that address;
4. By sending it by post in a prepaid registered letter addressed to him or her at the address at which he or she ordinarily resides or, in cases in which an address for service has been furnished, at that address or, where such registered letter is returned undelivered to the sender, by ordinary prepaid post; or
5. Where the address at which he ordinarily resides cannot be ascertained by reasonable inquiry and the notice, it shall be delivered to some person over sixteen years of age resident or employed on such land or premises or by affixing it in a conspicuous position on or near such land or premises.

8.03 Section 3(5) provides that it shall be an offence for any person to remove, damage or deface the document within 3 months of it being served or affixed to the property. Section 250 of the 2000 Act is identical to section 3 of the 1966 Act.

8.04 The 1960, 1966 and 2000 Act do not contain any provisions regarding what to do when landowners cannot be identified in the compulsory purchase procedure. However, section 107 of the 1966 Act provides for what to do where a landowner cannot be found and a housing authority must sell the person's home. The authority must apply to the District Court to issue a warrant and must provide the owner of the dwelling with 21 days' notice of such an application in writing and the grounds on which it is based. Once notice has been given, the authority has made an undertaking to the Court to pay "the appropriate amount"[166] together with any interest due and the owner cannot be found by reasonable enquiry, the justice of the District Court may issue a warrant. The warrant shall then vest all the estate, right, interest and title of the person to whom the house was leased or sold in the authority without any conveyance or transfer. Should the owner be subsequently found, he or she may make an application to the District Court to have the acquiring authority pay him or her, the amount due.

8.05 If the landowner is subsequently identified, there is a provision under the Third Schedule of the 1966 Act, section 76(2)(f), which provides that any person claiming to be entitled to any purchase money or compensation paid to another person under this article, may, within 6 years after the payment has been made, make an application to the Circuit Court. The court may then, as it thinks proper, either dismiss the application or make a decree against the housing authority for the amount found due in respect of the claim. It may also make a decree for a debt due to the authority by the person to whom the money was originally paid.

8.06 The Commission is not aware of any obvious issues with the provisions discussed above. One possible reform could be to enact provisions similar to sections 58 and 64 of the 1845 Act, whereby reasonable notice would be given and the compensation would be deposited into the bank or another financial institution. Whether or not an arbitrator is required to determine compensation in the absence of the landowner is open to discussion. There could also be an additional provision that would insist upon an oral hearing for the landowner, if he or she is identified before development begins. Also, 3 months could be considered an arbitrary amount of time to enforce the safe standing of the notice and this provision could potentially be revisited.

[166] Section 9 of the 1966 Act provides that "the appropriate amount" means the value of the aggregate of any moneys paid to a housing authority in respect of the sale or lease by the authority of a house or dwelling mentioned in subsection (1) of this section and in relation to which the application brought under subsection (8) of this section.

QUESTION FOR ISSUE 8

8. Do you consider that there should be any additional safeguards enacted in circumstances where a landowner cannot be located or identified?

Please type your comments (if any)

ISSUE 9

ESTABLISHING A PURPOSE FOR THE CPO

Stating a Purpose

9.01 When making a CPO, the acquiring authority must include a stated purpose for acquiring the land. Section 213(3)(a) of the *Planning and Development Act 2000* provides that land may be compulsorily acquired even though it is not immediately required for a "particular purpose", if, in the opinion of the local authority, the land will be required by the authority for that purpose in the future. Section 213(3)(c) provides that section 213(3)(a) shall have effect in relation to any power to acquire land conferred on a local authority by virtue of the Act or any other enactment whether enacted before or after the Act. This section allows for an authority to take an individual's land without specific plans, funding or a timeframe in place for the implementation of the purpose. Under the 2000 Act, it is also the acquiring authority that determines whether or not the land is suitable for the purpose in the future. It is not determined by An Bord Pleanála. There is no independent adjudicator on the matter of future potential for realising the purpose. The term "in the future" is indefinite.

9.02 Section 77 of the *Housing Act 1966* provides that a housing authority may be authorised to compulsorily acquire land that is not immediately required for the purposes of the Act, provided that An Bord Pleanála is of the opinion that there is a reasonable expectation that the land will be required by the authority in the future in order to attain any of the objectives to which it must have regard in preparing a building programme. This section differs from section 213 of the 2000 Act in that it is An Bord Pleanála, and not the local authority who determines if the land is suitable for a future purpose.

9.03 This is arguably the clearest instance in which the CPO process has the potential to pose a disproportionate interference with an individual's property rights. The reason for this is that the authority does not need to state the type of building, the classification, or the time period proposed. Nor does it need to have made any plans. The broad concepts of "development"[167] and "giving rise to development plans"[168] are

[167] For example, section 9(1)(a)(i)-(v) of the *Urban Renewal Act 1986* provides that: (a)It shall be the duty of the Authority to secure the redevelopment of the Custom House Docks Area and for that purpose it shall have the following functions – (i) to acquire, hold and manage land in that Area for it development, redevelopment or renewal either by the Authority or by any other person; (ii) to prepare a scheme or schemes for development, re-development or renewal of any land in that Area; (iii) to develop, redevelop or renew, or secure the development, redevelopment, or renewal of any land in that Area or otherwise to secure the best use of any such land; (iv) to dispose of the land – (I) on completion of its development, redevelopment or renewal under this Act; (II) to secure its development, redevelopment or renewal, or (III) to secure its best use; (v) to provide such infrastructure and to carry out such works of amenity development or environmental improvement as, in the opinion of the Authority, may be required to encourage people to work, shop, or reside in that Area or otherwise to use the facilities provided in that Area.

often used as the "particular purpose" with a general idea of what is intended. Without knowing, for example, that the area will be used for housing specifically, the authority will not be concerned with access, local amenities, greenery and open spaces that would be specific to such developments. Shopping centres, as another example, have very different planning requirements. If the plan is not specific to the area, another area may be better suited. It could be argued that a CPO may represent a disproportionate interference with an individual's property rights if the land being acquired were not shown to be a particularly suitable site in line with the proposed development. Section 210 of the 2000 Act also provides that, where land is vested in a local authority following a CPO being made, the local authority can appropriate the land for the purposes of any of its other functions. The local authority is, in effect, empowered to create a land bank, with significant autonomy over how it is put to use.

9.04 In *Hendron v Dublin Corporation,*[169] the local authority tried to compulsorily acquire the land of the plaintiffs under sections 37 and 38 of the *Housing (Miscellaneous Provisions) Act 1931*. Section 37, before the Act was repealed, provided that a local authority could purchase land compulsorily for the purpose of providing housing for the working class. Section 38 provided that the local authority could only acquire land by agreement where it was not immediately required. The plaintiffs had submitted plans and applications to the Dublin Corporation for the development of a large factory. These plans were approved but 5 months after permission was granted and the work had commenced, the plaintiffs were issued with an order prohibiting them from proceeding with the work and a CPO was subsequently made in respect of the land. The plaintiffs argued that the land was not *bona fide* required as there was no immediate need for such land and its acquisition would cause unnecessary hardship on the plaintiffs as it was contrary to natural justice.[170] They also argued that houses could not be erected on the land by reason of the plans and schemes proposed for the area by the Town Planning Authority. Finally, they argued that where such an interference seeks to deprive parties of their rights to property, it should be strictly construed against the local authority and favourably towards the parties.

9.05 The High Court (Gavin Duffy J) stated that "good intentions are no answer to a well-grounded complaint that the Corporation has exceeded its powers".[171] It considered the conduct of the defendants to be bewildering, having "blundered" in issuing a license to develop the land, then by issuing an illegal prohibition and finally by issuing the CPO, which it "had no right to make". It held that the Dublin City Manager had not yet decided if the land was required for housing purposes at all, but rather, the authority made the order in the name of expediency, "untrammelled by any definitive

[168] Section 12(1)(a) and (b) of In the *Urban Renewal Act 1986*, imposed a duty on the authority to prepare a planning scheme for the Area. In preparing it, the Authority is required to comply with any general directive given by the Minister under s. 9(6) of the Act which states that the Authority is required to have regard to the policy directive given by the Minister when performing its functions. Under 12(3)(d) the Authority must make arrangement for the making of submissions by interested persons in relation to the scheme and the consideration by the Authority of any such submissions.

[169] [1943] IR 566.

[170] *Ibid* at 568.

[171] *Ibid* at 570.

plans or tiresome resolutions, of which it might afterwards repent".[172] If the land was actually required to build homes for workers, as was envisioned by the legislation, then the "public interest will generally overshadow private grievances". However, the Court found that it would be extreme to expect that the Oireachtas ever intended to empower local authorities to do so without properly examining the needs of the working people and declaring itself satisfied that the land is "actually needed" for their housing. The local body would require a "solid reason and not a pious hope or a mere pretext for seizing it".[173] The Court found it startling that a planning officer gave evidence that plans for such housing were not ready for final approval 4 years after the CPO was made and therefore, quashed the order. This case from 1943 reflects an approach that does not appear to be the position of the more modern judiciary.

9.06 In *Crosbie v Custom House Dock Development Authority and Ors,*[174] the applicant challenged section 5 of the *Urban Renewal (Amendment) Act 1987*, which permitted the Custom House Dock Development Authority (a statutory body established by section 8 of the *Urban Renewal Act 1986*) to compulsorily acquire the land situated within the Custom House Docks Area, in order to perform its functions under *the Urban Renewal Act 1986*. Section 9 of the 1986 Act imposed upon the Authority the "general duty… to secure the redevelopment of the Custom House Docks Area". When the CPO was made by the Authority, it stated that "the Authority is hereby authorised to acquire compulsorily for the purposes of the Urban Renewal Acts, 1986 and 1987 and, in particular, for the purposes of section 9 of *Urban Renewal Act 1986,* the land described". This purpose was not specific and no plans had been made. Redevelopment is also a difficult concept to justify on the grounds of a pressing social need.

9.07 In this case, the High Court (Costello J) confirmed that the Minister (now An Bord Pleanála), in deciding whether or not to grant a compulsory purchase order should not consider:

1. Whether the proposed development in the planning scheme is desirable or not;
2. Whether development proposed by an objector in respect of his land is a preferable form of development or not;[175]
3. Whether the proposal is a good one or not; or
4. Whether alternative proposals advanced by an objector in respect of his land are to be preferred.[176]

9.08 The Court did not say that the acquiring authority must consider alternative locations, but rather appeared to infer that the question was not whether development would

[172] [1943] IR 566 at 571.
[173] *Ibid* at 572.
[174] [1996] 2 IR 531.
[175] *Ibid* at 543.
[176] *Ibid* at 544.

take place, but rather, *what* development would take place. This judgment did not point to what a Minister's (now An Bord Pleanála's) duties are when considering the approval of a CPO - which is understood to be based upon the evidence and submissions made at the oral hearing – but rather, what they are not. The Court concluded that the issue as to what the purpose for which the lands were acquired by the Authority is a question of fact.[177] The Court therefore, confirmed that the Act does not require an acquiring authority to state a specific purpose. Its rationale for this was that planning schemes and development plans change. Thus, a differentiation between "purpose" and "means" was held to exist.[178] It should be reiterated at this point that the proportionality test in *Cox v Ireland*[179] spoke of "the means" that must pass a proportionality test. This has been further dissected by academics into "means-end" review and "means-effects" review. Means-end review involves an examination of the tailoring of a restriction to its purpose. Means-effects review requires a court to go further and consider the effect that a restriction has on individual rights.[180]

9.09 The rationale behind a "purpose" and "means-ends" rather than a "means-effects" approach focuses on the possibility of a specific purpose being abandoned and, given that the CPO cannot operate in favour of a purpose that was not specified in the order; the acquiring authority would have to repeat the CPO process in order to protect the landowner's property rights. Such a doubling of efforts would be too costly and time consuming. On the one hand, it is understandable; therefore, that the acquiring authority should wish to keep the purpose broad but on the other hand, a proper process and review of the intended purpose would leave the landowner with the knowledge of exactly why his or her land is being acquired. In *In re the Health (Amendment) (No.2) Bill 2004,*[181] the Supreme Court held that where the State contends that legislation that delimits the individual's property rights in the name of the exigencies of the common good, an objective assessment is required to determine whether such restrictions are reasonably proportionate to the ends sought to be achieved. If the specific purpose is not known, then such an objective assessment cannot take place. "Development" or "giving effect to a development plan" may be argued to be unduly broad, and may also serve to dispossess the

[177] [1996] 2 IR 531 at 544.

[178] The High Court stated that "[t]his decision clearly shows (a) that a distinction is to be drawn between the purposes for which an authority may seek to acquire land and the means by which these purposes may be achieved and (b) that when an acquiring authority states that the purpose of the proposed acquisition is to carry out its general statutory powers it is not permissible to go behind the stated purpose in order to suggest that some other construction should be placed on its decisions" *Ibid* at 550. In *Clinton v An Bord Pleanála* [2005] IEHC 84, the High Court (Finnegan J) held that "It is clear that in section 213(2) and (4) of the 2000 Act and section 10 of the 1960 Act "purposes" refers to statutory purposes and not as is suggested by the applicant to a particular scheme of development intended to be pursued that is to means of achieving the statutory purpose. I can find no indication in the phrase 'particular purpose' in section 213(3) should be accorded any different meaning than statutory purpose and I am satisfied that the same refers to a particular statutory purpose. I am fortified in this view by the circumstances that section 213(3)(b) clearly distinguishes purposes and means." This was disputed by the Supreme Court, [2007] 4 IR 701 at 706, which held that "the alternative argument which I prefer, at least for the purposes of this case, is that because the property was required for the legitimate purpose of regeneration of the O'Connell Street area. The precise nature of this specific development was not required to be proved even if it be the case that in some other situations it might have to be done."

[179] [1992] 2 IR 503.

[180] Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31(1) DULJ 1.

[181] [2005] 1 IR 105.

landowner of any credible objection. It would potentially be easier to object to the specified problems that arise from specified developments than it is to object to the idea of development itself. A lack of specificity is likely to deny the landowner of any meaningful resistance to the interference.

9.10 It appears that the Oireachtas can enact legislation establishing an authority, and then give the authority powers an "almost unfettered freedom"[182] to acquire land for development purposes.[183] The functions of such a body can also include the requirement to develop a planning scheme.[184] Under section 143 of the 2000 Act, the Board, in performing its functions, is required to have regard to the policies and objectives of the government, any state authority, the Minister, planning authorities and any other body which is a public authority, and the functions of which may have a bearing on the issue. Section 143(1)(b) extends the scope of this provision to "the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State".[185] This is potentially important, because the recommendation to grant the CPO by the inspector could be made based on the acquiring authority's development plan or the acquiring authority could use the development plan as its purpose in making the CPO. This could be said to reflect a pre-determined preference for the acquiring authority over the individual landowner that could create a situation where the onus is on the landowner to prove that the CPO would not benefit the common good as opposed to the authority having to prove that it is. This shall be discussed below with regard to the *Clinton* case. The purpose provided can be that of fulfilling the legislation. This could be considered as creating a causal nexus, whereby the landowner may have no realistic chance of refuting the position of the Authority. In this way, the legislation acts as a CPO, and although it is debated and voted upon by publically elected officials, there is no consideration of specific CPOs concerned in its enactment as there would have been under the old 19th century system.

9.11 In *Clinton v An Bord Pleanála,*[186] An Bord Pleanála confirmed a CPO with the specified purpose of the order being "for development and to secure and facilitate the development of land in exercise of its powers".[187] A senior administrative officer of

[182] Walsh, "The Principles of Social Justice, The Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland" (2010) 32(1) DULJ 1. Walsh states that "once the relevant authority can afford to pay compensation, there appear to be very few circumstances in which it cannot acquire a person's property, as some kind of "regeneration" or "redevelopment" rationale can be articulated in very many cases to justify compulsory acquisition."

[183] In *Crosbie v Custom House Dock Development Authority & Ors* [1996] 2 IR 531, at 545, the High Court (Costello J) stated: "Here the Oireachtas, by enacting a law... has in effect concluded that the public good which is to be achieved by urban renewal requires the limitations on the objector's constitutionally protected rights. It is the law enacted by the Oireachtas which makes this determination, not the Minister carrying out an administrative function conferred on him by the law".

[184] In *Crosbie* [1996] 2 IR 531, at 544, the High Court (Costello J) also stated that the Authority can make a CPO before it has adopted a planning scheme.

[185] Section 143(1)(b) of the *Planning and Development Act 2000,* as inserted by section 26 of the *Planning and Development (Strategic Infrastructure) Act 2006.*

[186] *Clinton v An Bord Pleanala* [2005] IEHC 84, [2007] 2 ILRM 81.

[187] "I should mention in passing that one of the grounds of appeal is that the CPO itself merely mentioned "development purposes" whereas the confirming decision of An Bord Pleanála referred to 'facilitating the implementation of the development plan'. The learned trial judge did not accept that there was any substantial difference and I agree with that view. I would, however, state a strong preference for the slightly more elaborate statement contained in the confirming decision of An Bord Pleanála" *Ibid* at 87.

An Bord Pleanála stated in her affidavit that although the purpose was general, the proposed CPO was "necessitated by the council's objectives and policies as contained in the O'Connell Street integrated area development plan which in turn formed part of the Dublin City Development Plan and that in those circumstances, proof of a proposed specific development was not a prerequisite to the board confirming the CPO". This was confirmed by the Court, along with a finding that it is not the position of An Bord Pleanála to stipulate any purpose for which land is to be used but rather that it is the task of the local authority alone.[188] Incidentally, the Court noted that the reference to "purposes" in section 10(1)(a) of the *Local Government (No.2) Act 1960* is to include "purposes" referred to in section 213(2) of the 2000 Act.[189]

9.12 Before the Supreme Court, Clinton argued that the burden of proof at the oral hearing was such that he was required to justify the retention of his property as opposed to the authority justifying that the CPO would be for the common good. Secondly, he argued that the stated purpose of "development" was unacceptably broad. Clinton argued that, based on section 213(3)(a), the property could be acquired for future purposes by agreement only, and not compulsorily. The Court held that these submissions were unsound, as such sections enjoy a presumption of constitutionality; "[m]any compulsory purchase orders may involve the acquisition of a piece of land or a building to be used for a specific purpose. In that instance, the specific purpose would be itself the 'particular purpose'. It may be open to argument in such a case that a general purpose of development would not be sufficient".[190] However, that was not found to be the case in *Clinton*. In a similar regard to *Crosbie,* the means by which the purpose is realised does not have to be specified in the order. In the High Court (Finnegan P) held that the "particular purpose" in section 213(3)(a) was construed as a statutory purpose. However, the Supreme Court found that it preferred the argument that the regeneration of O'Connell Street was a sufficiently specific purpose.[191] Neither of these arguments however, considered why the need to specify a purpose is necessary. It is arguably important to acknowledge that a CPO is being confirmed in discharge of the acquiring authority's lawful powers to fulfil its statutory functions. However, if the balance of opposing interests is to be the test in the consideration of a CPO, specific plans are arguably required in order to ensure:

1. That no more land is taken than is necessary;
2. That the land is specifically suited;
3. That the common good is being served, and not just in the abstract sense; and
4. That the landowner can object to the nature of the project i.e. different plans and infrastructures will have different effects on the environment.

[188] *Ibid* at 88-89.
[189] Section 213(4) of the 2000 Act.
[190] *Clinton v An Bord Pleanala* [2007] 2 ILRM 81 at 93.
[191] *Ibid* at85.

CPOs for the benefit of private developers

9.13 The *State Authorities (Public Private Partnership Arrangements) Act 2002* (the 2002 Act) provides that certain State authorities[192] may enter an agreement with another State authority or with another person (a partner) for the performance of functions of the State authority.[193] These functions may include the design and construction of an asset together with the operation of services relating to it and the provision of finance for same.[194] If the agreement provides for the provision of services relating to an asset alone, it cannot be less than 5 years in duration.[195] Section 3(1)(d) of the 2002 Act provides for the transfer of the State authority's interest, or part of the interest to the partner or a nominee of the partner[196] by transfer, assignment, conveyance, grant of lease or license or otherwise.[197] The functions of the State authority may be transferred to the partner for the duration of the agreement if they are specified in the agreement.[198] These functions may be carried out in the partner's own name, subject to the general superintendence and control of the State authority concerned.[199] This provision has the potential to extend the power of compulsory acquisition to privately owned companies. This arguably has the potential to blur the lines of what is in the common good if private companies are able to profit from compulsorily acquired land. The transfer of functions could also be considered to be a cause for concern, and possibly unnecessary if the State authority retains its own powers and functions while working in tandem with the partner.

9.14 Public-Private Partnerships have the undeniable benefit of streamlining and providing financial infusions to economic infrastructural projects under the national development plan. In the Dáil debates on what became the 2002 Act, it was contended that the legislation would give better value for money compared to traditional procurement, by transferring risks from the public to the private sector.[200] It was also aimed at delivering improved efficiency in the adoption of whole life costing of services and innovation in the design, building and operation of assets.

[192] These include a Minister of the Government, a local authority, the Commissioners of Public Works in Ireland, the National Roads Authority, the Health Service Executive, a university within the meaning of *Universities Act 1997,* other than Trinity College and the University of Dublin, the Dublin Institute of Technology, a college within the meaning of section 2 of the *Regional Technical College Act 1992*, an education and training board, the Courts Service, a harbour authority within the meaning of the *Harbours Act 1946,* Sport Ireland, the National Treasury Management Agency, the National Development Finance Agency and the National Transport Authority. Under section 6(2) of the 2002 Act, if the State authority definition is to be expanded by adding an additional body or person, a draft of the order making such a proposal shall be laid before each House of the Oireachtas. Section 6(3) provides that if either House disapproves of the order within the subsequent 21 days, the order shall not be made.

[193] Section 3(1)(a) of the 2002 Act.

[194] *Ibid.*

[195] Section 3(1)(a)(iv) of the 2002 Act.

[196] If the transfer is to the partner's nominee, the State authority must get the consent of the appropriate Minister or, if the State authority is a Minister of the Government, the State authority must get the consent of the Minister for Public Expenditure and Reform.

[197] In the Dáil Debates on this Bill it was submitted that such a transfer would only be "for a defined period only" but that restriction does not appear in the Act whereas the transfer of functions is explicitly only for the duration of the agreement. Vol. 545, Dáil Eireann Debates, 27 November 2001, *State Authorities (Public Private Partnership) Bill 2001*: Second Stage.

[198] Section 4(1) of the 2002 Act.

[199] Section 4(2)(a) of the 2002 Act.

[200] Vol. 545, Dáil Eireann Debates, 27 November 2001, *State Authorities (Public Private Partnership) Bill 2001*: Second Stage.

During the same debates, the issue of compulsorily acquired land arose;[201] however, these concerns were not answered by the Minister of State at the Department of Finance, other than to discuss the CPO process itself in relation to farming land. While the 2002 Act came into effect in March 2002, section 5 of the 2002 operated with retrospective effect. It provides that every agreement which would have been enforceable had the Act been in operation will have effect and be taken always to have had effect.[202] Such developments should be subject to a heightened scrutiny, especially considering that such redevelopment will most likely target less affluent communities who may be less likely to effectively defend their interests through the political system[203] or financially, with regard to independent expert evaluations and court costs.

9.15 It has been noted that the constitutionality of compulsory acquisition for private redevelopment is somewhat less clear cut that in the US.[204] In *Central Dublin Development Association v Attorney General,*[205] the purpose of the CPO was described as for "redevelopment". The local authority entered into an arrangement with a development company whereby, the developer would lease the land from the authority, but profits would be divided between the authority and the developer. The High Court (Kenny J) rejected that this constituted an "unjust attack", as the local authority still benefitted from the arrangement and that private development was the most efficient way of regenerating the area. The Court also upheld the ability of the authority to sell or lease the land under any conditions. However, it has been argued that private developers are effectively being subsidised by the State's exercise of compulsory acquisition powers "in his or her favour, as he or she gets access to land that would not otherwise be available to him or her".[206]

Expert Evidence and Objective Bias

9.16 In the *Clinton* case, it should be noted that there was:

1. A report by the Dublin City planning officer, which certified that the acquisition of the particular area for development purposes was consistent with the city development plan and the proper planning and development of the area;
2. A certificate by the city's architect as to the site's suitability for development purposes;

[201] Deputy Paul McGrath questioned "what will happen to land which is taken from a farmer by compulsory purchase order? It will be given to a private company to make a profit. This is very different from the initial idea of compulsory purchase orders…has the Minister of State considered the possibility that the landowners should be given an opportunity of becoming shareholders in the company that will provide the money and construct the road?" Vol. 545, Dáil Eireann Debates, 27 November 2001, *State Authorities (Public Private Partnership) Bill 2001*: Second Stage.

[202] Section 5 of the 2002 Act.

[203] Walsh, "The Principles of Social Justice, The Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland" (2010) 32(1) DULJ 1.

[204] *Ibid*. In this article, Walsh contrasts the Irish case law (*Crosbie* and *Clinton*) with US developments (*Berman v Parker* 348 US 26 (1954) and *Kelo v City of New London* 545 US 469 (2005)).

[205] [1975] 2 IR 531.

[206] Walsh, "The Principles of Social Justice, The Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland" (2010) 32(1) DULJ 1.

3. A report dealing with water and drainage services;
4. A report by the project manager for the O'Connell Street integrated area plan certifying that the acquisition of the area was necessary for the purposes of development and for securing or facilitating the development of land by Dublin Corporation;
5. A report of the economic development officer relating to a demand for commercial and retail development in the area; and
6. A recommendation for compulsory acquisition by the executive manager.

Within the CPO, 4 reasons were given for the authority's wish to acquire the land. Firstly, the historical lack of development, secondly the derelict appearance of the area, thirdly the high levels of vacancy and under-use of the existing buildings, and finally, the general poor quality of the physical environment. In the Government's policy document, "*Accommodating Change – Measuring Success: Property Asset Management Delivery Plan*", it is stated that before acquiring an existing structure, an architect's report, a fire officer's report, and a mechanical, electrical and structural engineer's report should be obtained.[207] The process of seeking potential sites should be based on sound analysis and consideration of the location, cost and suitability.[208] Although this appears comprehensive, each report is produced by the acquiring authority or an entity employed by the authority.

9.17 The landowner, on the other hand, may not have the financial resources to carry out such a study. As noted above, without a specific purpose it would be difficult to even determine what assessments of the land are relevant. In *Nurendale Ltd (t/a Panda Waste Services) v Dublin City Council,*[209] the respondent Council essentially made an order (following a public consultation process) prohibiting the applicant, a private company, from collecting household waste in the Council's administrative area. In an expert report provided by the Council, it was stated that household waste collection by a private company, as opposed to the Council, would be harmful to environmental planning and would be detrimental to consumers. It was alleged that the report was manipulated from earlier drafts of the report, where specific facts that were damaging to the Council's position were obscured. The initial drafts provided to the Council contained comments written by the Council indicating their acceptability or not. Portions and words were deleted or reworded when they did not support the Council's position. There were also email references to meetings with the authors of the reports as well as notes from meetings, which indicated that the findings of the report were a foregone conclusion. The Court held that whether or not the City Managers were aware of this fact was immaterial, as a senior Council official was certainly aware of it. It found that "such massaging of reports, which were later, in their edited versions, released publicly, is a strong indicator, to me, of unacceptable influence in a process, supposedly carried out in the public interest, and further elucidates a high level of prejudgment in the decision to vary the [Waste Management

[207] Office of Public Works, *Accommodating Change – Measuring Success: Property Asset Management Delivery Plan* (June 2016), at 12.
[208] *Ibid* at 13.
[209] [2009] IEHC 588.

Plan]".[210] In *Reid v Industrial Development Agency,*[211] the chair of the IDA[212] was also a director of the firm that carried out the report on the suitability of the land, having assessed 5 different sites. However, according to the IDA, he had no involvement in the preparation of the report. He was however, involved in the decision to initiate CPO proceedings and to confirm the CPO. Based on this, the Supreme Court found grounds for objective bias.

9.18 Similar processes have, however, been given a wide margin of appreciation by the ECtHR. In *Zumtobel v Austria,*[213] the expropriation order was confirmed by the Office of the Provincial Government (the Office) which dismissed 2 requests by the applicant, one for full details of the planning procedure and the second for the appointment of an independent road traffic expert to assess whether the proposed road was necessary. The Administrative Court held that the applicant had failed to cast doubt on the official expert's report; therefore no alternative was necessary. The failure of the Office to engage with local authorities was also not considered sufficient to quash the order. The applicant claimed that the refusal of the Office to furnish him with documents and fact that the experts were employed by the Office violated Article 6. The Court held that the Administrative Court examined and rejected these complaints and as that Court was already held to be in line with Article 6, there was no need to examine the issue further.

Competing Interests of the Authority and Financial Necessity

9.19 An oppositional argument against using a specific purpose would be the large amount of work and preparation an authority would need to undertake in order to provide detailed plans, a timeline, planning permission and a budget for a CPO, which may not be subsequently approved by An Bord Pleanála. Planning standards should arguably require that in choosing land to acquire, an environmental impact assessment is carried out, including an assessment of the impact on the local population, who could benefit, how many homes would be impacted, and whether alternative suitable sites exist. If there is no assessment of suitable alternative sites, it could be argued that the property rights of the individual are disproportionately infringed upon. An increased workload and expenditure therefore becomes an issue of resources and it is clear from the judgment of the Supreme Court in *In re the Health (Amendment) (No.2) Bill 2004,*[214] that where a statutory provision interferes with the individual's right to property, and the State seeks to justify it by reference to the "common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an

[210] [2009] IEHC 588, at 461. See also Law Reform Commission, *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), Appendix B, at 461.

[211] [2015] 4 IR 494.

[212] Under the *Industrial Development Act 1986* "IDA" meant the Industrial Development Authority. Under the *Industrial Development Act 1993* the Authority's functions were then transferred to Forfás, a body comprising 2 agencies, Forbairt and the Industrial Development Agency. Under the *Industrial Development (Forfás Dissolution) Act 2014,* IDA now means the Industrial Development Agency (Ireland). For ease of reference, this Issues Paper refers to the IDA, except where required such as in the name of cases.

[213] Application No. 12235/86.

[214] [2005] 1 IR 105.

objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances".[215] Also, it is clear that such assessments would have to be performed when the acquiring authority is ready to develop the land. Ascertaining the level of suitability before the CPO is made rather than after is arguably of considerable benefit. It can be argued that the creation of land banks, which sit idle without funding or plans, is of little benefit and would also arguably be a burden on the acquiring authority in relation to maintenance and the prevention of adverse possession claims. The only apparent benefit for the acquiring authority may be that, as the date of valuation is the date of the notice to treat, and the general impetus of the housing market would suggest that market values will continue to rise, it could be considered to be in the authority's interest to acquire the land as early as possible, once it confirms the land is suitable for any purpose. However, as mentioned above,[216] it is well established that the financial interest of the State cannot be the sole justification for an interference with an individual's property rights.

"Self-realisation": should the landowner be allowed achieve the same purpose as a CPO?

9.20 In *Crosbie v Custom House Dock Development Authority,*[217] the authority's initial intention was to build a National Sports Centre in the area that included lands, owned by the plaintiff. When the CPO was confirmed by the Minister, it was stated that "during the public enquiry it became apparent that the first-named defendants did not really know at that stage what use if any they would make of the lands". The plaintiff wished to develop his land and build a science technology park in association with Trinity College Dublin, which he believed, would attract between 7 and 8 hundred high calibre jobs. Mr. Crosbie therefore began proceedings to quash the CPO, which ended the following year, when he agreed to sell his lands privately to the Authority in exchange for the withdrawal of all pending court proceedings. 2 years later, the Authority abandoned the plan to build the National Sports Centre and proposed alternative development plans.

9.21 When no progress had been made the following year (5 years after the CPO was confirmed), the plaintiff requested that the CPO order be reversed, as the underlying purpose had been abandoned. He also requested that the land be sold back to him and that section 9 of the *Urban Renewal Act 1986* be declared unconstitutional. Counsel for the Authority argued that the transfer of lands had been made through a voluntary conveyance and not a CPO, and this was confirmed by the Court.[218] Counsel also argued that despite the earlier correspondence between the authority and the

[215] *Ibid* at 206.
[216] In Issue 13 at paragraph 13.18.
[217] [1996] 2 IR 531.
[218] The Court held that: "the Minister when deciding whether or not to confirm a compulsory purchase order did not make a determination that the public good to be achieved by the confirmation of the compulsory purchase order should prevail over the plaintiff's property rights. There is therefore no basis for the suggestion that the statute is constitutionally defective because of its failure to provide for the re-conveyance of compulsorily acquired land in the circumstances suggested, because the Minister is not performing the function on which this claim is based" *Ibid* at 550.

landowner, letters by the Authority's secretary and the minutes of meetings of the authority described the purpose of the land to be the construction of a National Sports Centre. The order itself did not specify the particular building, only that the purpose was to implement a statutory power. They argued that the land being acquired would be suitable for redevelopment even if the National Sports Centre was not the end result. It was also confirmed that the decision to acquire the land was made before the decision to build a National Sports Centre.

9.22 The High Court (Costello J) stated that even though the applicant planned to develop his land into a Science Technology Park with a common good component, namely job creation, the local authority could decide that its public good was more suitable. The Court held that where the sole or principal purpose cannot be, or is not, brought to fruition; the local authority could not then proceed with another purpose that had not been properly determined through the CPO process. Thus, there would be no balance between private rights and public good. It further commented that a CPO that does not afford the landowner, from whom the land was acquired, the opportunity to re-acquire the land where the sole or principal purpose has been abandoned amounts to an excessive and disproportionate interference with his or her property rights and is an unjust attack upon same.[219] In *Clinton,* the applicant was the landowner of a site on Upper O'Connell Street in Dublin (on which no development had occurred for 20 years) for which he had received planning permission in 1998, which was due to expire in 2004 unless substantial works were carried out. The site was part of the City Council's area plan, and was earmarked for development. A number of years after the planning permission had been granted, a CPO was granted in respect of the land. The Council had no specific development planned, nor did it know whether the development would be undertaken by the Council or in conjunction with a private developer. Similar to *Crosbie*, reports of the Council stated that the applicant did not have the resources or necessary expertise in order to carry out the development he envisioned.[220] The Supreme Court found that this was not an unreasonable view given the evidence.[221] However, there was no dispute that, had the development plan been implemented, it would have fulfilled the requirements of the regeneration of Upper O'Connell Street.

9.23 By comparison, in Belgium, there is a right to self-realisation, which provides that a landowner has the right to carry out the plan of the local authority him or herself but will only have a set amount of time within which to do so.[222] However, this is confined to residential or commercial construction projects; public infrastructure works are

[219] [1996] 2 IR 531 at 546.

[220] "[T]he applicant had urged a number of justifications as to why he had been unable to procure the commencement of his development. These included the need to undertake significant preparatory works, the need to ensure that a correct tenant mix was achieved and a whole host of other reasons, including allegations against the second-named respondent in relation to the delay in undertaking the civil works. Mr Clinton was part of 'The Carlton Group' which was made up of him and three other property owners in the area however subsequently disbanded when the other property owners no longer wished to be involved in the project", *Ibid* at 90.

[221] *Ibid* at 86.

[222] Verbist, "Expropriation Law in Belgium", in Sluysmans, Verbist & Waring, *Expropriation Law in Europe,* (Nijmegen: De Auteurs, 2015) at 49.

not included.[223] This is an interesting concept in light of the High Court (Clarke J) decision in *Lord Ballyedmond v Commission for Energy Regulation,*[224] which followed *Ashford Castle Ltd v SIPTU,*[225] in finding that any individual who may, potentially, be adversely affected by the result of a decision made by an administrative body, must have "a reasonable chance to deal with any factor that might mitigate against its interest".[226] However, this could potentially be in conflict with the view expressed by the High Court (Hedigan J) in *Egan v An Bord Pleanála,*[227] where a decision to grant a CPO in respect of a derelict site was upheld; despite the applicant being able to bring the property to a non-derelict standard using only a nominal amount of money. The Court held that there was ample evidence to render the decision rational.

Undertaking as to Funding

9.24 In assessing the proportionality of the interference, it is arguably important that the acquiring authority can demonstrate that the land was chosen for a specific purpose, that it is for the public benefit and also, that funding is available. It could be argued that such a recommendation could be construed as micromanaging expenditure and, therefore, risks trespassing upon the separation of powers. The alternative may be that such a recommendation would not amount to micromanagement, as it would not dictate the amount of funding required, or how the Government should allocate its funds, but rather prevent a situation whereby land is compulsorily acquired and the landowner waits years to be compensated because there are no funds to adequately provide such compensation. This is especially so, when it is taken into consideration that the use of the land is significantly diminished in the interim period. Although the compulsory purchase of land is not to be considered as the sale of land, a procedure which takes land without immediately and sufficiently compensating the landowner would arguably be extremely inequitable. Such a system has the potential to lead to a position where the landowner is unable to mitigate his or her loss due to financial incapacity.

Planning permission before the CPO

9.25 In relation to planning permission, it is open to discussion as to whether there should be a requirement to obtain such permission, or alternatively, to obtain outline permission228 under section 36 of the 2000 Act. One consideration is that it may be preferable in order to ensure that such permission would not be subsequently refused, demonstrating that the land was acquired in error. Such an occurrence may be unlikely however, given that An Bord Pleanála is the confirming body for both a CPO and strategic development and any potential issues could be acknowledged at

[223] *Ibid* at50.
[224] [2006] IEHC 206.
[225] High Court 21 June 2006.
[226] [2006] IEHC 206 at paragraph 3.3.
[227] [2011] IEHC 44.
[228] Outline permission is permission that is granted in principle for the development of land but is subject to a subsequent detailed application for permission under section 34. It requires significantly less preparation for the application while providing an indication of whether or not the permission will be granted. However, section 36(3)(a) states that the full planning application must be made no more than three years after the outline permission is granted.

the confirmation stage of the CPO. Galligan and McGrath have noted that "insofar as it is necessary for the Board to consider whether the exercise of compulsory purchase powers is in accordance with the principle of proportionality, a holistic approach is required, taking into account planning considerations".[229] The existence of a requirement to obtain permission following the confirmation of a CPO may suggest that such permission is not inevitable. It also separates the acquisition of the land from the use of that land. Section 36(3)(a) provides that where outline permission has been granted by a planning authority, any subsequent application for permission must be made within the following 3 years or, within 5 years if specified by the planning authority.

9.26 The Supreme Court in *Clinton* confirmed the decision of the High Court, given that the purpose of regeneration was expressly permitted by the Oireachtas.[230] It stated that it could not have been envisioned that the Council would have specific plans as to how the regeneration would be carried out, given that the CPO process usually involves private developers in some form, and also due to the requirement to apply for planning permission. This is interesting to note given the decision of the Supreme Court in *Moran v Dublin Corporation,*[231] which found that the reason outline planning permission did not have to be applied for, before the making of the CPO, was the absence of any legislative provision expressly requiring the authority to do so and the fact that the legislation allowed for land to be acquired for a future purpose. Each finding appeared to rely on the other for justification without a greater assessment of whether this system is the least restrictive interference with the individual's property rights. The Court did note, however, that the compulsory acquisition of land for immediate purposes necessarily assumes that there is a "reasonable expectation" of planning permission being granted. Without this, the Court argued, the ownership of private property "might be displaced in circumstances which could not reasonably be said to come within 'the exigencies of the common good'".[232]

9.27 It could be argued that it is somewhat illogical to suggest that a lack of planning permission for immediate development could be unconstitutional, whereas creating land banks with no specific purpose, no assessment of specific suitability, no planning permission and no opportunity to object to specific developments exist is constitutionally sound. Similarly to *Clinton,* the Court in *Moran* relied on the existence of legislative provisions permitting land banks rather than assessing the constitutionality of the provisions themselves. A consideration of the Court in *Moran* that could be potentially open to question is the finding that the Minister will have ample powers under the 1966 Act and the *Local Government (Planning and Development) Act 1963* (since repealed and replaced by the *Planning and*

[229] Galligan & McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed. (Bloomsbury 2013) at 133.
[230] *Ibid.*
[231] [1973] 109 ILTR 56.
[232] *Ibid,* the Court continues to state that "any attempt to quantify the likelihood of development permission being granted in the future would be a fruitless exercise, in the absence of concrete information as to the nature and scope of the housing need that is expected to arise, and in the absence of other relevant factors that are undiscoverable because they lie hidden in the future". Therefore, it is difficult to reconcile the finding that an acquiring authority should have merely a reasonable expectation of planning permission being granted as opposed to planning permission being confirmed before the making of the CPO.

Development Act 2000) "to ensure that the use of the land for the purpose of satisfying a housing need will not fail for want of development permission".[233] This appears to suggest that the powers of the Minister or local authority should extend to the extent that planning permission requirements do not apply to them or their projects. There is potential for instances in which land acquired for a certain purpose is unsuitable due to flooding concerns, environmental issues or heritage protections unknown to the authority. If the local authorities wish to bypass these issues and no individual has sufficient interest or financial resources to solicit experts in the area to assess for such issues, a pattern of unaccountability and unfettered power could potentially emerge.

Consideration of Alternative Sites

9.28 In *Lord Ballyedmond v Commission for Energy Regulation,*[234] the respondent Commission wished to lay a gas pipeline through the applicant's land. The applicant argued that another route would be equally suitable. The Commission then proposed an alternative route as a compromise which was also rejected by the applicant. An inspector was then assigned to determine the best route. The Commission ordered an ecological, archaeological and engineering survey of the route proposed by the applicant. This survey showed that this route would affect other landowners and would also present engineering problems of crossing drainage ditches, trench excavations, plant movement and other similar difficulties. The inspector determined that these difficulties could be overcome, but with some difficulty and cost. A pipeline differs from an acquisition of a building or the space above the land. Once the pipeline had been laid, and the ground resorted, there would only be minimal interference in respect of future development on agriculturally zoned land. The applicant did not have any objection to the route proposed other than that it would have a more severe effect, while the work was ongoing during the initial period, on the enjoyment of his house. The High Court held that it is always open to a landowner to suggest different lands which may meet the requirements on which the CPO is based. However, it would be unreasonable to suggest that simply shifting the burden onto a third party would solve the issue without objective reasons for such a shift.[235] The Court accepted that the route suggested by the applicant was 25% longer than that suggested by the Commission and undoubtedly more expensive. It held that the Commission did not offer a monetary value of the extra cost, nor was it required to.[236] Placing particular reliance on the fact that alternative landowners would have to suffer on the basis of the proposed change in route, and the significant adverse cost implications, the Court held that the Commission did not act disproportionately or unreasonably. The Commission had made significant efforts to assess the alternative route, had considered third party landowners and made the most informed decision it could have. Where, in this circumstance, there are only a finite amount of options for where such a pipeline could be laid down and there are no extenuating

[233] [1973] 109 ILTR 56.
[234] [2006] IEHC 206.
[235] *Ibid* at paragraph 6.5.
[236] *Ibid* at paragraph 6.9.

circumstances that would make the particular landowner more susceptible to an individual and excessive hardship, then it could be argued that such an acquisition should be considered proportionate.

9.29 The Court in *Clinton* held that it was only necessary for the council to demonstrate that a CPO was "desirable" in the public interest to achieve the purpose. This was despite the fact that the word "desirable" was removed during the Oireachtas debates on what became the *Planning and Development Act 2000* following advice from the Attorney General.[237] The Court found that such a requirement would defeat the purpose of the power conferred by the section.[238] It stated that it did not find *Crosbie* to be a decision of general application, nor indeed a particularly helpful authority in this case. The Court is undoubtedly correct in the same regard; the question before it was whether An Bord Pleanála had followed the process in light of the legislation. In summation, the Court dismissed the appeal in so far as it related to the matters that did not relate to the Constitution and stated that if counsel wished to pursue a Constitutional argument, it would discuss the appropriate procedures. The question of whether sections 212 and 213 of the 2000 Act were unconstitutional was never posed, as the applicant did not proceed further.

9.30 From the *Clinton* case, it appears that the suitability of the area for development was assessed after the location had been chosen, rather than being chosen from a number of competing areas. A similar argument was made in *Reid v Industrial Development Agency,*[239] in which the appellant argued that the IDA contact with his family[240] before the CPO was made proved that it had determined that the lands were to be acquired before it had any technical knowledge of its suitability; therefore, the report was an exercise in *ex post facto* justification. The IDA submitted that there had been a purpose, that of "industrial development" and that the case law, such as *Clinton*, had permitted the lack of specificity. This was despite the fact that the land was zoned as agricultural and couldn't be used for industrial development at that time and also, according to the appellant, the second location assessed did not have the same zoning issues as his land.

[237] Vol. 161, Seanad Eireann Debates, 24 November 1999, *Planning and Development Bill 1999*: Committee Stage (Resumed), No. 5. Government Amendment No. 245: "Ministers do not generally admit to being somewhat embarrassed about moving an amendment. This is a slight cause for embarrassment because after the Houses completed consideration of the recent Planning Bill, the Office of the Attorney General advised that, because compulsory acquisition is an interference in the constitutional rights to property, it should only be legislated for where necessary. The desirability of acquiring a structure for its protection is not a sufficiently objective criterion on which to base this interference in property rights. The Office of the Attorney General suggested that the words "or desirable", which had been proposed as an Opposition amendment and which I accepted in a slightly different form, as a reason to make a compulsory purchase order to acquire a protected structure, should be removed. This amendment deletes the offending words".

[238] *Clinton v An Bord Pleanala* [2007] 2 ILRM 81 at 93 and 94.

[239] [2015] 4 IR 494.

[240] In December 2011, the IDA contacted the applicant's mother expressing genuine interest in purchasing the land. Following two meetings with the applicant in which he informed the IDA that he had no interest in selling the land, the IDA then sent a letter stating that if the applicant was not willing to sell the land, it would have "to consider" initiating proceedings to CPO the land. In March 2012, the IDA served notice of its intention to CPO the land.

9.31 In *Reid,* the CPO was quashed due to the lack of immediacy required. Section 16[241] of the *Industrial Development Act 1986* (the 1986 Act) which permitted the compulsory acquisition of land by the IDA differs from section 213(3) of the 2000 Act in that it does not contain a provision permitting compulsory acquisition for a future purpose. The IDA's primary function is to secure foreign direct investment through establishing, developing and attracting industrial undertakings into, and within, the State. The land in question was 72 acres of farmland, which was zoned primarily for agricultural use and had been occupied and owned by the applicant and his family since 1904. The family farmhouse was a protected structure dating back to 1760. There was an extensive Information and Communications Technology facility a short distance away. The High Court (Hedigan J) favoured a broad approach to section 16, finding that such an interpretation was necessary to allow the IDA to successfully compete in the international marketplace and attract industrial enterprise to Ireland.

9.32 The Supreme Court found that, as one of the established principles borne out by the case law on CPOs, the impairment of the individual's rights must not exceed what is necessary to attain the legitimate object sought to be pursued.[242] The interference must be the least possible and must be consistent with the advancement of the authorised aim which underlines the power.[243] It held that section 213(3) deals with 2 separate issues, namely the presence or absence of a "particular purpose" and the acquisition of land for future use. The Court held that, in conferring such powers on local authorities, it facilitated the "orderly functioning" of such authorities whereas "in denying such a power where land banking is the sole purpose, it is reflecting due respect for a landowner's property rights".[244] It held that the Oireachtas must have had a reason for inserting section 213(3) into the 2000 Act. In the absence of a similar provision in the 1986 Act, the Court held that there was no power conferred on the IDA to acquire land compulsorily for future use and thus held that the CPO in question was made *ultra vires*.

Difficulties in Objecting

9.33 The Court in *Clinton* also stated that if the local authority had to provide a specific purpose as to a specific development, then there would be very little that the Council would have to prove on a *prima facie* basis. It held that there was nothing in the evidence or the inspector's report to justify the complaint that the onus was in any way reversed. It further stated that the inquiry would have been taken up with the objections of the appellant. This may be the case; however, this may be because a more specific purpose would have more specific opposition. When the purpose is

[241] This section provides that the IDA can acquire land compulsorily for the purpose of providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking. Section 16(1)(h) provides that, in order to achieve such acquisition, the IDA may do any act or thing which may be necessary if it considers that industrial development will or is likely to occur as a result and is satisfied that the undertaking conforms or ill conform to the criteria set out in sections 21(3), (4) and 25(2).

[242] It held at paragraph 60 that "the assessment of due compliance must be case specific. This means that an individual evaluation of the circumstances surrounding each exercise of compulsory power must be undertaken as part of this assessment."

[243] *Ibid* at 44.

[244] *Ibid* at 51.

general and unspecific, there are arguably very few potential arguments against development itself. Development itself only means an event constituting a new stage in a changing situation. In reality, the authority may have a vague idea of future plans, but in order to comply with this stated purpose in the CPO, it would merely need to change any aspect of the land in order to be compliant with the proposed purpose. This is perhaps a low standard to enforce any safeguarding of the individual's property rights. The current process does not appear to afford the landowner a substantial opportunity to refute the order.

Lack of Purpose and Compensation

9.34 Galligan and McGrath also note a significant issue regarding a lack of specified purpose and the assessment of compensation. If the purpose is unknown, there will be difficulty in applying the *Pointe Gourde*[245] principle, which states that no account shall be taken of the underlying scheme in determining compensation.[246] Aside from that, there could also potentially be an issue with zoning. If the CPO is made in respect of agricultural land that is subsequently used for residential purposes, the vague purpose could have the potential to assist the acquiring authorities in driving down the value of the land.[247]

Independent Recommendations

9.35 In 2013, Seamus Woulfe SC was appointed to conduct an independent report on a CPO made by Wicklow County Council in Charlesland, County Wicklow. This CPO sought to create a land bank intended for social and affordable housing purposes. The lands were first identified by the Economic Development Executive of the Council in November 2003. In August 2004, the Senior Engineer of the Housing and Corporate Estate wrote a report (which comprised of the principal element of any site selection carried out at that time), stating that the site had been simply identified as a potential site for purchase "in the most general way".[248] The engineer's report made no issue of potential flooding on the site. The Senior Planner then made another report which found that the acquisition of the subject lands were in conformity with the Wicklow County Development Plan 2004-2010, the 1999 Local Area Plan and the proper planning and sustainable development of the area. Mr Woulfe noted that this report was very bare, in that there was a lack of any supporting detail.[249] Once the CPO was made, the occupier of the lands submitted a written objection, on the grounds that the entire river valley in which the field is situated, was flooded a year and a half previous to the making of the CPO. His nephew subsequently appeared as a witness

[245] Discussed in detail in Issue 16 below, at paragraph 16.62.

[246] Galligan & McGrath, "Judicial Review of the Exercise of Compulsory Purchase Powers – Part Two" (2013) 20(4) IPEL 156 at 157.

[247] The then Minister for the Environment and Local Government, during the debates on the *Planning and Development Bill 1999* (enacted as the 2000 Act), argued that "the law on CPOs is carefully crafted, and one must state why the compulsory purchase of property is necessary. A local authority would have to state it was for housing purposes and suddenly a piece of agricultural land becomes development land, one will still pay development prices". Select Committee on Environment and Local Government Debate, 17 May 2000, *Planning and Development Bill, 1999*, Seanad: Committee Stage.

Woulfe, *Report of the Independent Review of the Compulsory Acquisition of Land at Charlesland, County Wicklow, by Wicklow County Council*, (8th February 2013), at 16.

[249] *Ibid* at 17.

at the oral hearing on his behalf, reiterating his concerns. The Council responded stating that the flooding issue had been investigated by a firm of engineering consultants who simply recommended that the stream channel should be upgraded to cater for a storm and that floor levels should be built at a minimum of 1 metre above the design top water level.[250] Evidence was given of an alternative site of approximately 7 hectares left in the ownership of the Council which could accommodate around 160 units. Following the oral hearing, the inspector noted that this land would be severed by the construction of a new road and being located next to businesses uses would be more suitable for a hotel.

9.36 The occupier's nephew submitted an objection to the effect that the land beside his uncle's field, of about 3 acres, had recently been bought by one of the developers involved in a nearby development. He referred to access issues, stating that this land might be more suitable than his uncle's land. He then queried whether the Council had considered purchasing this land or whether the Council had considered swapping his uncle's land for the developer's land. As Mr Woulfe notes, there was no evidence of such a plan and this appeared to be a question rather than an accusation.[251] The law agent for the Council stated that this land wasn't suitable because it had access problems via a church property and that the land is question was "reasonably" suited for housing.[252] The inspector agreed with this assessment in her report. Solicitors on behalf of the owner of the land, who had been made a ward of court due to his dementia, withdrew the owner's complaint.

9.37 In her report, the inspector noted that she was satisfied that the flooding could indeed occur in the lower levels of the land but that detailed flood prevention measures could be introduced to counter this issue. The CPO was therefore approved without modifications given that "the objections could not be sustained having regard to [the necessity of the purpose]".[253] In 2011, during the arbitration, the Council's second valuer gave evidence that the Council informed him in 2010 that one-third of the land was below the flood level. In his report, Mr Woulfe stated that the assumption that there were no adverse ground considerations such as flooding was clearly incorrect.[254] He also notes however, that the initial report did outline potential flooding issues and that the Council believed that any risk of flooding could be met through small upgrades.[255] Despite the evidence of the second valuer, he found that the potential for flooding was overstated and did not suggest serious flood plain difficulties. In his concluding recommendations however, he stated that "it seems to be that the site selection procedure was somewhat bare and inadequate" yet accepted that reports of site suitability may be made retrospectively considering the CPO was made before applying to the Department's Social Housing Investment

[250] Woulfe, *Report of the Independent Review of the Compulsory Acquisition of Land at Charlesland, County Wicklow, by Wicklow County Council*, (8th February 2013), at 20.
[251] *Ibid* at74.
[252] *Ibid* at25-26.
[253] *Ibid* at28.
[254] *Ibid* at53.
[255] *Ibid* at59.

Programme for funding. It is not clear whether approval of a funding application is contingent on a CPO being confirmed or whether that is simply the normal operation. He did however; recommend that "consideration be given to putting in place a more comprehensive site selection procedure".[256] More generally, he noted that the "multiplicity of different applications and different decision makers is a recipe for overlap and duplication".[257]

[256] Woulfe, *Report of the Independent Review of the Compulsory Acquisition of Land at Charlesland, County Wicklow, by Wicklow County Council*, (8th February 2013), at 76.
[257] *Ibid* at77.

QUESTIONS FOR ISSUE 9

9(a) Do you consider that it should be possible for land to be acquired as land banks for future purposes?

9(b) Do you consider that the current system, whereby no specific plans, funding or planning permission are approved before a CPO is made, should continue?

9(c) Do you consider that expert reports should be obtained by An Bord Pleanála in addition to, or instead of, those obtained by the acquiring authority?

9(d) Do you consider that there should be a statutory right to "self-realisation" whereby the landowners would be given the opportunity to achieve the aim of the compulsory acquisition themselves before an acquisition by an acquiring authority?

9(e) Do you consider that the acquiring authority should be required to show evidence of assessments of suitability carried out on alternative sites?

Please type your comments (if any)

ISSUE 10

STANDING TO OBJECT, GROUNDS FOR OBJECTION, AND THE TIME LIMIT TO OBJECT

Power of local authority to confirm a CPO without permission of An Bord Pleanála

10.01 Under section 217(3) of the 2000 Act, where a local authority complies with the notification provisions under paragraph 4 of the Third Schedule of the 1966 Act, it must send the CPO for confirmation to An Bord Pleanála within 6 weeks. There was no time limit for the sending of the CPO under the 1966 Act. This is subject to section 216, which provides the power for local authorities to confirm its own CPO in instances where:

1. No objections are received;
2. The objections received are subsequently withdrawn; or
3. The objections raised can be dealt with by the property arbitrator who deals with compensation disputes.

10.02 However, this power does not apply to a scheme under section 49 of the *Roads Act 1993*, a proposed road development under section 51 of that Act, a development under section 175 of that Act, or a compulsory acquisition under the *Derelict Sites Act 1990.*

Oral Hearing

10.03 If there are any objections to the proposed CPO, An Bord Pleanála may, "at its absolute discretion", hold an oral hearing.[258] This may be in contradiction with Article 6 of the ECHR (which will be expanded upon in Issues 12 and 17), which has been used by the ECtHR to find an entitlement to an oral hearing. In *Galvin v Chief Appeals Officer,*[259] it was held that there are "no hard and fast rules" in deciding whether to grant an oral hearing. The decision to grant such a hearing must be assessed in light of the nature of the inquiry being undertaken by the decision-maker, the rules under

[258] Section 218 of the 2000 Act.
[259] [1997] 3 IR 240.

which the decision-maker is acting, and the subject matter under discussion. Account should also be taken as to whether an oral hearing was requested.[260]

10.04 Objections will only be reviewed where the objector is a person whose land is subject to the compulsory acquisition.[261] In *Crosbie,*[262] it was found that the holding of a public hearing is what balances the competing rights, by providing the landowners the chance to object and to be heard.[263] The governing provisions of oral hearings are contained in sections 134, 143 and 146 of the 2000 Act. The oral hearing was previously a public enquiry, and this still exists under the Local Government Acts of 1941, 1946, 1955 and 1991. However, as Butler notes, the differences between the 2 systems are purely academic.[264] Section 218(3) provides that a reference to a public inquiry under section 10 of the 1960 Act, section 78 of the 1966 Act and Part IV of the *Roads Act 1993* shall be construed as a reference to an oral hearing. Section 76(5)(2) of the Third Schedule of the 1966 Act provides that An Bord Pleanála shall not confirm the CPO when there has been an objection, without a public local inquiry. At a public inquiry, there was an onus on the acquiring authority to prove that statutory procedures had been complied with. This is no longer required by An Bord Pleanála at an oral hearing. Furthermore, the requirement that the Minister is represented at the public hearing does not apply to oral hearings.

10.05 The following are the most common examples of objection:

1. The land is not being acquired for the purpose of the statutory provision under which the scheme is purportedly made;
2. The acquiring authority has omitted an essential step or proof; or
3. The acquisition would be a disproportionate interference with the owner's property rights.

Instances in which an oral hearing may not be required

10.06 In *O'Callaghan v Commissioners of Public Works in Ireland,*[265] the plaintiff was issued with a preservation order over Drumanagh Fort, which was situated on his land. When he bought the land, he was informed that he could not carry out any excavation or reclamation without providing notice to the defendants by virtue of the provisions of the National Monuments Acts. The plaintiff subsequently engaged an agricultural contractor to commence ploughing in the fort without giving such notice. He argued

[260] *Ibid* at 251.

[261] Section 76(5)(2) and Schedule 3 of the 1966 Act provides that the Minister shall not confirm a compulsory purchase order in so far as it relates to any land in respect of which an objection is duly made by any of the persons upon whom notices of the making of the order are required to be served until he has caused to be held a public local inquiry into such objection and until he has considered such objection and the report of the person who held the inquiry.

[262] *Crosbie v Custom House Dock Development Authority* [1996] 2 IR 531.

[263] *Ibid* at 546: "A public inquiry of the type referred to... above is required to enable the balance between the private property rights of the individual concerned and the public good to be considered. The decision as to whether the relevant lands are to be required is made on foot of the evidence and argument addressed at the said enquiry. Where a compulsory purchase order is confirmed by the Minister on foot of such enquiry, what is decided is that, on the basis of that case, the balance favours the public good".

[264] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 278.

[265] [1985] ILRM 364.

that he had only been informed that such notice had to be given in relation to the earthworks at the base of the headland. Considerable damage was done to the interior of the fort and to the outer banks, causing the Commission to make a preservation order. The plaintiff argued that the Commission had failed to act judicially by making the order without affording him notice, the chance to object or to make representations at an oral hearing. They had also failed to consider that the monument could be compulsorily acquired from the plaintiff with compensation. The Supreme Court found no substance in these objections given the emergent situation the Commissioners found themselves in, due to the plaintiff's defiance of his legal obligations. Nor were they under any obligation to consider compulsory acquisition as the plaintiff's address was unknown at that time. It also found that the preservation order could be revoked; therefore, it was open to the Commissioners to consider, by way of review or appeal, any objections or representations. Therefore, the Court found no breach of the requirements of natural justice.

Public Participation and EIA Directive

10.07 The EIA Directive, Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended and later consolidated as Directive 2011/92/EU) requires persons seeking to develop a project that is likely to have a significant effect on the environment, including on human health, to submit to a relevant public authority an Environmental Impact Statement (EIS). The relevant public authority must then carry out an independent Environmental Impact Assessment (EIA) of the EIS that was submitted to determine whether the EIS complies with the EIA Directive. The EIA Directive was amended by Directive 2003/35/EC, known as the Directive on Public Participation, and which in turn derived from the Aarhus Convention, the 1998 UNECE Convention on Public Participation and Access to Justice on Environmental Matters. As amended by the 2013 Directive, the EIA Directive therefore requires that an EIA project must facilitate public participation prior to any decision being made to approve such a project. In *Grace v An Bord Pleanála,*[266] the High Court (Fullam J) held that the EIA Directive thus provides that:

1. There must be effective public participation and consultation with authorities likely to be concerned by a development, in the decision-making process;
2. Access is conditional on members of the public concerned demonstrating (a) sufficient interest or (b) maintaining the impairment of a right. Such conditions should not be so restrictive as to render the remedy ineffective;
3. Failure to participate in the decision-making process should not, of itself, be determinative of the issue of *locus standi*;
4. 'Wide access to justice' does not mean 'open house';

[266] [2015] IEHC 593.

5. A person who seeks to raise an issue at the review stage that he could have raised during the decision-making process must provide a cogent explanation for his previous non-participation;

6. The applicant must show that the issue proposed to be raised at judicial review could not have been advanced prior to the making of the decision impugned; and

7. The applicant must show that the interest concerned is personal to him and is not vicarious or general and it must be shown that such an interest is adversely affected or in danger of being so affected.

Objections based on personal hardship

10.08 Objections based on emotion or sentimentality (or pleas *ad misericordiam)* will not succeed. However, in *In re the Health (Amendment) (No.2) Bill 2004,*[267] the Supreme Court held that the property of "modest" persons should be deserving of particular protection, "since any abridgment of the rights of such persons will normally be proportionately more severe in its effects".[268] It would be questionable whether financial need or vulnerability should be treated significantly different to specific emotional hardship that would occur if the individual's land was compulsory acquired. In *In re the Planning and Development Bill 1999,*[269] a housing scheme that favoured "eligible persons" who applied for social housing was upheld. The persons eligible included young persons needing institutional care or family accommodation, those in need of accommodation for medical or compassionate reasons, the elderly and people with disabilities. This housing was being provided for at the perceived expense of the housing developer, who would have to transfer up to 20% of the land he or she acquired for such a development. The financial circumstances of the developer were not taken into consideration by the planning authority in determining what percentage should be acquired. Relying on the Court's decision in *In re the Employment Equality Bill 1996,*[270] it was argued that these developers could not be held responsible for the housing crisis and that it was the fault of the central government and local authorities who failed to provide affordable housing and increase wages to keep pace with the inflation in property prices. The Court held that the fact that a particular planning scheme may result in the conferring of benefits on some categories of persons seen by the Oireachtas as being in particular need of assistance can be said to be a form of unequal treatment. However, where classifications made by the Oireachtas for a "legitimate legislative purpose, are relevant to that purpose and treat each class fairly, they are not constitutionally

[267] [2005] IESC 7.
[268] *Ibid* at 202.
[269] [2000] 2 IR 321.
[270] [1997] 2 IR 321. In this case it was held that a Bill would be found unconstitutional if it sought to transfer the burden of achieving its objective to a particular section of the community in an unfair and discriminatory manner.

invalid".[271] This may potentially provide an avenue for wider protections for certain groups from the pre-selection of sites for CPOs.

10.09 Although not endorsed by the Irish courts, despite a brief mention in *Meath County Council v Murray,*[272], the decision of the UK House of Lords in *South Buckinghamshire District Council v Porter,*[273] provides strong support for consideration of personal hardship in expropriation (compulsory acquisition) cases. The South Buckinghamshire case concerned the removal of members of the travelling community from halting sites where they were unlawfully situated. A significant aspect of this case is that the respondents had no alternative housing due to the prohibitive nature of the legislation. There was also a strong perception that the planning system was systematically abused.[274] One of the respondents, Mr Berry, had a family of 6 children and had a history of cardiac illness. He was refused planning permission to stay and subsequently moved to another site where he and his family were subjected to violence by the other residents. Mrs Porter, another one of the respondents, had lived with her partner in a caravan on the site since 1985 and had been denied planning permission 4 times. She had chronic ill-health and was, therefore, permitted to remain. She had chronic asthma, severe generalised osteo-arthritis and chronic urinary tract infections. Her mobility was poor and she was taking medication for depression. Her general practitioner gave evidence that moving from the site would be detrimental to her health, which had worsened over the previous few years. In upholding the judgment of the English Court of Appeal, the UK House of Lords held that questions of family health and education are inevitably relevant, as are the countervailing considerations such as the need to enforce planning control in the general interest. [275] It further held that proportionality requires not only "that the injunction be appropriate and necessary for the attainment of the public interest objective sought… but also that it does not impose an excessive burden on the individual whose private interests… are at stake".[276] Specifically, Lord Clyde held that planning authorities should consider in particular the "human factor"[277] citing views to the same effect of Lord Scarman in *Westminster City Council v Great Portland Estates Plc.*[278]

10.10 In the ECtHR case *Yordanova v Bulgaria,*[279] the applicants were of Roma origin and were occupying state-owned land, upon which they built homes in the 1960s, without plumbing or sewage. Most of the applicants lived in their houses with their families, which included their children and grandchildren. According to the applicants, due to their association with the Roma community, they had difficulty regularising the buildings they constructed. In 2005, the State and municipal authorities sought to

[271] *Ibid* at 357.
[272] *Meath County Council v Murray and Murray* [2017] IESC 25.
[273] [2003] 2 AC 558.
[274] *Ibid* at 45.
[275] *Ibid* at 38.
[276] *Ibid* at 41.
[277] *Ibid* at 69.
[278] [1985] AC 661.
[279] Application No. 25446/06.

reclaim the land and evict the applicants, having enacted legislation in 1996 that would permit rights of adverse possession following 10 years occupation. The district mayor gave the applicants 7 days to leave their homes, failing which they would be forcibly removed by police. Through a series of appeals and political pressure, the eviction never came to pass. The residents had not registered as persons in need of housing, and the municipality could not give them priority over other people who had been on the waiting list for years. Therefore, like in *South Buckinghamshire,*[280] the applicants had no alternative housing but this was irrelevant to the authority. When the domestic court insisted that the eviction could not proceed without alternative housing being available, the District Mayor indicated that there was some housing available, but there was no information concerning the unification of families.

10.11 The applicants, in claiming a violation of their right to a home under Article 8 of the ECHR, argued that the authorities never considered the applicants personal circumstances, having never consulted them before issuing a removal order and never considered proportionality, even in theory.[281] The relevant question was whether the authorities would order the collective eviction of a non-Roma community of 200 persons, including children, without compensation or alternative shelter.[282] The Government argued that the occupation was always unlawful and the applicants could not have had any reasonable expectation of staying indefinitely. It argued that had the Bulgarian authorities ignored the safety and sanitary risks that the applicant's settlement created, they would have failed to discharge their positive obligation to protect life and health. This was even though the applicants had been left alone for over 40 years until a right to adverse possession would have arisen.

10.12 While finding that the Government sought to achieve a legitimate aim (putting an end to unlawful occupation) and had done so in a proportionate manner, the ECtHR held that such interference had not responded to a pressing social need and therefore, the enforcement of the applicant's eviction would constitute a violation of Article 8. In doing so, the Court held that "since the loss of one's home is a most extreme form of interference with the right under Article 8 to respect one's home, any person at risk of an interference of this magnitude should, in principle, be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8".[283] It also held that in the absence of proof that alternative methods of dealing with the pursed aim (in this instance, countering health and sanitary considerations) had been studied seriously; the supposed solution is weakened and cannot in itself justify the removal order.[284]

10.13 It should be noted that the separation of families was not specifically dealt with in the *Yordanova* case, unlike the Irish case of *Meath County Council v Murray.*[285] This case involved a family with 3 children who had sought planning permission to build a

[280] [2003] 2 AC 558.
[281] *Ibid* at 88.
[282] *Ibid* at 90.
[283] *Ibid* at 118.
[284] *Ibid* at 124.
[285] [2017] IESC 25.

home; however, once they were refused, they built a house twice the size of the originally proposed structure. The Council sought its removal 3 months later under section 160 of the *Planning and the Development Act 2000*. The Supreme Court referred to its decision in *Morris v Garvey*[286] in which it was held that there were some exceptional circumstances in which a section 160 application may be denied. These included gross or disproportionate hardship. It also considered that it would be relevant to consider whether the demolition of a structure would affect third parties beyond those that caused the unauthorised structure to be erected i.e. employees.

10.14 The Court in *Murray* held that in the instance of section 160 applications, the public interest will be ever present on the enforcement side,[287] similar in nature to a CPO. It will, it held, always exist and most likely will "stand first in the queue for consideration". It also laid out the factors to be considered when considering a section 160 application. These included: the severity of the breach, the conduct of the infringer, the public interest and the personal circumstances of the respondent.[288] The weight attributed to each will depend on the individual circumstances of the case. The Court acknowledged that the demolition of their family home would cause enormous hardship to the defendants, especially considering the first respondent was a victim of the economic crisis and could not find work and their 3 children went to school in the area. However, the High Court (Edwards J) held that they had "sought to drive a coach and four through the planning laws and that cannot be permitted no matter how frustrated they may have felt".[289] This was upheld in the Supreme Court, which, while mindful of the hardship, could not disregard the flagrant breach of the planning laws.

10.15 In *Reid v Industrial Development Agency,*[290] the applicant referenced Articles 3 and 8 of the ECHR which, he claimed, should entitle him to have the proportionality of the decision by An Bord Pleanála, which involved the confiscation of his family home, determined by an independent body or tribunal. The High Court (Hedigan J) held that as there was no evidence to suggest that the decision to CPO the applicant's land was unlawful, arbitrary, unfair, disproportionate or based on irrational considerations, this claim should be rejected. This issue was not considered in the Supreme Court and no increased significance was attached to the fact that the property was a family home.

10.16 An issue that arises is whether varying standards should apply depending on the landowner and any hardship that may exist. A lower standard, which could be applied in connection with acquiring the land of landowners or businesses without any particular financial or emotional ties to the land, could be that of "specially suited", that is, more useful than another plot of land in some specific way. A higher standard, "specifically suited", could be applied in the case where a family home was in issue

[286] [1983] IR 319.
[287] [2017] IESC 25 at paragraph 89.
[288] *Ibid* at 90.
[289] [2010] IEHC 254, at paragraph 135.
[290] [2015] 4 IR 494. This case is discussed in further detail below in the Issues Paper. It involved section 16 of the *Industrial Development Act 1986* and the Court found that it did not permit the IDA to create land banks.

or where relevant individual circumstances might be taken into account, such as the requirement of nearby medical facilities, a particular educational institution, or the close proximity to remaining familial connections. Under such a proposed higher standard, it would have to be established by an acquiring authority that, having taken account of similar land in the area, the particular plot of land contains a specific benefit that is required for the development. Alternatively, An Bord Pleanála could be conferred with discretion to allow it to have regard to such individual issues.

Third Party Objectors

10.17 Another issue that arises is the potential for third parties, such as neighbours, to make an objection to a CPO. It could be argued that this is not necessary on the ground that it might open the floodgates on an issue that is essentially about the acquiring of land as opposed to the purpose for which the land will subsequently be used. However, it could be considered important to ascertain any potential deficiencies unknown to the acquiring authority before the land is compulsorily acquired. The question of whether a third party would be better placed to alert the acquiring authority than the landowner is open to discussion. Any development made under the Seventh Schedule of the 2000 Act is considered to be strategic infrastructure and alternate provisions, discussed below, apply to such developments in contrast to general planning permission applications. Such developments would include industrial installations, oil pipelines, transport terminals, airports, harbours or waste disposals. Strategic infrastructure development explicitly includes any compulsorily acquired land referred to in sections 214, 215A, 215B or 215C which relate to developments such as are laid out in section 2(1) of the 2000 Act.[291] These would include road development, railway works and strategic gas infrastructure.

10.18 Under section 37A of the 2000 Act, any permission for strategic infrastructure must be made directly to An Bord Pleanála and not to a planning authority (that is, the relevant city council or county council). An Environmental Impact Statement (EIS) must be submitted and an Environmental Impact Assessment (EIA) carried out under the EU EIA Directive,[292] unlike in an application for a CPO approval where an EIS and EIA are optional.[293] Before a person can apply to the Board for permission for strategic infrastructure, he or she must publish notice of the proposal and the location where it, along with the EIS, can be viewed by the public. The notice must also invite the making of submissions and observations to the Board relating to the implications of the proposed development for proper planning and sustainable

[291] These include: (a) any proposed development in respect of which a notice has been served under section 37B(4)(a); (b) any proposed development by a local authority referred to in section 175(1) or 226(6); (c) any proposed development referred to in section 181A(1) which has been identified as likely to have significant effects on the environment in accordance with regulations made under section 176; (d) any proposed development referred to in section 182A(1); (e) any proposed strategic gas infrastructure development referred to in section 182C(1); (f) any scheme or proposed road development referred to in section 215; and (g) any proposed railway works referred to in section 37(3) of the *Transport (Railway Infrastructure) Act 2001* (as amended by the *Planning and Development (Strategic Infrastructure) Act 2006*).

[292] On the EIA Directive generally, see paragraph 10.07, above.

[293] Section 37E of the 2000 Act, as inserted by section 3 of the 2006 Act.

development and the likely effects on the environment of the proposed development.[294] It is noteworthy that the term "objection" is not used. A question arises as to the extent to which the Board must have regard to such submissions, because it would appear that there is no explicit obligation on the Board to consider these submissions or observations, only that it must wait until the submission deadline before making its decision.[295]

10.19 The CPO process may be the only instance in which an individual could make a substantial objection to the development in its entirety. As has already been mentioned, given the acceptability of a non-specific purpose, it could be difficult to object without knowing the actual plans for the land. It could therefore be argued that consideration should be given to requiring that the specific nature of the plans must be available before the land is acquired in order to afford the landowner and neighbouring landowners the opportunity to make meaningful objections. If such a reform was considered appropriate, certain procedural matters would also arise, such as whether such objectors should have access to funding to engage suitably qualified persons to prepare an independent EIS and whether time limits should be introduced in order to prevent vexatious or repetitive claims.

[294] Section 37E(3)(a) of the 2000 Act.
[295] Section 37F(7) of the 2000 Act.

QUESTIONS FOR ISSUE 10

10(a) Do you consider that third party members of the public should be permitted to submit objections to CPO applications?

10(b) Do you consider that there should be differing tests based on the type of objectors in relation to matters such as standing and the awarding of costs?

10(c) Do you consider that the acquiring authority should be empowered to confirm its own CPO in any instance, such as those in section 216 of the *Planning and Development Act 2000*?

10(d) Do you consider that An Bord Pleanála, when making a decision to confirm or not confirm a CPO, should have a discretionary power to have regard to issues of sentimentality or specific hardship that may arise for landowners?

10(e) Do you consider it necessary to conduct an oral hearing when any objection has been made?

Please type your comments (if any)

ISSUE 11

THE JURISDICTION OF A BODY TO HEAR AND DETERMINE OBJECTIONS

Powers of the Inspector

11.01 For the majority of CPOs (that is, those confirmed by An Bord Pleanála), the oral hearing is conducted by an inspector of An Bord Pleanála who is able to act with a large amount of discretion and who conducts the hearings without undue formality. Nonetheless the inspector also has significant statutory powers that in some respects mirror those in a court.[296] For example, he or she decides on the order of appearance of the witnesses,[297] permits a representative for each person to speak on his or her behalf,[298] and may permit any person who has not made submissions or observations to the Board to speak where the interests of justice would permit it.[299] He or she may also hear evidence on oath,[300] curtail cross-examination,[301] require the attendance of persons,[302] and require the production of books, deeds or contacts or other documents.[303] Refusal on the part of any person to attend in accordance with the requirements of the section is a criminal offence.[304] The inspector may also require persons intending to appear at the hearing to submit to him or her, in writing and in advance of the hearing, the points or a summary of the arguments that they propose to make at the hearing.[305] Following that, An Bord Pleanála may direct the inspector, upon the recommendation of the person appearing, to allow points or arguments in relation to only matters previously specified, at the oral hearing.[306] This direction shall be complied with unless the inspector forms the opinion that it is necessary, in the interests of observing fair procedures, to allow a point or an argument not specified in the direction.[307] However, the inspector may refuse to

[296] On the relationship between the rules of evidence that apply in courts and those that apply in non-court adjudicative and decision-making bodies, see Appendix B to the Commission's *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

[297] Section 135(2B)(a) of the 2000 Act.

[298] Section 135(2B)(b) of the 2000 Act.

[299] Section 135(2B)(e) of the 2000 Act.

[300] Section 135(4) of the 2000 Act.

[301] In *Keane v An Bord Pleanála*, High Court 20 June 1995, the inspector twice stopped observers to the appeal from carrying out cross-examinations. The High Court held that it would not quash the Board's subsequent decision on this ground for breach of the rules of natural justice because "to evaluate the inspector's decision properly and confidently, it would be necessary to have attended throughout the entire proceedings indeed to understand what was raised therein or at least to have a complete transcript of the proceedings."

[302] Section 135(5)(a)Ii) of the 2000 Act.

[303] Section 135(5)(a)(ii) of the 2000 Act.

[304] Section 135(6) of the 2000 Act.

[305] Section 135(2A) of the 2000 Act.

[306] Section 135(2AB) of the 2000 Act.

[307] Section 135(2AC) of the 2000 Act.

allow the making of a point or an argument if the point has not been submitted in advance,[308] is not relevant[309] or is considered unnecessary so as to avoid undue repetition in relation to any matter.[310] Under section 175(7) of the 2000 Act, the inspector can also hear evidence as to the likely effects of development, such as that as proposed under the Fifth Schedule of the *Planning and Development Regulations 2001*, on the environment and on the proper planning and sustainable development in the area in which such development is proposed. In practice, this may be a difficult power to exercise given the lack of specificity required in any proposed CPO.

Information or Recommendation?

11.02 Although the inspector is required to submit a report with recommendations to An Bord Pleanála (under section 146 of the 2000 Act), he or she is not tasked with the decision-making role but, instead, should act in a more advisory and informative capacity. It is merely "a step in the process".[311] In *Murphy v Dublin Corporation,*[312] the Supreme Court commented on the role of the Minister (now An Bord Pleanála) by stating that "by statute, the Minister is the one who has to decide the matter – not the inspector. In doing so, the Minister must act judicially and within the bounds of constitutional justice."[313] However, in a subsequent case, *Murphy v Dublin Corporation (No.2),*[314] the High Court (O'Keeffe J) commented that it would be a misinterpretation of the Court's judgment to believe that an inspector should not give his or her views in the report to the Minister. The Court held that what was intended was surely that the inspector, in making his or her report, should not include information obtained outside of the public consultation. It should also not include any personal views that were not the subject of discussion throughout the inquiry.[315] In *Lord Ballyedmond v Commission for Energy Regulation,*[316] the High Court (Clarke J) held that the inspector's report itself is not subject to judicial review. If the inspector's report contains misleading or untrue information and this is relied upon by the decision-maker, then it would be the decision-maker's decision that would be open to challenge, rather that the report itself.[317]

11.03 In *Geraghty v Minister for Local Government,*[318] the inspector's report had been circulated to other officers in the Department, who subsequently made additional comments. The inspector had recommended that outline planning permission be refused for 3 reasons, one of which was that the residents in the development would suffer loss of amenity due to significant aircraft noise. The note made by a senior

[308] Section 135(2B)(d)(i) of the 2000 Act.
[309] Section 135(2B)(d)(ii) of the 2000 Act.
[310] Section 135(2B)(d)(iii) of the 2000 Act.
[311] *Lord Ballyedmond v Commission for Energy Regulation* [2006] IEHC 206 at paragraph 5.7. The report is therefore, not subject to judicial review and the recommendations contained in it are neither binding nor do they give rise to any formal consequences for the process as a whole.
[312] [1972] IR 215.
[313] *Ibid* at 238.
[314] [1976] IR 143.
[315] *Ibid* at 151.
[316] [2006] IEHC 206.
[317] *Ibid* at 5.5.
[318] [1976] IR 153.

official in the planning section of the Department, was "do not use in view of fact that portion of site is zoned as residential".[319] There was an implication that it may not have been desirable for the Council to zone the land in question for development.[320] An attempt was later made to erase the marginal notes. This report eventually reached the Minister of State (who was previously known as the Parliamentary Secretary prior to 1977) who made the final decision. The High Court (O'Higgins J), in applying *Murphy*, held that the decision was *ultra vires* because the factors that led to the decision were not mentioned at the oral hearing, where the objectors would have been the opportunity to contradict such assertions. The Supreme Court subsequently upheld this decision on appeal and set out the following guidelines for oral hearings (adapted here to take into account that An Bord Pleanála has since replaced the Minister in this context):

1. An Bord Pleanála is the deciding authority.
2. An Bord Pleanála is acting *ultra vires* if it comes to a conclusion or makes a decision that cannot be sustained on the basis of the evidence or the materials properly before it.
3. Neither An Bord Pleanála nor the person conducting the inquiry can come to a conclusion of fact unless there is evidence upon which such a conclusion could be formed.
4. An Bord Pleanála is not bound by the decision of the inspector, nor any conclusion as to fact, and is quite free to form a contrary conclusion, but only if there are evidence and materials properly before it to suggest such a diversion.
5. The inspector must transmit to An Bord Pleanála a report which fairly and accurately informs An Bord Pleanála of the substance of the evidence and the arguments for or against the issues raised as the inquiry by those represented at the inquiry.[321]

11.04 The Court held that the inspector is "there to record and report – not to conclude or advise".[322] However, the Court added that "if the inspector does recommend or advise, it must be related strictly to matters arising at the hearing".[323] Point 5 above appears to suggest that only information is to be transmitted into the report, but point 4 includes the option for An Bord Pleanála to deviate from the inspector's decision; therefore, it seems that the current procedure should include the information and a recommendation in the report, which An Bord Pleanála is free to accept or reject, provided it is based on the same evidence. It is perhaps noteworthy that section 137 of the 2000 Act, which applies to planning appeals, provides that An Bord Pleanála

[319] *Ibid* at 158.
[320] *Ibid* at 160.
[321] *Ibid* at 160.
[322] *Ibid* at 162.
[323] *Ibid*.

can take matters into account that were not raised through submissions to them in relation to the appeal, but this does not apply to oral hearings in respect of CPOs.

Time Limits

11.05 Section 221(2)(a) of the 2000 Act provides that it shall be the objective of the Board to ensure that any matter under sections 214, 215, 215A, 215B or 215C, shall be determined within a period of 18 weeks beginning on the last day for making objections, observations or submissions. These sections provide for the transfer of the Minister's functions to An Bord Pleanála under a number of Acts, including the 1960 and 1966 Acts. If the Board determines that more time is required, it shall serve notice on all interested parties before the expiration date, informing them of this.[324] Once the CPO is confirmed by An Bord Pleanála, the next step is either an appeal or notification and the notice to treat.

11.06 The Commission is not aware that particular problems arise in practice in connection with the oral hearing process, but seeks views of interested parties as to whether the process might benefit from reform. Without prejudice to any such suggestions, the Commission seeks views as to whether the oral hearing process would benefit from a review of the timelines for decisions or the possibility of providing statutory guidelines for inspectors in relation to the considerable discretion they have in exercising their powers under section 135 of the 2000 Act and the weight given to the various grounds for objections.

[324] Section 221(3)(a) of the 2000 Act

QUESTIONS FOR ISSUE 11

11(a) Do you consider that the CPO oral hearing process would benefit from general reform? If so, please specify.

11(b) Without prejudice to your answer to (a), do you consider that the oral hearing process would benefit from: (i) reform of the timelines for decisions; (ii) the provision of statutory guidelines for inspectors in relation to their discretion under section 135 of the *Planning and Development Act 2000*; (iii) the weight given to the various grounds for objections? If so, please specify the reforms you would propose.

Please type your comments (if any)

ISSUE 12

ADVERTISING AND NOTIFYING THE OUTCOME OF THE CONFIRMATION HEARING

The 1845 and 1851 Acts

12.01 The provisions concerning notification of the CPO being made under the 1845 and subsequent amending Acts differ in important respects from the modern system in the 1960, 1966 and 2000 Acts, discussed below. Under the 1845 Act, the arbitrator is, in effect, both the inspector and the arbitrator, so that the CPO hearing and determination of compensation under the 1845 system occur at the same time. The 1845 Act does not appear to provide for any oral hearings, but rather a number of compensation hearings. Section 9 of the 1851 Act provides that the arbitrator may make a draft award which shall be sent to all persons entitled to compensation, or who have been heard by the arbitrator as claimants for compensation. The notice shall be made in the same manner as the notification of maps as mentioned earlier. The notice shall contain a time and place for a meeting to hear the objections against the award. Following the meeting, when the arbitrator has heard and determined all objections, he or she shall make the award. The acquiring authority must then publish details of the final award and require any person with any right or interest in the land to send details of the nature of the claim and a short abstract of the title on which the claim is founded.

The 1966 Act

12.02 Section 78(1) of the 1966 provides that, as soon as An Bord Pleanála has confirmed the CPO, the housing authority shall publish notification of the CPO being made in a newspaper circulating in the local area. The notice shall name a place where a copy of the CPO can be viewed. It shall also serve a similar notice to every person who objected to An Bord Pleanála and who appeared at a public inquiry in support of his or her objection. Section 78(5) provides that any time after the CPO has become operative; the housing authority shall send a copy to every person to whom it sent notice of its intention to CPO.

The 2000 Act

12.03 Section 217(5) of the 2000 Act provides that a notice of the making of a confirmation order shall be published or served within 12 weeks of the making of the order. The CPO will become operative 3 weeks after such notification.[325]

[325] Section 217(7)(a) of the 2000 Act.

12.04 The Commission seeks views as to whether the advertising and publication process in relation to the confirmation of the CPO has given rise to any difficulties in practice. The Commission also seeks views as to whether every person who made an objection, but did not appear at the hearing, should receive notification of the outcome.

QUESTIONS FOR ISSUE 12

12(a) Do you consider that there are any difficulties that arise in practice with the advertising and publication process in relation to the confirmation of the CPO?

12(b) Do you consider that every person who made an objection, but did not appear at the oral hearing, should be notified of the outcome?

Please type your comments (if any)

ISSUE 13

SPECIAL RULES FOR JUDICIAL REVIEW OF DECISION OF CONFIRMING BODY

The 1966 Act

13.01 Section 78(2) of the 1966 Act provides that if any person is aggrieved by a CPO which has been confirmed, he or she may question the validity of the order, within 3 weeks of the publication of the notice of the confirmation order, by making an application to the High Court. In such an application, the High Court may: (a) by an interim order suspend the operation of the confirmed CPO either generally or in so far only as it affects any property of the applicant until the final determination of the proceedings; and (b) if satisfied upon the hearing of the application that the confirmed CPO is not within the powers of the 1966 Act or that the interests of the applicant have been substantially prejudiced by any requirement of the 1966 Act not having been complied with, may quash the confirmed CPO either generally or in so far only as it affects any property of the applicant. This wide-ranging power of the High Court appears to be in place of any alternative method of challenging a confirmed CPO, such as judicial review, because section 78(4) provides that "subject to section 78(2)" a person shall not question a CPO by prohibition or *certiorari* in any legal proceedings whatsoever. Section 78(3) provides that if an application under section 78(2) is *not* taken, or as the case may be is withdrawn, the CPO will become operative 21 days after the publication of the award, or on the date of withdrawal of the application or, on the date of the determination of the application. One notable aspect of this section is the use of the words "any person" and "a person" as opposed to landowner or person whose land is taken or severed by the CPO; which would suggest that the ability to apply for judicial review extends to those who are unable to object to the CPO before it is confirmed.

The 2000 Act

13.02 Under section 50 of the 2000 Act, the only possibility to appeal a compulsory purchase order or act performed by An Bord Pleanála under the 2000 Act is by judicial review.[326] Galligan and McGrath provide a list of grounds of challenge usually employed by the applicants when taking cases for judicial review. This includes: failure to comply with statutory or notification requirements; failure to observe fair

[326] Section 50(2)(b) and (c) of the 2000 Act, as inserted by section 13 of the *Planning and Development (Strategic Infrastructure) Act 2006*.

procedures; breach of the *nemo iudex* (bias) rule; acquisition for an improper purpose; irrationality; failure to take into account relevant considerations; failure to exclude irrelevant considerations; failure to give adequate reasons; breach of the principle of proportionality; breach of obligations in relation to environmental impact assessments; and breach of obligations under the European Convention on Human Rights.[327]

13.03 The decision of the High Court to grant leave for judicial review is final and cannot be appealed to the Supreme Court unless it is appealed on a point of law of exceptional public importance and it is desirable in the public interest that such an appeal be taken[328] or, if the constitutionality of a law is being questioned.[329] The reason for these restrictions is undoubtedly the finality and certainty that such a provision ensures, along with the avoidance of unnecessary delays caused by unrestricted access to the courts. In *Glancré Teoranta v Mayo County Council,*[330] the High Court (McMenamin J) laid out a number of principles to be used in determining whether a case can be considered to be of "exceptional public importance":

1. The requirement goes substantially further than merely the emergence of a point of law. It must be one of *exceptional importance* which is a clear and significant additional requirement;
2. The jurisdiction to certify such a case must be exercised sparingly;
3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases;
4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established, a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court;[331]
5. The point of law must arise from the decision of the High Court and not from discussion or consideration of a point of law during the hearing;
6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which, although they may overlap, to some extent, require separate consideration by the Court;[332]
7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional";
8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning;
9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appeal to indicate that the

[327] Galligan and McGrath, "Judicial Review of the Exercise of Compulsory Purchase Powers – Part One" (2013) 20(3) IPEL 108.
[328] Section 50A(7) of the 2000 Act. This follows the decision in *Irish Asphalt Ltd v An Bord Pleanála* [1996] 2 IR 179.
[329] Section 50A(8) of the 2000 Act.
[330] [2006] IEHC 754.
[331] *Kenny v An Bord Pleanála (No.2) High Court* (Kearns J) 2 March 2001.
[332] *Raiu v Refugee Appeals Tribunal* [2003] 2 IR 63.

uncertainty must arise over and above this, for example, in the daily operation of the law in question; and

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases.

13.04 Until 2011, the 2000 Act had also provided that, in taking a case for judicial review, the applicant had to show that they had a "substantial interest"[333] in the matter. This operated in conjunction with the requirement that the High Court believes that there are substantial grounds[334] for contending that the decision is invalid or should be quashed. This was a higher test than is generally imposed when establishing *locus standi*, namely that of a significant interest. This was subsequently reduced to that of a "sufficient" interest by the *Environment (Miscellaneous Provisions) Act 2011*. The sufficient interest need not be based on the land or on a financial interest.[335] The Court may also, as a condition for granting leave, require the applicant to give an undertaking as to damages.[336] Under the 2000 Act as originally enacted, a court had to be satisfied that the applicant was either a local authority that proposed to acquire land or carry out a scheme, or was an objector or someone who had made submissions to the authority.[337] Butler notes that there has never been any direct prohibition upon a local authority challenging a decision of the Board, but that in practice, it has never happened.[338] There was also a possibility that a person who did not submit an objection or make a submission could have made an application. However, the court would have had to believe that such an applicant had had good and sufficient reasons for not doing so.[339] A Member State of the European Union or a state that was party to a trans-boundary convention did not have to show that observations or submissions were previously submitted by them when applying for leave.[340] When section 50 of the 2000 Act was amended by the *Planning and Development (Strategic Infrastructure) Act 2006* (the 2006 Act), these provisions were removed.

Inconsistencies in the Time Limits

13.05 The application must be made within 8 weeks following the date on which the first notification of the Board's decision is sent to the landowner or published.[341] This is despite the fact that the CPO becomes operational 3 weeks after the notification of the CPO's confirmation has been published.[342] Following the CPO becoming

[333] Section 50A(3)(a) of the 2000 Act.
[334] Section 50A(3)(b)(i) of the 2000 Act. See also *McNamara v An Bord Pleanála* [1995] 2 ILRM 125, at 130, in which the High Court (Carroll J) stated that "in order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty, it must not be trivial or tenuous... However, I am not concerned with trying to ascertain what the eventual result will be. I believe I should go no further than satisfy myself that the grounds are substantial."
[335] Section 50A(4) of the 2000 Act.
[336] Section 50A(6) of the 2000 Act.
[337] Section 50(4)(c)(i)(v) of the 2000 Act as enacted, since repealed.
[338] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 285.
[339] Section 50(4)(c)(ii) of the 2000 Act as enacted, since repealed.
[340] Section 50(4)(c) of the 2000 Act as enacted, since repealed.
[341] Section 50(7) of the 2000 Act.
[342] Section 217(7)(a) of the 2000 Act.

operational, 14 days-notice must be given to landowners before the acquiring authority can enter their land. As a result of this, there are potentially 3 weeks where the acquiring authority is actively carrying out the terms of the CPO while the possibility of a judicial review looms over them. In practice, this provision may not cause a difficulty, but it could arguably be more logical to have the date on which the CPO becomes operational correspond with the date on which no further applications for judicial review could be made. This could remain subject to the High Court's discretion to extend the time limit where there are good and sufficient reasons to do so.[343] The Court must be satisfied that the circumstances that resulted in the failure to make the application for leave (within the period so provided) were outside the control of the applicant.[344]

General Grounds for Seeking Judicial Review

13.06 The Commission has already referred to Galligan and McGraths' list of grounds of challenge usually employed by applicants when seeking judicial review of a CPO.[345] That list should be considered against the background of the general criteria or tests on which judicial review may be brought. In *State (Keegan and Lysaght) v Stardust Victims Compensation Tribunal,*[346] the Supreme Court held that judicial review may be granted where the the decision-maker has flagrantly rejected or disregarded fundamental reason or common sense in reaching the decision.[347] This test is arguably more generous that the subsequent test set out by the Supreme Court in *O'Keeffe v An Bord Pleanála,*[348] which was as to whether there was "relevant material" before the decision-maker, the absence of which would render the decision void. The test in *Keegan* is one of irrationality whereas, in *O'Keeffe*, the test is one of unreasonableness.[349] It has been noted that *O'Keeffe* is extremely narrow, and any evidence at all will deny the applicant his or her success whereas, with *Keegan*, a reviewing court would have to explore the reasoning of the decision-maker beyond a question of fact.[350] The *O'Keeffe* approach seems to rely purely on fact rather than

[343] Section 50(8)(a) of the 2000 Act.
[344] Section 50(8)(b) of the 2000 Act.
[345] Galligan and McGrath, "Judicial Review of the Exercise of compulsory Purchase Powers – Part One" (2013) 20(3) IPEL 108: see paragraph 13.02, above.
[346] [1986] IR 642.
[347] *Ibid* at 658. This followed the test in the English Court of Appeal decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 222 in which Lord Greene MR held that the Court may interfere where an authority has "come to a conclusion so unreasonable that no reasonable authority could ever have come to it... The power of the court to interfere in each case is not as an appellate authority to override a decision of the... authority, but as a judicial authority which is concerned, and concerned only, to see whether the authority have contravened the law by acting in excess of the powers which Parliament has confided in them". In *Keegan*, Griffin J also cited with approval the dictum of Lord Brightman in the UK House of Lords decision *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 in which he held that "judicial review is concerned, not with the decision, but with the decision-making process... Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made".
[348] [1993] 1 IR 39.
[349] Kane, "Examining the Theory of Proportionality in the Review of Planning Decisions for Administrative Unreasonableness" (2016) 23(1) IPEL 12 at 14. "Unreasonableness is the disregard of fundamental reason or common sense in reaching an administrative decision. Yet irrationality is considered to be even more disagreeable in that it refers to situations which are alleged to be perverse and arise less frequently in litigation", quoting Denham J in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701.
[350] Daly, "Standards of Review in Irish Administrative Law after Meadows v Minister for Justice, Equality and Law Reform" (2010) 32(1) DULJ 379.

the balancing of competing interests; therefore, it could be argued that it does not lend itself well to a proportionality assessment. It has been submitted that the general reason for incorporating a proportionality test is that it permits the Court to scrutinise the decisions of others to ensure that they go no further than necessary in limiting constitutional rights.[351] The *O'Keeffe* principles have since been adjusted to some extent by the test set out by the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform*[352] in which the Court considered whether the use of the *O'Keeffe* principles was appropriate in administrative decisions concerning constitutional rights.

13.07 In *Radio Limerick One Ltd. v Independent Radio and Television Commission,*[353] the Supreme Court used all 3 tests as one concept. This case involved a dispute over the revocation of a broadcasting licence. The applicant argued that the termination of the license was disproportionate given that the contractual breaches were minor or already remedied. As the Court noted; however, it proposed no support for the proposition that the principle of proportionality could legitimately be invoked to test the validity of an administrative act. The respondent Commission argued that the proportionality principle only applied to legislative enactments and delegated legislation and, in particular, to the restriction by such legislation of a constitutionally protected right. The Court held that in addition to the *Keegan* test, it would seem self-evident that if the decision was grounded on an erroneous view of the law, it should not normally be allowed to stand.[354] It asserted that the disproportion between the gravity of a breach of a statutory privilege and the permanent withdrawal of the privilege could be so gross as to the revocation unreasonable.[355] The Court reiterated that it was not concerned with the merits of the decision but rather, the manner in which the decision was reached.[356] It concluded that the decision made was "not based on an erroneous view of the law or extraneous or irrelevant in their nature. Nor did it exhibit such a degree of irrationality that would justify" it being set aside.[357] This case therefore, used all 3 tests as one concept.

13.08 The words themselves are difficult to divorce from each other without examining the principles behind them. The "unreasonable" test will be satisfied if there is a lack of relevant material. The "irrational" test will require a decision lacking fundamental common sense. A disproportionate interference will occur where the competing rights involved were not appropriately balanced. Therefore, it is important to acknowledge that when these terms are being used, they may not always represent the tests that have been found to emanate from them. It has been argued that the

[351] Kane J, "Examining the Theory of Proportionality in the Review of Planning Decisions for Administrative Unreasonableness" (2016) 23(1) IPEL 12 at 14.
[352] [2010] 2 IR 701.
[353] [1997] 2 IR 291.
[354] *Ibid* at 292.
[355] *Ibid* at 314.
[356] *Ibid* at 318.
[357] *Ibid.*

omission of the "no relevant material" standard in the *Meadows* case is critical.[358] *Meadows* now asserts that the proportionality test attaches itself to the test of reasonableness, rather than viewing the 2 tests as distinct from one another.[359]

13.09 In *Meadows*, in relation to the bringing of a challenge for judicial review, Hardiman J held that the applicant is not entitled to call on the decision maker to justify his or her decision to the court but rather, the onus is on the applicant to prove the deficiency or "cognisable irregularity" in the decision.[360] However, although he agreed,[361] Murray CJ held that the justification for grave or serious limitations on certain rights, particularly those that are considered fundamental, as a result of an administrative decision, must be the more substantial of the 2 arguments.[362] The Court's struggle between deference to the skilled decision maker and the protection of fundamental rights is evident throughout the judgment. It held that it is "quintessentially a discretionary matter for the first respondent in which he has to weigh competing interests and only the first respondent, who has responsibility for public policy in this area, is in principle in a position to decide where the balance lies".[363] Murray CJ reiterated this by incorporating a margin of appreciation into the test, providing for discretion within the decision "in choosing an effective means of fulfilling legitimate policy objectives".[364] This discretion, it could be argued, might be exercised in technical or value decisions, but no legal issue should be left outside the remit of the courts. In *Meath County Council v Murray,*[365] the Supreme Court held that it was "not an easy task to try and articulate a visible boundary line beyond which a judge should not go when applying the proportionality test. Some engagement with the facts is obviously required. However, he is not permitted to reach his own independent view on the planning merits of the case. That is the function of the planning process".[366]

[358] Daly, "Standards of Review in Irish Administrative Law after Meadows v Minister for Justice, Equality and Law Reform" (2010) 32(1) DULJ 379 at 380.

[359] [2010] 2 IR 701, Murray CJ held that the principle of proportionality has "a legitimate and proper function" in examining whether an administrative decision is valid. He also stated that he "was of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense" at 727. Denham J found that the proportionality test was "inherent in any analysis of the reasonableness of a decision", at 741. In terms of intermingling the two tests, Hardiman J held that the Court, in conducting a reasonableness review, should bear in mind the significance of the decision for both parties, thus, applying a proportionality assessment within the reasonableness test, at 805. Fennelly J held that a decision may also "affect fundamental rights to such a disproportionate degree, having regard to the public objectives it seeks to achieve, as to cross a threshold, and to be justifiably labelled as so unreasonable that no reasonable decision-maker could justifiably have made it" at 825-826.

[360] [2010] 2 IR 701, at 805.

[361] *Ibid* at 727.

[362] *Ibid* at 724.

[363] *Ibid* at 731.

[364] *Ibid* at 727. Daly notes that in *Director of Public Prosecutions v Kebilene* [2000] 2 AC 326, the UK House of Lords rejected the concept of a margin of appreciation, because it is more commonly used by the ECtHR which is a supranational body rather than a domestic court: see Daly, "Standards of Review in Irish Administrative Law After Meadows v Minister for Justice, Equality and Law Reform" (2010) 32(1) DULJ 379.

[365] [2017] IESC 25.

[366] *Ibid* at 124. The Court continued, "the courts must not act as a surrogate for the nominated bodies. They have no role in performing such function through some process of reviewing the merits of a decision reached by either of them within their remit. Still less, do they have the expertise to carry our such a function."

13.10 It has been suggested that the edifice of public law requires the delicate balance between the functions to be exercised by administrative decision-makers and the courts.[367] Such a balance would require that the Superior Courts operate in a purely supervisory role.[368] This argument is supported by Denham J's judgment in *Meadows,* where she held that although the executive has the primary role of determining policy, the court has a duty to protect constitutional rights and the fact that there are hearings at administrative level does not nullify the court's duty. Denham J also referenced the judgments of the Supreme Court in *Fajujonu v Minister for Justice,*[369] which found that the discretion conferred on the Minister, is subject to a consideration of the relevant constitutional rights involved.[370]

13.11 What *Meadows* proposes, that the proportionality is an underlying aspect of the *O'Keeffe* test, has the potential to allow the latter to "smother" the former.[371] Such decisions would include determinations over development plans or a decision as to whether a proposed development constitutes a strategic infrastructure development. These decisions can be made based on reports which are within the specific skillset of the decision maker. The balance however, is one that respects the expertise of the decision-makers and their "value judgments" and thus grants significant discretion with only a very narrow test for judicial review and acknowledges that there are issues of expertise and issues of law. Issues of law, particularly those that would involve the constitutional rights of the individual should arguably, be subject to judicial review based on the merits of the case, rather than on the procedure alone. This would in large part be based on the indefinability of many of the constitutional terms such as "common good" and "unjust attack" that would arguably require legal knowledge. It could be considered to be imprudent to expect individuals who are experts in the area of planning or surveying, or even valuation, to be able to make such legal determinations. Although in the minority in *Meadows*, Hardiman J suggested that deference to decisions should be done on a sliding scale. Fennelly J, in the majority, rejected a sliding scale but only on the basis of a scale of rights, as opposed to a scale of the expertise required.[372] It is arguable that there are some decisions made by An Bord Pleanála that should remain within the remit of the *O'Keeffe* principles, given both the expertise in planning and the technical and, therefore, somewhat factual nature of the decision made.

13.12 With regard to CPOs, it might be argued that the question should not simply be whether the land is suitable for development,[373] as that would be a question that

[367] Biehler, "Upholding Standards in Public Decision-Making: Getting the Balance Right" (2017) 57 Irish Jurist 94, at 116.
[368] *Ibid*.
[369] [1990] 2 IR 151.
[370] *Ibid* at 162.
[371] Kane, "Examining the Theory of Proportionality in the Review of Planning Decisions for Administrative Unreasonableness" (2016) 23(1) IPEL 12 at 14, "by juxtaposing these two doctrines, proportionality is almost eliminated by the presence of any material or legitimate planning "objective" which is in support of the decision".
[372] He held that "it is neither appropriate nor necessary to have a different standard of review for cases involving an interference with fundamental, constitutional or other personal rights": [2010] 2 IR 701, at 826.
[373] In *Lord Ballyedmond v Commission for Energy Regulation* [2006] IEHC 206, the High Court held at paragraph 4.1 that such decisions "are not necessarily 'proofs' in themselves, in the sense in which that term might be applied to specific factual matters that need to be

would fall within the *O'Keeffe* test. The relevant question might be argued to be whether the necessity of the proposed purpose justifies an irredeemable and permanent interference with the landowner's property rights. This question might be argued to balance the interests involved; it is, in any event, a legal question that should perhaps remain within the remit of the Court's review. It can be argued that, if this was not the case, there would be no requirement for an oral hearing or acceptance of objections from the landowners. A CPO, by its nature, signifies the most exaggerated displacement of the personal right to property. The interference is so extreme, and in some cases, can end an individual's livelihood or eject him or her from the family home. It might therefore be argued to be a potentially disproportionate interference with the individual's property rights to remove a consideration of the constitutional rights of the landowner from the decision-maker's remit.

13.13 In *James v United Kingdom,*[374] the ECtHR, while granting national authorities a wide margin of appreciation in implementing social and economic policies, held that it was still bound to review a contested measure under Article 1, Protocol 1, of the ECHR (A1P1), and in doing so, make an inquiry into the facts with reference to which the national authorities acted. The applicants argued that the lack of judicial review procedures for either the individual determination of whether the property should be acquired or the level of compensation to be determined caused a violation of the procedural elements of A1P1. The UK Government argued that such a system sought to avoid the uncertainty, litigation, expense and delay that would inevitably follow such a provision. The Court, in showing what could be considered a deferential approach to the powers of Parliament, determined that expropriation legislation had to deal with a wide variety of situations and was thereby "hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned".[375] The system chosen could therefore, not be considered irrational or inappropriate. The Court held that it should only intervene where the judgment is "manifestly without reasonable foundation".[376] This approach leans toward the *O'Keeffe* test of reasonableness and marries it with the more investigatory proportionality test without referring to the existence or non-existence of relevant material. This is evident in the phrasing of "reasonable foundation" as opposed to "any foundation". It has been suggested that the *Meadows* judgment signifies that only "very" or "clearly disproportionate decisions will be quashed.[377] This is supported by the High Court (Clarke J) in *Lord Ballyedmond v Commission for Energy Regulation,*[378] which held that the Commission should not seek to determine if

established in order that a court may come to a conclusion or, indeed, in order that a statutory or administrative body may come to a similar type of conclusion."

[374] Application No. 8793/79.

[375] *Ibid* at 68.

[376] *Ibid* at 46.

[377] Kane, "Examining the Theory of Proportionality in the Review of Planning Decisions for Administrative Unreasonableness" (2016) 23(1) IPEL 12 at 14, submits that "if this submission is correct, a decision to grant permission to operate a large incinerator next to a frail, elderly person who suffers from chronic breathing problems might be set aside if it could be shown that there were other, suitable sites for the incinerator".

[378] [2006] IEHC 206.

an alternative location is preferable but whether, the acquisition before them should be made. This was qualified however, by the statement that "if there were a demonstrably better route with significant advantages and/or significantly less adverse effects on a range of material factors then, at a certain point, it might be said that a body such as the Commission was acting irrationally or disproportionately".[379] The test in this case therefore, is whether an alternative is "demonstrably superior".

13.14 In *White v Dublin City Council,*[380] which followed *Meadows,* a neighbour of the plaintiff sought planning permission, which was unopposed by the plaintiff. However, the neighbour then submitted revised plans, which meant that the proposed structure would be overlooked by the plaintiff. The senior executive planner with the planning authority felt that there was no reasonable basis for objection and therefore, did not notify the plaintiff nor did he serve notice on the public of the change in plans. The Supreme Court held that the Court should not overrule this decision merely because it disagreed with it; the planner gave ample reasons for his decision, which could not be regarded as irrational. It held that the Court should be extremely slow to interfere with the decisions of experts in planning matters. However, he concluded nonetheless, that the planning inspector's reasoning was flawed, as he excluded the applicants from his consideration. On this basis, it was held that the decision was "unreasonable and irrational". This would appear to be a combination of the *O'Keeffe* and *Keegan* principles but in substance, the decision was quashed based on the lack of balance between competing interests, which amounts to a proportionality assessment.

13.15 The crux of the majority's decision in *Meadows* is that the proportionality test should be contained within the reasonableness test; however, it could be argued that these 2 tests serve different functions for 2 different types of decisions. The 2 questions that may best dictate which test should be used are as follows:

1. Are the constitutional rights of the applicant being interfered with?
2. Does the decision made require more than technical expertise?

13.16 If the answer to these questions is yes, then the proportionality test could be used to assess whether the decision-maker was correct in its decision. If the answer is no, then the *O'Keeffe* principles could be used in due deference to the expertise of the decision maker while acknowledging the non-existence of competing fundamental rights. It is noted however, that certain planning decisions can involve multi-faceted issues that will not always be amenable to a binary distinction as is suggested above.[381] Certain factors may aid the decision-maker in determining the spectrum of standards of review. These may include "the expertise of the decision maker, the

[379] *Ibid* at paragraph 6.7.
[380] [2004] 1 IR 545.
[381] Kane, "Examining the Theory of Proportionality in the Review of Planning Decisions for Administrative Unreasonableness" (2016) 23(1) IPEL 12 at 13.

complexity of the decision, the democratic legitimacy of the decision-maker and the extent of the participatory rights accorded to individuals".[382]

13.17 A difficulty in this approach was identified in the dissenting judgment of Hardiman J in *Meadows*. He noted that the proportionality test is best served to assess only decisions of a particular kind, such as constitutional challenges to legislation or breaches of the State's obligations under the ECHR, rather than to individual decisions themselves.[383] It could be argued that this approach bears weight, with regards to only certain decisions being worthy of a proportionality test. This sentiment appears to reflect the idea that proportionality should only be used when challenging the constitutionality of the legislation as opposed to an administrative decision. It could be argued that where a decision maker has followed the relevant statutory provisions which did not demand a balancing of the rights nor allowed any discretion to do so, then an aggrieved landowner may be more successful challenging the constitutionality of that legislation, as opposed to the challenging the decision maker. [384] Such a model is a double-edged sword. One opinion may be that the decision maker who is highly trained in planning but not legally educated should not be making decisions that involve the balancing of constitutional rights. However, where the legislation empowers such a decision maker to make the decision, such a person has little option but to make the decision on the facts in front of him or her, or question their inability to do so. No key piece of legislation governing compulsory purchase orders grants the deciding body discretion to consider the constitutional rights of the landowner. Instead, it is presumed that the legislation has built in mechanisms to protect such rights. In relation to the decision to CPO an individual's land, An Bord Pleanála does not have the statutory power or the discretion to deny an application based on property rights. It can choose to diverge from the inspector's recommendation, but only where there is evidence to support such a divergence. It is therefore, operating on an *O'Keeffe* basis.

13.18 Allowing discretion to a person without legal training could lead to difficulty if the decision began to depend on the individual preferences of the decision-maker. Regardless of whether the test is unreasonableness or irrationality, the determination of such is arguably dependent on the individual decision-maker.[385] Proportionality, rationality and reasonableness are subjective judgments. If there is an urgent housing crisis and a landowner has their land compulsorily acquired even though there were equally suitable sites for sale, such a judgment could be considered unreasonable and disproportionate. However, when the scenario is

[382] Daly, "Standards of Review in Irish Administrative Law after Meadows v Minister for Justice, Equality and Law Reform" (2010) 32(1) DULJ 379. The author contends however, that where constitutional rights are implicated, the proportionality test would automatically become the standard of review.

[383] [2010] 2 IR 701 at 791.

[384] This is supported by the view expressed in paragraph 4.3 of *Lord Ballyedmond v Commission for Energy Regulation* [2006] IEHC 206: "firstly where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the court."

[385] Fennelly J in *Meadows* held that "at one level all this is no more than semantics; what is irrational or unreasonable depends on the subject matter and the context", at 825.

altered, i.e. the landowner's land will cost less but the landowner is elderly and has family close by that care for her, the lens shifts. The questions will then become, how much more money would it cost, can the State bear the financial burden, can the landowner be moved to a new home equidistant from her family? In *In re Health (Amendment) (No.2) Bill 2004,*[386] the Supreme Court addressed the question concerning the cost to the State of reimbursing 6 years of unlawfully imposed health charges, which the Bill under challenge proposed to prevent by, in effect, retrospectively validating the charges. The cost involved, it was argued, would have been in the order of €500 million, while the State's budget for the year in which the case was heard (2005) was €11 billion. The Supreme Court accepted "that, upon discovery of an unforeseen liability to reimburse patients in the relevant categories, the State may find itself faced with a significant additional financial burden. However, while it is evident, in the opinion of the court, that the financial burden on the State of making the relevant repayments is a substantial one, it is by no means clear that it can be described as anything like catastrophic or indeed that it is beyond the means of the State to make provision for this liability within the scope of normal budgetary management".[387] The Supreme Court held that the proposal in the Bill, to absolve the State from repaying unlawfully levied charges that its institutions had imposed (and which in that instance had involved charges imposed on vulnerable adults), was in clear breach of the property rights of those involved, and was therefore repugnant to the Constitution notwithstanding that the total cost to the State was considerable. The level of financial hardship imposed on the State, therefore, must be considerable in order to justify an interference with a person's property rights. It was also held that it would strain the principle of social justice to include the State's financial interests as the sole reason for the unlawful expropriation of property involved.[388]

13.19 To combat this issue, one option might be to provide clear statutory guidance to An Bord Pleanála regarding the weight that may be afforded to the competing rights of those involved in making its decision whether to approve a CPO. Another option might be to include a legal expert in any decision-making panel regarding the approval of a CPO.

Other Grounds for Judicial Review

13.20 The above discussion only relates to the merits of the decision. There are also alternative means that can be used in order to succeed in a judicial review such as bias, recusal, legitimate expectation and the duty to give reasons. The most relevant of these to the area of compulsory acquisition is the principle against bias, *nemo iudex in causa sua.*

[386] [2005] 1 IR 105.
[387] *Ibid* at 205.
[388] *Ibid* at 205-206.

The principle against bias: nemo iudex in causa sua

13.21 The principle against bias dictates that one party cannot be a judge in its own case. In *Reid v Industrial Development Agency,*[389] the IDA itself, rather than an independent confirming body, confirmed its own CPO. The High Court (Hedigan J) held, using the *O'Keeffe* principles, that the IDA was best placed, by virtue of its own expertise, to determine the likelihood of industrial development. As the IDA was performing an administrative, rather than a judicial function the principle of *nemo iudex in causa sua* did not apply. The respondents argued on appeal that the IDA was not adjudicating on the parties' rights nor was it making a decision for its own benefit. Instead, it was acting solely in the public interest. The Supreme Court found that as the IDA was not being asked to act upon recommendations of a fact-finding body, it was the sole decision maker and was therefore, carrying out a quasi-judicial function.[390] The most satisfactory way of solving the conflict between the interests of the acquiring authority and the landowner, it held, is to separate the decision-making process between the policy driver and the decision maker.[391] It used the example of An Bord Pleanála as the external adjudicator of decisions made by a planning authority. Such intervention, it argued, would inspire overall confidence in the process, unless such was made "practically impossible or exceedingly difficult by compelling countervailing circumstances".[392]

13.22 In *O'Brien v Born na Móna,*[393] the Supreme Court held that persons who carry out administrative acts in a judicial manner are under an obligation to act fairly and such persons "can and will be reviewed, restrained and corrected by the courts if they act in a manner which is considered to be arbitrary, capricious, partial or manifestly unfair".[394] The Court in *Reid* noted that *O'Brien v Bord na Móna,*[395] – in which the respondent was considered to be exercising an administrative function and, therefore, not subject to *nemo iudex in causa sua* – was decided before the enactment of the *European Convention on Human Rights Act 2003* which could potentially have an impact on future cases concerning compliance with the Constitution or the Convention. It has also been argued that although a body may be classified as administrative in nature, the existence of a dispute involving constitutional rights may require a higher standard of impartiality.[396]

Article 6 of the ECHR

13.23 Article 6 of the ECHR provides protection for the individual's right to a fair hearing. It provides that in the determination of an individual's civil rights, he or she is entitled to a fair and public hearing within a reasonable time by an independent and impartial

[389] [2015] 4 IR 494. This case is discussed in further detail below. It involved section 16 of the *Industrial Development Act 1986* and the Supreme Court held that such a provision did not permit the IDA to create land banks.
[390] *Ibid* at 530.
[391] *Ibid.*
[392] *Ibid* at 532.
[393] [1983] IR 255.
[394] *Ibid* at 282.
[395] [1983] IR 255.
[396] Biehler, "Upholding Standards in Public Decision-Making: Getting the Balance Right", (2017) 57(57) IJ 94, at 97.

tribunal established by law. In order to determine whether Article 6 is applicable, it will ask whether there was a dispute over a right of a civil nature and whether the result of the proceedings concerning the dispute at issue was directly decisive for such a right. In *Ringeisen v Austria,*[397] the ECtHR held that it is not necessary that both parties to the proceedings should be private persons but rather, it covers all proceedings which are decisive for private rights and obligations. It further held that the character of the legislation which governs how the matter is to be determined and the decision-maker is of little consequence.[398] Article 6 therefore applies to public law proceedings that determine matters concerning civil rights and obligations. Any tribunal determining disputes must be independent of both the executive and the parties to the case. It must also be legally binding and operate beyond a mere advisory capacity. It has been argued that Article 6 should not apply to every administrative decision as this was not the original intention of the article which was to guarantee access to the courts. [399] To do so would also ignore the intention behind tribunals which is to minimise the time and money spent in the courts as well as to delegate "responsibility in certain technical area to those bodies equipped with the relevant expertise".[400] In *Fredin v Sweden,*[401] the ECtHR held that a lack of judicial review procedures of the County Administrative Board decision to revoke a gravel exploitation permit violated the applicant's right to a fair trial under Article 6 of the ECHR. The applicant argued that the decision was made without sufficient scientific material or the views of a geological expert, that it did not grant the applicant's interests' sufficient consideration and also, that it had not granted a reasonable closing down period. The Court held that there had been a "genuine and serious" dispute between the parties regarding the lawfulness of the impugned decision; therefore, as the Government was the final decision maker there had been a violation of Article 6 of the ECHR.

Full Jurisdiction

13.24 An administrative body that does not satisfy the criteria laid out in Article 6 may not be in violation of it, if there is a judicial body that may review its decisions.[402] Such a body must be able to review both the legal questions and the merits of the case in order to comply with Article 6. Therefore, the Article will not be satisfied where a court considers itself bound by findings of fact on material issues. This is relevant to the Irish Courts and judicial review procedures that would offer excessive deference to value judgments. However, the Court has set out exceptions to the full jurisdiction rule. These include where the matter requires a certain degree of secrecy,[403] where

[397] Application No. 2614/65.
[398] *Ibid* at paragraph 94.
[399] McKechnie, "Article 6 of the European Convention on Human Rights, Administrative Tribunals and Judicial Review Part II" (2002) 7(7) BR 364.
[400] *Ibid.*
[401] Application no. 12033/86.
[402] *Albert and Le Compte v Belgium* Application No. 7299/75; 7496/76 at paragraph 29, which was followed in *Bryan v United Kingdom* Application No. 19178/91 in which it was held that the test for satisfying Article 6 must look at the subject matter of the decision, the manner in which the decision was arrived at and the content of the dispute, including the actual and desired grounds of appeal, at paragraph 45.
[403] *Klass v Germany* Application No. 5029/71 at paragraph 32.

the subject matter is technical and specialised (such as in planning),[404] and where the administrative process involves an area of high policy content.

13.25 The full jurisdiction argument arose in relation to CPOs in *Zumtobel v Austria.*[405] In this case, the applicant was the manager and sole shareholder in a company that was being expropriated in order to build a bypass. The applicant claimed that the lack of accessibility to a court with full jurisdiction to hear his complaint violated Article 6. The order was challenged by the applicant in the Constitutional Court, which decided not to hear the case as it believed the applicant had no chance for success and fell within the jurisdiction of the Administrative Court. The Court held that the Administrative Court could only review questions of lawfulness, which could not be considered equivalent to a full review. However, it also noted that expropriation is "not a matter exclusively within the discretion of the administrative authorities".[406] This was due to the fact that under the relevant legislation, an expropriation order for the purpose of a highway could not be made unless it was not possible to construct or retain a section of highway that was more suitable from the point of view of traffic requirements, environmental protection and the financial implications.

13.26 What the Court found most relevant, was that the Administrative Court was able to consider each issue brought by the applicant without having to decline jurisdiction. Therefore, it held that the Administrative Court fulfilled the requirements of Article 6 and there had been no violation. While it is important that the Court does not rule in abstraction and focuses on the case before it, it is argued that the relevant fact should be whether the Administrative Court could rule on the merits of the decision, regardless of whether it was asked to do so. It is perhaps likely that the applicant did not bring issues of merit, as he knew they would not be entertained.

[404] *Bryan v United Kingdom* Application No. 19178/91.
[405] Application No. 12235/86.
[406] *Ibid* at 31.

QUESTIONS FOR ISSUE 13

13(a) Do you consider that there should be a time limit within which an application for judicial review of a CPO decision should be made, without any discretion to extend that time limit?

13(b) Do you consider that there should be different standards of judicial review depending on the nature of the rights involved?

13(c) Do you consider that the Superior Courts should be able to review the merits of CPO decisions made by An Bord Pleanála?

13(d) Do you consider that CPO legislation should require the confirming decision-maker to justify the decision to approve a CPO using the proportionality test?

13(e) Do you consider that an individual with legal expertise should be a member of a panel of the Board to assess CPO applications?

Please type your comments (if any)

ISSUE 14

NOTICE TO TREAT AND THE VALUATION DATE

What is a notice to treat?

14.01 The notice to treat, once served on the landowner, is an offer made by the acquiring authority to compensate him or her for the land that is being acquired. It is not considered a binding contract, nor does it pass any estate or interest in the land to the acquiring authority, but it creates a relationship that concludes when compensation has either been agreed by the parties or assessed by the arbitrator.[407]

Time in which it must be served

14.02 If the CPO is confirmed by An Bord Pleanála and no appeal has been made or the appeal has been determined in favour of the acquiring authority, the notice to treat must be served. The time limit for such service was originally 3 years under section 123 of the 1845 Act, but section 217(6) of the 2000 Act provides that any notice to treat served under the 2000 Act or the 1966 Act must be served within 18 months. Prior to the 2000 Act, there was no specified time limit under the 1966 Act and there was no textual amendment in the 1966 Act to reflect the time period provided under the 2000 Act. Section 123 of the 1845 Act provides that, where no specified time limit is prescribed, the time limit shall be 3 years.

14.03 Section 78(3) of the 1966 Act no longer applies in relation to CPOs and the time limit attached to the serving of notices to treat. It had provided that, should court proceedings arise, the CPO would become operative on the date of the withdrawal of proceedings or upon the date of the determination of the court proceedings in cases in which the courts approve the CPO. This was not originally dealt with by the 2000 Act, which provides under section 217(6) that the notice to treat shall be served within 18 months of the CPO becoming operative. However, legislation was enacted the night before the date on which the 18 month period on which the CPO regarding the Galway city outer bypass would have been extinguished had the notice to treat not been sent to landowners.[408] The *Compulsory Purchase Orders (Extension of Time Limits) Act 2010* now provides that the time in which to serve a notice to treat shall be either 30 days following the conclusion of legal proceedings[409] or 18 months following the initial 18 month period. This period of 18 months after the 18 months can be extended where the High Court considers that there are good and sufficient

[407] In *In re Greendale Building Co* [1977] IR 256, at 265, the Supreme Court stated that "generally speaking, the service of a notice to treat confers on the acquiring authority the right to acquire the land on the payment of the proper compensation which is to be assessed, if necessary, by the property arbitrator and it confers on the land owner the right to have the compensation assessed and paid."

[408] Section 217(6) of the 2000 Act.

[409] Section 217(6A)(a) of the 2000 Act as inserted by section 1 of the *Compulsory Purchase Order (Extension of Time Limits) Act 2010.*

reasons for doing so.[410] However, given the cost involved in a CPO application, and the cost of acquiring the land itself, it would seem that saving the State that cost and the landowner his or her time would constitute more than good and sufficient reasons, potentially rendering section 217(6A)(ii)(II) redundant. It should be noted, as the sponsoring Minister highlighted during the Oireachtas debates on the 2010 Act, that it only applies to local authorities and not to other State bodies that possess the power to compulsorily acquire land.

14.04 Under section 79(1) of the 1966 Act, where a CPO has been confirmed by An Bord Pleanála and such an order has become operative, the authority shall serve a notice to treat on every owner,[411] lessee and occupier[412] of the land. This notice shall state that they are willing to "treat" (in other words, to compensate) the individual once they receive the exact nature of the interest in respect of which compensation is claimed, and if required, an explanatory breakdown for each amount requested. In *In re Greendale Building Co,*[413] the claimants sought to rely on a notice to treat that was served before the CPO was operational due to ongoing High Court proceedings. 2 notices to treat were served and the earlier of the 2 would have resulted in a £30,000 increase in the land's valuation. The claimants argued that by appointing an arbitrator and making representation before him in respect of the first notice to treat, the acquiring authority prejudiced itself and should be denied relief based on promissory estoppel. The High Court (McMahon J) held that the notice to treat could only be valid once the CPO became operational as the acquiring authority cannot know until the proceedings are determined whether it will be entitled to acquire any land under the order.[414] It also dismissed the claim relying on promissory estoppel as it held that the authority went beyond its statutory powers in issuing the notice to treat and cannot subsequently be estopped to rely on an invalid notice.[415] Promissory estoppel will not extend to actions that are *ultra vires.* This was confirmed by the Supreme Court, which found the notice to treat to be a mistake that was premature and invalid.[416]

14.05 A notice to treat may be served in respect of a portion of the land only, and a subsequent notice to treat may be made if further land is required. Under section 79(2) of the 1966 Act, a notice to treat served under the section is deemed to be a notice to treat for the purposes of the *Acquisition of Land (Assessment of*

[410] Section 217(6A)(b) of the 2000 Act as inserted by section 1 of the *Compulsory Purchase Order (Extension of Time Limits) Act 2010.*

[411] An owner is defined under section 75(e) of the *Housing Act 1966* as: "owner means in relation to land a person, other than a mortgagee who is for the time being entitled to dispose of the fee simple of the land whether in possession or reversion and includes also a person holding or entitled to the rents and profits of the land under a lease or agreement the unexpired term whereof exceeds three years."

[412] A tenant who is on a year lease that has yet to expire is entitled to compensation under section 121 of the *Lands Clause Consolidation Act 1845*. A licensee is not normally entitled to a notice to treat nor to compensation unless the licence confers an interest in the land to be acquired. However, certain licensees may have rights to an equitable interest in the land entitling the licensee to a notice to treat and to compensation.

[413] [1977] IR 256.

[414] *Ibid* at 259.

[415] *Ibid* at 260.

[416] It held, at 266, that "parties that are to be affected by the exercise of a statutory power cannot compel the donee of the power to convert, into a valid exercise of the power, conduct which the statute expressly or by implication says cannot be an exercise of the power. That is the position here."

Compensation) Act 1919, the principal Act that sets out the rules on compensation (discussed in Issue 16, below). There is no prescribed form for a notice to treat. It must, however, provide for at least 1 month for submissions from relevant landowners. In *Healy v Cork Corporation,*[417] the notice required details within one calendar month of notification; therefore the notice was deemed to be invalid. An invalid notice to treat does not invalidate the CPO itself; rather, the CPO is invalidated only if a valid notice to treat is not served within 18 months.

14.06 The case of *Dublin Corporation v Gemmata NV,*[418] concerned Article 2(1)(i) of the Third Schedule of the 1966 Act which provides that an arbitrator shall not take into account any interest "created" in land after the date on which notice of the CPO is published. The defendant bought certain interests in land subject to a CPO after such a notice was published. The plaintiff argued that his interests should not be taken into consideration but the arbitrator disagreed and assessed the compensation with regard to the defendant's interests. The plaintiff sought to have the arbitrator's order set aside in the High Court but this claim was dismissed on the basis that the interests were acquired by the respondent, not "created". It held that the purpose of the provision is to ensure that circumstances will not change between the date of publication of the CPO and the date of the notice to treat.[419]

The Valuation Date

14.07 Under section 84 of the 1966 Act, the date upon which the notice to treat is served is also the date upon which the land is valued. Therefore, the acquiring authority has 18 months to determine the lowest point in land value and could serve the notice when it is most financially advantageous for it. Any development on the land or improvements made to the property already on the land will not be included in the compensation following the notice to treat.[420] This is particularly problematic given the absence of a statutory time limit upon which compensation will have to be determined or paid.

14.08 By way of explanation, consider the following 3 scenarios:

(1) Emma buys a house in 2004 for €1 million. By 2010, the value of the house has been significantly reduced due to the banking crisis. In 2010, the house is worth €400,000 and the notice to treat is served. The acquiring authority pays Emma her compensation in 2014 when property prices have risen; the house is now valued at €700,000. In this scenario, Emma loses a significant amount of the money she spent on the property (which she might otherwise have recovered having waited for property prices to level off), she cannot buy

[417] High Court 1980.
[418] [1995] 1 IR 204.
[419] *Ibid* at 207.
[420] Article 2(1) of the Third Schedule of the Housing Act 1966 provides that "The arbitrator shall not take into account: Any interest in land created after the date on which the notice of the order having been made is published in accordance with article 4 of this schedule, or any building erected or any improvement or alteration made after the said date if the opinion of the arbitrator the erection of the building or the making of the improvement or alteration was not reasonably necessary and was carried out with a view to obtaining or increasing compensation".

an equivalent property with her €400,000 and she also cannot pay off her mortgage that she took out in 2004.

(2) Jackie buys a house in 2010, taking advantage of the low property rates and pays €400,000. Soon after buying the house, a CPO is confirmed in respect of the property and the acquiring authority serves Jackie with the notice to treat. The acquiring authority pays Jackie her compensation in 2014 when property prices have risen somewhat, and the house is now valued at €700,000. In this scenario, Jackie cannot buy an equivalent property but can at least pay off her mortgage. However, this would not take into account the interest to be paid on the mortgage.

(3) Caroline buys a house in 2004 and is served with the notice to treat soon after, when the property is worth €1 million. The acquiring authority pays Caroline her compensation in 2010 when the property is worth €400,000. In this scenario, Caroline can certainly purchase an equivalent property with a significant surplus; she has made €600,000 on the property and can pay off her mortgage.

14.09 It could be argued that none of the above scenarios are entirely fair to both the acquiring authority and the landowner. The principle of equivalence, which underpins the CPO process, is notably absent and the delay in compensating the landowner can result in serious financial difficulty for the landowner. It is important to remember that this is a landowner who did not seek to sell the land, and who was restricted in his or her enjoyment of the land in the period between the service of the notice to treat and the payment of compensation.

14.10 In the report prepared by Seamus Woulfe SC on the CPO made by Wicklow County Council in Charlesland, County Wicklow, it was noted that the notice to treat was served in June 2006, before the economic crash, and the value of the land decreased significantly. The owner claimed €10,425,000 on the basis of 3 comparable properties in the land. The occupier claimed €6,349,325 for both the value of the land and temporary disturbance. The valuation carried out on behalf of the Council valued the property at €7 million, "having referred in a very general way to comparable sales of similar zoned lands in the area",[421] without any reference to issues of access or flooding. By comparison, the valuer working on behalf of the owner submitted a report, detailing 8 comparable sales of land in the area, which in his opinion resulted in the valuation of the land as €10,425,000. The Council subsequently decided to get a second opinion in respect of the value of the land. The second valuation took into consideration that there was only a narrow track by way of access to the land; however, alternative access could in theory be provided from 3 locations. Based on this, the second valuation came in at €4,580,000 if the lands were considered to be owned by the occupier (who claimed adverse possession) or €5,215,000 if owned by

[421] *Ibid* at31.

the original owner. This dispute over who had the right to the title of the lands was subsequently settled during compensation negotiations.

14.11 The Council was then approved for an amount of €5 million by the Department for the Environment, Community and Local Government. However, as the Council did not draw down this money in time, the approval lapsed. In 2008, the Council was notified that both the owner and occupier had both died recently at which point the Council lost interest in the CPO seemingly as a result of the collapse of the national finances and the lack of further funding for new social housing projects. The respective estates were eager to proceed, however, and given that a CPO cannot be withdrawn 6 weeks after the first claim was made, they were legally obligated to proceed. Over the following 2 years, during compensation negotiations, there was little progress until 2011 when an arbitrator was appointed. The second valuer had noted that offering €200,000 per acre was "purely for negotiation purposes",[422] knowing that the valuation date coincided with the height of the market. The Council was advised to make an unconditional offer of approximately €600,000-€650,000 with a view of being able to actually offer €1.2 million despite acknowledging that a reasonable arbitrator might award €4-5 million. The Council then used the potential flooding, which they determined was not an insurmountable issue in order to confirm the CPO, in order to reduce any potential compensation.[423] As a result of the mass of conflicting evidence that would be placed before the arbitrator and the law agent's note that the arbitrator in question had a reputation of being more generous than previous arbitrators, it was recommended to the Council that it increase its unconditional offer to €3 million. During a lunch break from arbitration, the parties settled on €3 million with costs. No formal arbitration award was made to avoid the payment of stamp duty on such an award, which would be payable by the Council. As the compensation was determined by agreement, it was payable immediately.

14.12 The banking crisis was one of the worst economic crises in the past hundred years, and such an extreme fluctuation in land value is arguably unlikely to repeat itself on a regular basis. Rather, it is more likely that property values will increase with time and so, if the compensation is based on previous years, the landowner will be at a serious disadvantage. This was asserted by the Supreme Court in *Dreher v Irish Land Commission,*[424] stating that the market value of the land at any given time may not always constitute "just compensation" as such value could be "affected in one way or another by current economic trends or other transient conditions of society". This case involved an applicant who wished to be paid in cash as opposed to Land Bonds whose value fluctuated between the times the Commission Bonds were lodged to the credit of the applicant to when the applicant had the right to dispose of the bonds (upon proof of title being confirmed). It was concluded that the statutory provisions go as far as is "reasonably possible" in taking into consideration inflation and fluctuating rates of interest in so far as they are "reasonably foreseeable". It held that

[422] *Ibid* at38.
[423] *Ibid* at40.
[424] [1984] ILRM 94.

if there are inflationary trends or fluctuations in the rates of interest outside of the control of the Minister for Finance, a statute could not be considered unconstitutional by not taking account of such unpredictable variations.

14.13 The constitutionality of section 84 has never been questioned in court. Nonetheless, the former Chief Justice, Mr Justice Ronan Keane, in his leading text on local government law has stated that "it may be, however, that when the compulsory purchase legislation eventually comes to be reformed, this will be one of the areas which the legislator will concern itself".[425]

Progress must be made within a reasonable time

14.14 In *Van Nierop v Commissioners of Public Works in Ireland,*[426] the Commissioners of Public Works served notice on the wrong owner of the land and only 2 years later served notice on the correct owner, the plaintiff. The plaintiff immediately advised that he would sell the land for market value but refused the Commissioner's offer and arbitration proceedings were instigated by the Commissioners. There were significant delays and 7 requests for updates to the Commissioners went unanswered. 11 years after the notice was served to the plaintiff, there had been no progress and he had been made an offer for his land. When he alerted the Commissioners to the offer and his will to sell, they responded making an offer of £1800. 13 years after the notice was served, the plaintiff sought to void the CPO due to the lapse in time and submitted auctioneer evidence that the land was now worth in excess of £45,000. The High Court (O'Hanlon J) followed the decision of the English Court of Appeal in *Simpson Motor Sales (London) Ltd. v Hendon Corporation,*[427] in which it was held that where a notice to treat has been served, the acquiring authority is under a duty to proceed to acquire the land within a reasonable limit, and, if they do not proceed within a reasonable time (what is a reasonable time shall be determined by fact) to acquire the property and pay the compensation, they may lose their rights to enforce the notice.[428] However, it should be noted that this case involved a delay in initiating the process rather than the enforcement of the determined compensation.

14.15 The Court in *Van Nierop* also cited with approval the decision in *Richmond v North London Railway Company,*[429] in which the English Court of Appeal held that such a notice must be acted upon within a reasonable time or it shall be considered to be abandoned. In the absence of any progress, the injury to the landowner "would be very great. During the whole 10 years he would have had but a qualified ownership or enjoyment of his own property. If land, he could not improve it or build on it; if a house, he could not rebuild or repair it, however urgent the necessity of doing so might be, without the strong possibility of getting no return for the money".[430] The

[425] Butler, *Keane on Local Government* 2nd ed.(First Law 2003) at 296.
[426] [1990] 2 IR 189.
[427] [1963] Ch 57, which followed *Richmond v North London Railway Co* (1868) LR 5 Eq 358.
[428] [1990] 2 IR 189, at 198.
[429] (1868) LR 5 Eq 352.
[430] *Ibid* at 358-359.

result therefore, is that such a notice cannot be held over the landowner's head for an indefinite or unreasonable amount of time.

14.16 The principles relating to unreasonable conduct under the English *Housing Act 1936* were set out by the UK House of Lords in *Simpson Motor Sales (London) Ltd v Henden Corporation*[431] as follows:

(1) If the acquiring authority does not proceed within a reasonable time, it may lose its rights to enforce the notice;
(2) The acquiring authority may explicitly state or through its conduct show it wishes to abandon the notice; however, a landowner who proceeds within a reasonable time, can demand the enforcement of such a notice;
(3) If the initial purpose with which the notice to treat was served changes, any further development by the authority may be viewed as *ultra vires*;[432] and
(4) Misconduct on behalf of one of the parties may be enough to enforce the notice to treat.

14.17 These principles, however, have never been explicitly applied in any Irish case. It should be noted that in *Nestor and Flynn v Galway Corporation,*[433] the plaintiffs sought an order of specific performance enforcing the compensation assessment of the arbitrator. The defendant, who was responsible for the payment, had created significant delays in realising the award. The High Court (Carroll J) upheld the claim and awarded an interest rate of 24%, which was the punitive rate of interest then payable in law society contracts, stating that the compensation should have been provided within a reasonable period of time.

Withdrawal of the Notice to Treat

14.18 The acquiring authority is entitled to withdraw the notice within 6 weeks after the delivery of the claim and submission of title by the landowner, but is obliged to pay compensation to the claimant for any loss as a result of the notice to treat, which then may be determined by the property arbitrator.[434] However, as Butler notes, there is no withdrawal time limit under the Act where no claim is made.[435]

Issues with the current process

14.19 Once the notice to treat is served by the local authority as acquiring authority, this is followed by a submission of title and a request for compensation by the landowner. This is followed by negotiations, then a possible review by an arbitrator, which could then be followed by further judicial review proceedings. The acquiring authority need not deposit the money with the landowner or the bank until it is ready, as interest will

[431] [1964] AC 1088.
[432] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 7: "A natural person can do everything save what the law forbids; an artificial legal person can only do that which the law allows. In the vast majority of cases, the promoter of an undertaking requiring acquisition powers would be an artificial legal person, such as a local authority or a limited liability company."
[433] High Court 17 April 1953.
[434] Section 5 of the 1919 Act.
[435] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 295.

only begin accruing from the date of entry onto the land and there is no time limit within which compensation must be paid. Butler notes that under the 1966 Act, the date of the notice to treat is the date that interest begins to accrue, but in practice he notes that that is not the case. The property arbitrators value all compensation cases, except cases under the 1966 Act, on the basis of either the date of entry onto the land or the date upon which compensation is determined.[436] Coupled with the fact that the stated purpose is permitted to be something as vague as "development", it may be years before a potential plan with interested developers, funding and methods materialises.

14.20 There is no time limit within which acquiring authorities must begin such development. This means that the time limit that the landowner spends waiting for his or her compensation while being effectively denied his or her own development of the land is potentially excessive and with a risk of causing a disproportionate effect on his or her property rights.[437] If the CPO is all but inevitable, it may not make sense to enforce a time limit, after which, the process needs to be repeated. This would, arguably, not benefit the State or the landowner. However, without firm time limits, the process affects landowners' property rights in a disproportionate manner. It could be argued that land banks are beneficial as they may attract foreign investors or provide acquiring authorities with easy access to land if urgent development is required. On the other hand, the power to create land banks could be viewed as incentivising local authorities to acquire land that it considers potentially useful without a plan or funding, given that the earlier the land is acquired, the lower the market value would arguably be. Such acquisition, when conducted compulsorily, arguably constitutes a disproportionate interference with the landowner's property rights, as this land is taken without knowing that the property acquired is specifically suitable. Therefore, there may be other areas of land that would be equally suitable that could be acquired through a mutually beneficial sale, rendering the compulsory acquisition unnecessary.

14.21 One solution may be to create a statutory timeline within which compensation must be paid or else the CPO fails and cannot be re-ordered. This could create an incentive for authorities to make effective use of the land and avoid creating land banks at the expense of the landowners who could otherwise enjoy their land. With regard to the valuation date, it may be considered to be a fairer system if the value of the land was determined at the date of arbitration; however, the same issues would arise unless the compensation is paid immediately. Any gap between assessment and payment of compensation might be argued to lead to an inequitable outcome, as many landowners will not be able to mitigate their losses without compensation in advance.

[436] *Ibid* at 295.

[437] "Even where [compulsory purchase] is justified in principle, the extent to which the property rights are interfered with must, so as to comply with the principles of proportionality, be both proportionate to the ends intended to be achieved thereby, and interfere with the plaintiff's property rights to no greater extent than that which is necessary to achieve those end", *Crosbie v Custom House Dock Development Authority* [1996] 2 IR 531at 545.

QUESTIONS FOR ISSUE 14

14(a) Do you consider that the valuation date of the market value should remain the date on which the notice to treat is served or should such value be determined on the date of arbitration?

14(b) Do you consider that the time limit within which a notice to treat must be served should be amended?

14(c) Do you consider that the acquiring authority should be required to pay the compensation prior to developing the land?

Please type your comments (if any)

ISSUE 15

POWER OF ENTRY BEFORE ASSESSMENT OF COMPENSATION AND INTEREST RATE PAYABLE

The 1845 Act

15.01 Under section 70 of the 1845 Act, once an amount of compensation is determined, the acquiring authority can lodge the money into the bank and create a vesting order, which then allows it to enter the land and begin development. Section 17 of the 1845 Act also provides that a certificate provided by 2 justices of the peace will be sufficient as proof that the compensation has been paid and the authority can subsequently make the vesting order. If the landowner refuses to leave his or her land, then the sheriff can remove the landowner, and he or she will have to pay the costs incurred in the sheriff invoking his or her power.[438] Under section 69 of the 1845 Act, if the landowner has a disability and is not in a position to affect the conveyance of the land or to produce a good title, the local authority can vest the lands in itself through a deed poll. Under section 124 of the 1845 Act, where an acquiring authority enters lands by mistake, that is, having omitted to purchase the lands from landowners they were unaware of, they are entitled to remain in possession of the land subject to a payment of compensation with interest. Section 2 of the *Railways (Ireland) Act 1860* is similar in that it provides that where the acquiring authority deposits the compensation, as determined by the arbitrator, into the Bank of Ireland, it may enter upon and use the lands for the purpose of carrying out the CPO.

The 1960 and 1966 Act

15.02 Section 80(1) of the 1966 Act provides that, after the notice to treat has been served, the authority may, upon no less than 14 days written notice to every owner, lessee and occupier of the land, enter on, take possession of and use the land as may be specified in the notice. Section 80(2) of the Act does not apply to orders made under the 1960 Act and provides that, with regard to occupiers that have no greater interest than a tenant for a year or from year to year, the authority may enter the land 21 days after providing written notice to such occupiers. This section provides that such entry need not comply with the provisions of the Land Clauses Acts, which would insist upon the payment of compensation into the bank or to the landowner before

[438] Section 91 of the 1845 Act.

entry. This section also does not refer to the need to sample or assess the land. Section 10(4)(a) of the 1960 Act provides that section 80(1) of the 1966 Act shall apply to an order made under section 10. Compensation does not have to be paid before entry; however, interest shall accrue from the date of entry.

Interest to be paid

15.03 There is potential confusion in the rate of interest to be paid in the most commonly used systems. Section 85 of the 1845 Act provides that the interest rate is 5%, but this applies only to compulsory acquisition schemes that incorporate the 1845 Act scheme. While section 80 of the 1966 Act does not expressly refer to a rate of interest, article 2(j) of the Third Schedule of the 1966 Act incorporated the rate of interest under the *Housing of the Working Classes Act 1890* and amended this from 3% (the rate inserted by the *Housing (Amendment) Act 1948*) to the rate "at which, on the date of such entry the local authority could borrow from the local loans fund.[439] This refers to the *Local Loans Fund Act 1935*, which was enacted to provide loans from the Central Exchequer to local authorities for various capital purposes, including housing. In *Murphy v Dublin Corporation,*[440] the plaintiff argued that he was entitled to interest at the commercial rate of interest, whereas the defendant Corporation argued that the interest should be the rate under the 1845 Act, given that the Second Schedule of the 1966 Act had incorporated section 85 of the 1845 Act. The Supreme Court held, however, that the rate of interest was as provided under Article 24 of the Second Schedule to the 1890 Act, as amended by the Third Schedule of the 1966 Act, that is, the local loans fund rate. This also appears to be the current position,[441] but this nonetheless creates some difficulties.

15.04 First of all, under the 1935 Act, the rate of interest payable by local authorities was to be set from time to time by the Minister for Finance. Until 1948 this was done by Ministerial statutory direction, when the rate was set at 3.25%.[442] It is not clear that the 1935 Act requires the rate to be set by statutory order; and it would appear that, in recent decades, the Minister sets the local loan funds rate of interest on an administrative, non-statutory, basis twice yearly, based on the average yield on certain Government stocks for given periods leading up to the assessment date. If the rate under the 1935 Act can, indeed, be set on a non-statutory basis, it thus appears that the local loan funds rate is, in effect, a "floating rate" that varies from time to time on this administrative basis. This can clearly have significant implications in the CPO context, particularly where there is a long gap between the CPO being made and the date when compensation is assessed under the 1919 Act. A second complicating feature is that, while the 1935 Act remains in force and was amended as recently as 2011[443] to take account of the establishment of the Department of Public Expenditure and Reform, it was stated in 2012 by the then Minister for Public Expenditure and

[439] Article 76(2)(j) of the Third Schedule of the 1966 Act.
[440] [1979] IR 115.
[441] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 298.
[442] *Local Loans Fund (Rate of Interest) Direction 1948* (SI No.158 of 1948).
[443] By the *Ministers and Secretaries (Amendment) Act 2011*.

Reform that the 1935 Act is no longer used as the basis on which loans to local authorities are made by the Exchequer.[444] This suggests that the 1935 Act may, in effect, be obsolete, and is thus not suitable as a reference point for determining the interest rate payable for CPO purposes. For these reasons, the Commission seeks views as to whether there is need to reform the basis for assessing the rate of interest payable.

15.05 There is no claim for compensation where the enjoyment of the land has been interfered with while the landowner waits to be paid or for the authority to begin development. Under section 76(2)(l) of the Third Schedule of the 1966 Act, the arbitrator is to disregard any interest in land created after the date on which notice of the order having been made is published or any building erected or any improvement or alteration made after the said date if, in the opinion of the arbitrator, the erection of the building or the making of the improvement or alteration was not reasonably necessary and was carried out with a view of obtaining or increasing compensation. The Supreme Court has held that "the right to own what is one's own is as ancient as the earliest form by which unit groups of society regulated the affairs of those within them. Intrinsic to such a right is an entitlement to undisturbed enjoyment of one's property and if necessary, the right to rebuff all unwelcome interferences with it".[445]

15.06 Given the excessive duration of the time between the notice to treat being served and the compensation paid, this could be considered a disproportionate interference. The land will be left stagnant and the landowner will be unable to use the land as he or she wishes.

Vesting Order

15.07 Under the 1966 Act, once the acquiring authority has entered and taken possession of the land and 6 months have elapsed, if it is considered urgent and necessary, and a proper offer in writing has been made to the landowner who has provided particulars of his or her interest, then the acquiring authority can complete the acquisition by making a vesting order.[446] The authority must then publish notice in one or more newspapers that the vesting order has been made. It must also serve notice on every person appearing to have an interest in the land to which the order relates.[447] The effect of the vesting order is to vest the land in the housing authority in fee simple, free from encumbrances, 21 days after the order is made.[448] It extinguishes all of the landowner's rights in respect of the land. From that date, the acquiring authority becomes responsible for any purchase annuities, rent payments, or other annual sum payable to the Irish Land Commission or to the Commissioners of Public Works in Ireland (the Office of Public Works).[449] It is noteworthy that there is no obligation to

[444] Vol. 751 Dáil Éireann Debates, 11 January 2012, Written Answers, No.281 (Local Loans Fund), Minister for Public Expenditure and Reform: "The v The Local Loans Fund is no longer used as a mechanism to provide loans to local authorities. Other funding arrangements have been put in place."

[445] *Reid v Industrial Development Agency, Ireland* [2015] 4 IR 494 at 516.

[446] Section 81 of the 1966 Act.

[447] Section 81(3)(a), (b) of the 1996 Act

[448] Section 82(1) of the 1966 Act.

[449] Section 82(2) of the 1966 Act.

make the vesting order within a certain amount of time and, given that there is no time limit within which compensation must be paid, this might be considered one of the process that may give rise to some concerns.

15.08 It is envisioned that all liability in respect of the land will vest in the authority from that date. This is straightforward where the entirety of the land is acquired. However, in instances where only part of the land is acquired, this may cause issues and potential confusion in relation to insurance payments, liability from tortious claims and maintenance of the land. It also leaves the acquiring authority open to claims of adverse possession following 12 years of occupation by an individual, even by the original landowner, if it fails to work or maintain the land in the absence of the landowner's permission. In relation to land owned by a state authority,[450] as opposed to "State land",[451] the individual would have to be in adverse possession for 30 years before a claim could arise.[452]

15.09 In 2008 it was reported[453] that Fingal County Council was required to make compensation payments twice over in respect of 40 acres of former agricultural lands located at Dunsink in Finglas, Dublin. The land had been compulsorily acquired as part of an 800 acre land bank which Fingal County Council intended to develop, and compensation exceeding €5 million had been paid to the original landowners of those 40 acres. It later transpired that 2 families of the travelling community had occupied these 40 acres for over 20 years, without any action being taken to prevent this by the original landowners, so that the 2 families had obtained adverse possession of the land. As a result, it was reported that one of the families was paid a further €1.1 million compensation by Final County Council in respect of 12 of the 40 acres involved.

Entry before the payment of compensation

15.10 The power of entry before payment of compensation may be questioned under Article 40.5 of the Constitution, in light of the decisions in *Fortune,*[454] *Kinsella*[455] and *Murray.*[456] The then Chief Justice, Ms Justice Denham, speaking extra-judicially, described Article 40.5 as "one of the most important, clear and unqualified

[450] Under the *Statute of Limitations 1957* the term "state authority" is confined to a Minister of State, the Commissioners of Public Works in Ireland, the Irish Land Commission, the Revenue Commissioners and the Attorney General.

[451] Under the *State Property Act 1954*, "state land" is defined as land that belongs to the State, the Nation, the People or a state authority or a gift made to the State, Nation or the People. There are a number of exceptions including any land acquired or vested in the Commissioners under any acts relating to the drainage of land and any land acquired, held by, transferred or vested in, or payable to, the Land Commission. Section 2(3) of the Act provides that, within the Act, any reference to State land vested in a State authority shall be construed as including references to State land otherwise than by or under the Act. A State authority is defined as a Minister of State or the Commissioners of Public Works in Ireland.

[452] Section 13(1)(a) of the *Statute of Limitations 1957*.

[453] Bartley, "Travellers raise the stakes after €5.5m Council Payout" *Irish Independent* 29 March 2008. See also Melia, "Squatter will be paid €1m by Council to leave 12-acre site" *Irish Independent* 11 June 2007; and Holland, "Whose Land is it Anyway?" *The Irish Times* 16 June 2007.

[454] *Wicklow County Council v Fortune* [2012] IEHC 406, [2013] IEHC 255.

[455] *Wicklow County Council v Kinsella* [2015] IEHC 229.

[456] *Meath County Council v Murray and Murray* [2010] IEHC 254, [2017] IESC 25.

protections given by the Constitution to the citizen".[457] 2 points emanate from Article 40.5. The first is that the dwelling is conferred with a constitutional protection above that of general property with regards to entry, and the second is that the issuing of a warrant (or authorisation of forced entry) is an administrative act that must be exercised judicially.[458] The issuance of such a warrant must be granted by an independent body and cannot be permitted by a body involved in the investigation of the individual subject to the warrant. In *DPP v McCreesh,*[459] the Supreme Court held that entry onto a premises requires express statutory authotisation. In *King v Attorney General,*[460] the Supreme Court held that "save in accordance with law" meant "without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution".[461] In *Deighan v Hearne,*[462] the High Court (Murphy J) held that, in the criminal sphere, a statutory provision could confer the power on an authorised officer to enter into a dwelling house having regard to the "exigencies of the common good" referred to in Article 43.[463] Given that the common good is also engaged in the context of a confirmed CPO, there may be scope to extend such a view to the actions necessary to implement a CPO. If, however, the entry was viewed as a separate action, and a proportionality test was performed on the constitutionality of such an entry, the absence of advance compensation could arguably be a disproportionate interference with Article 40.5.

15.11 It is important to note, however, that Article 40.5 may be irrelevant in instances of entry for the purposes of assessing the suitability of the land, as was made clear by the Supreme Court in *The People (Attorney General) v O'Brien.*[464] In this case, it was held that the dwelling only applies to the actual home and not the land surrounding it. Therefore, it may only be of use where a home is being acquired as opposed to a strip of land. In the same case, "dwelling" was defined as the house as a whole where members of a family live together.[465] Each member of the family will enjoy the constitutional protection of such a dwelling.[466] The constitutional family is that which is based upon or around a marriage, and even the concept of a *de facto* family was rejected as a legal concept in *McD v L and M.*[467] The use of "family" could be cause of some confusion given the lack of an explicit distinction in Article 40.5 cases between married and unmarried participants. The defendants in the O'Brien case were brothers living with their father. However, their parents may have previously been married and living in the house. As Article 40.5 is a personal right and not a family right under Article 41, it would appear more likely that the marital status of the

[457] Denham, "Some Thoughts on the Constitution of Ireland at 75", Conference on "The Irish Constitution: Past, Present and Future" Royal Irish Academy, Dawson Street, Dublin (28 June 2012).
[458] See the Supreme Court decision in *Damache v Director of Public Prosecutions* [2012] IESC 12.
[459] [1992] 2 IR 239.
[460] [1981] IR 233.
[461] *Ibid* at 257 (Henchy J).
[462] [1986] IR 603.
[463] *Ibid* at 614.
[464] [1965] IR 142. Also in *DPP v Corrigan* [1986] IR 290, the High Court (Blayney J) found that the search warrant was lawful as the defendant was arrested in his driveway. He noted the same would apply to an arrestee's garden, at 296.
[465] *Ibid* at 169.
[466] *Ibid.*
[467] [2008] 1 IR 417.

dweller is immaterial and that "family home" is used more as a useful term to describe the existence of family ties.[468]

15.12 In *Reid v Industrial Development Agency,*[469] the Supreme Court acknowledged that although there was a distinction between the compulsory acquisition of land, which is offset to an extent through the payment of compensation, and a search warrant which grants investigatory agencies entry onto a dwelling, there is also "a good deal of similarity between both in that constitutional rights are being lawfully interfered with, potentially resulting in very serious consequences for those affected by the exercise of such powers".[470] The Court also held that Article 40.3, 40.5 and 43 are intermingled but spoke to the specificity of the rights under Article 40 in particular.[471] Unfortunately, the Court did not engage with Article 40.5 for the purposes of the interference with the plaintiff's dwelling, especially as it was not a "family" home for the purposes of the Constitution. Whether the family home could be protected under Article 41 has never been argued by a married couple in opposition to a CPO. A better argument may be found under an application for a declaration of incompatibility with Article 8 of the ECHR which contains protection for both family life and the home under the same article.

Section 160 Cases and Article 40.5

15.13 While the following discussion is useful in terms of expanding the scope of Article 40.5 and its protection, there are some key differences between the demolition of unauthorised structures and CPOs. Most importantly, there is an absence of compensation for the demolition of a structure under section 160, and a landowner who is subject to a CPO has not committed any unlawful conduct that would require punitive enforcement. In the ECtHR case of *Chapman v United Kingdom,*[472] it was held that the Court, when considering "whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy or requiring the individual to move".[473] A section 160 order can also not be made by An Bord Pleanála; it can only be authorised by the courts. One similarity however, is that they are both interferences with an individual's property rights that are conducted in the name of the common good.

[468] Also, in *The People (DPP) v Barnes* [2007] 3 IR 130, the Court of Criminal Appeal found that the protection extended to "householders".
[469] [2015] 4 IR 494.
[470] *Ibid* at 518.
[471] The Court held that "Article 40.3.1 of the Constitution gives protection at a fundamental, personal rights level to the property rights of every individual. That protection is enhanced by the provisions of Article 43 which acknowledges that the right to private ownership of external goods, which it describes as a natural right, inures to man by virtue of his rational being and treats its historical origin as being 'antecedent to positive law'. These provisions are phrased in general terms and embrace virtually all forms of property, whereas Article 40.5 offers specific protection as regards one's dwelling house, describing it as being 'inviolable'. All of these constitutional provisions, but in particular those first mentioned, inform each other", *Ibid* at516-517.
[472] [2001] 33 EHRR 399.
[473] *Ibid* at428.

15.14 In *Fortune*, Article 40.5 was used as a defence for the first time against the exercise of the local authority's powers under section 160 of the 2000 Act to restrict the development of unauthorised structures on land by a landowner or order the restoration of the original position. The defendant had constructed a small timber-framed chalet without planning permission. She was then visited by officials from the council on a number of occasions, and was also sent a warning letter, but chose to proceed regardless. The defendant was refused planning permission on the grounds that the lane connected to the proposed development was substandard in horizontal and vertical alignment and would therefore endanger public safety. The board also considered the proposed development to be at an elevated location designated in the Wicklow County Development Plan as an area of outstanding beauty. The defendant argued that without this development, she and her children would be homeless. It is noteworthy that Policy SS9 of the Settlement Strategy states that it is the policy of the planning authority not to allow development of dwellings within areas so designated, unless the applicant has a permanent note of residence in the immediate vicinity or has resided at the location for a minimum of 10 years. This would appear to conflict with the decision in *Blascaod Mór,*[474] which held that interferences with property rights cannot be based on pedigree alone.

15.15 The High Court (Hogan J) held that were it not for the Article 40.5 argument, he would have upheld the judgment of the High Court (Edwards J) to confirm the order. The Court held that a dwelling should enjoy the "highest possible level of legal protection which might realistically be afforded in a modern society".[475] It found that the Court should not exercise its jurisdiction under section 160 unless the there is an objectively justifiable necessity and the case for such a drastic step is convincingly established. It argued that it would be necessary to go beyond the unlawful conduct of the individual and question whether the dwelling would be so "manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response".[476] This would include situations where the jeopardised or threatened the rights or amenities of others. The Court submitted that Article 40.5 went further than Article 8 of the ECHR which protects the home; however, it has been argued that one construction could be that only unauthorised entry is prohibited, rather than a protection of the structure itself.[477] The Court adjourned the question of whether the unauthorised dwelling should be demolished for further arguments and in *Fortune (No. 2),* it confirmed that the making of a section 160 order would, on the particular facts of the case, represent a drastic interference with the inviolability of the dwelling along with the defendant's property rights. In terms of expanding the scope of Article 40.5, the Court also held that the Article extends to both civil and criminal proceedings and to both State and non-State actors.[478]

[474] For a further exploration of this case, see Issue 3, above.
[475] *Ibid* at 41.
[476] *Ibid* at 42.
[477] Hughes, "Section 160, Unauthorised Development and "Inviolability" of the Dwelling" (2013) 20(2) IPEL 65 at 66.
[478] *Wicklow County Council v Fortune* [2012] IEHC 406 at paragraph 35.

15.16 This case was subsequently followed by *Kinsella*, in which the High Court (Kearns J) found that the judgment in *Fortune* was "beyond this Court's comprehension" given the lack of preference to the public and community interest in protecting environmental integrity and planning law enforcement. The decision focused heavily on the misconduct of the respondent and the significant precedent. However, as aforementioned, Article 40.5 had never been argued in a section 160 case before; and as noted by the Supreme Court in *Murray,* "Hogan J was not only entitled but was obliged to deal with the points articulated on behalf of Ms Fortune, however novel, complex or difficult they may have been".[479] The Supreme Court in that case found that although it did not share the views of Hogan J, it acknowledged the "legal and constitutional ingenuity that led him to the conclusion he reached".[480] This would appear to support an expansion of the protection of Article 40.5 in less extreme cases where the unlawful conduct of the respondent is not as prominent. It continued, the *Fortune* judgments "may well refocus attention on and reinvigorate the journey which Article 40.5 has still to undertake".[481] The Court submitted that the "forcible entry" reference may indicate that the force of the Article is primarily on entry and search powers but insisted that it was not "suggesting that the ambit of the Article is so confined".[482] It did argue however, that the expansion of Article 40.5 to include civil matters was general in its description, non-qualified and unconditional. As such, such a statement would have immense reach, "with potential capacity to travel to destinations quite unknown".[483] This concerned the Court, which concluded that the widespread expansion from the Article's traditional sphere of influence should be case driven and individually assessed. Despite this hesitation, it confirmed that Article 40.5 is not confined to criminal law or its procedural surrounds.[484]

15.17 Although the decision of the High Court in *Fortune* was overturned by the Supreme Court and not therefore followed in *Kinsella*[485] and *Murray,*[486] its conclusions might prove relevant for those who would argue against forced entry before the payment of compensation, and where there have been no unlawful acts.

[479] *Meath County Council v Murray* [2017] IESC 25 at paragraph 133.
[480] *Ibid* at 109.
[481] *Ibid.*
[482] *Ibid* at 117.
[483] *Ibid.*
[484] *Ibid* at 118.
[485] *Wicklow County Council v Kinsella* [2015] IEHC 229.
[486] *Meath County Council v Murray and Murray* [2010] IEHC 254, [2017] IESC 25.

QUESTIONS FOR ISSUE 15

15(a) Do you consider that there are any instances in which entry should be permitted before compensation is paid to or deposited for the landowner?

15(b) Do you consider that, in CPO cases involving a dwelling, entry before the payment of compensation would disproportionately interfere with the individual's right to property or the inviolability of his or her dwelling?

15(c) Do you consider that the duty to pay compensation should be triggered by the making of the vesting order?

15(d) Do you consider that there is need to reform the basis on which the interest rate is paid in CPO cases? If so, please specify.

Please type your comments (if any)

ISSUE 16

PRINCIPLES AND RULES FOR THE ASSESSMENT OF COMPENSATION

The Right to Compensation

16.01 In *In re the Planning and Development Bill 1999,*[487] the Supreme Court held that "there can no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property".[488] Compensation has therefore been used as a tool, both in the Irish courts and the ECtHR, to offset the interference with the individual's constitutional right to property. However, as has already been adverted to, one approach might be to conduct the proportionality test from the beginning of the process, as opposed to after the decision has been made, in order to permit the acquisition of the land. The High Court (Finnegan J) in *Clinton v An Bord Pleanála,*[489] endorsed the view that "compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good. Any other view would mean that Article 43 merely guarantees a right to compensation rather that a right to property per se".[490] In *In re the Health (Amendment)(No.2) Bill 2004,*[491] the Supreme Court held that compensation should be accepted as a "material consideration", rather than a justification for the courts when determining whether a piece of legislation interferes with Article 43 or Article 40.3. On the other end of the spectrum, legislation that does not permit the payment of compensation upon the substantial encroachment on rights "will rarely be justified".[492] This approach is echoed in the ECtHR decision of *Pressos Compania v Belgium,*[493] in which the Court held that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable…only in exceptional circumstances".[494]

16.02 It is noteworthy that the only constitutional requirement to pay compensation for land acquired falls under Article 44.6, which provides that the property of any religious denomination or any educational institution shall not be diverted except where such

[487] [2000] 2 IR 321.
[488] *Ibid* at 352.
[489] [2005] IEHC 84 at 87.
[490] Hogan and Whyte(eds), *Kelly's The Irish Constitution* (LexisNexis Butterworths, 2004) at paragraph 7(7)(88).
[491] [2005] 1 IR 105.
[492] *Ibid* at 201.
[493] [1995] 21 EHRR 301.
[494] *Ibid* at paragraph 38.

diversion is required for necessary works of public utility "and on payment of compensation". This may be contrasted with the more generally applicable provision in the Greek Constitution, which explicitly provides that compensation must be paid, and which sets out a time limit for such payment.[495] It has been argued that the decision of drafters to exclude the explicit mention of compensation in Article 43 of the Constitution of Ireland was rooted in the concern that it would excessively constrain the Oireachtas.[496] However, it is evident that although there is no generally applicable reference to compensation in the text of the Constitution (Article 44.6 being limited in scope), the courts have read an implied, but not invariable, right to compensation into Articles 43 and 40.3.2.

16.03 The statutory obligation to pay such compensation is found across many CPO Acts spanning nearly 2 centuries but it finds its foundation in section 16 of the 1845 Act, which provides that where land is to be compulsorily purchased by an acquiring authority, it shall be unlawful to "put in force any of the powers of this or the special Act" without the "whole of the capital or estimated sum for defraying the expenses of the undertaking" being paid to the landowner, their heirs, executors or administrators. More significantly from a constitutional perspective, in *Central Dublin Development Association v Attorney General,*[497] in which the High Court (Kenny J) held that "the absence of compensation for this restriction or abolition will make the Act which does this invalid if it is an unjust attack of the property rights".[498]

16.04 Figure 2 sets out the steps involved in the compensation process. Sections 16 to 68 of the 1845 Act related to the purchase of the land otherwise than by agreement; however, sections 22 to 57 of the 1845 Act have largely been made redundant by the *Acquisition of Land (Assessment of Compensation) Act 1919* (the 1919 Act).

[495] Article 17(4) of the Constitution of the Hellenic Republic of Greece provides that compensation shall, in all cases, be determined by the civil courts and until compensation is paid, the rights of the owner shall remain intact and occupation of the property shall not be allowed. The compensation must be paid with a year and a half from the date of publication of the decision provisionally determining the compensation payable, otherwise the expropriation shall be automatically revoked. Such compensation shall be exempt from all taxes, deductions and rates. Under Article 17(2) the value of the land shall be determined at the time of the court hearing of the application.

[496] Walsh, "Private Property Rights in the Drafting of the Irish Constitution: A Communitarian Compromise" (2011) 33(1) DULJ 86.

[497] (1969) 109 ILTR 69.

[498] *Ibid* at 86.

The Compensation Process

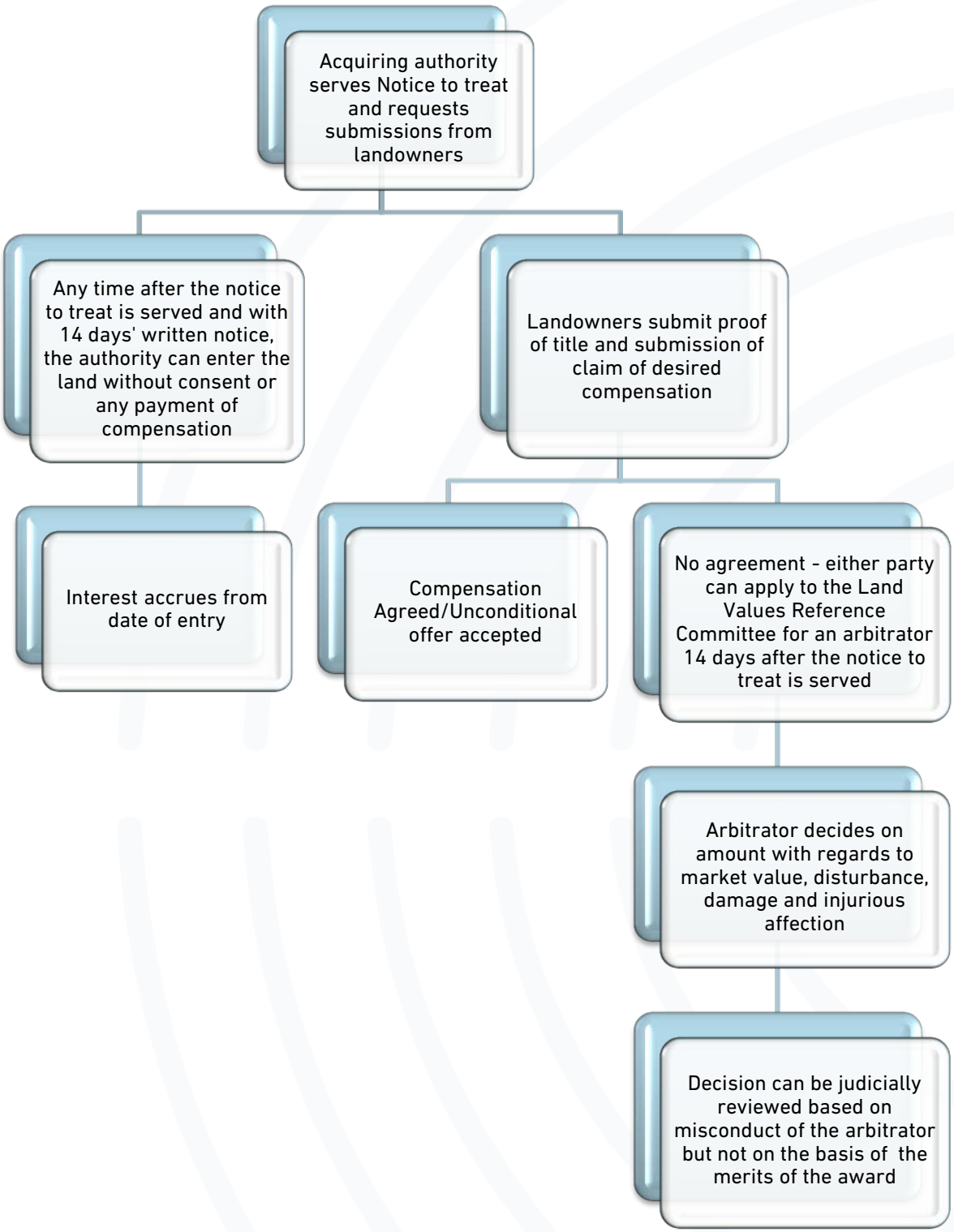


Figure 2

Compensation Headings

16.05 There are 5 main headings under which compensation may be determined. The first is market value, which has already been discussed in relation to the valuation date (Issue 15). The second is disturbance, an element of compensation that was created through common law and became one of the 6 rules of the 1919 Act. The other 3 elements are found in section 63 of the 1845 Act and are sometimes referred to, along with disturbance, as "the other elements". They are damage, severance and injurious affection. It is somewhat difficult to ascertain how compensation payable in respect of land that has been subject to a CPO is determined in practice, as decisions are not readily available and the particular points are not laid out in statute. Therefore, the best information on the arbitrator's practice arises when there is a case stated or an appeal of the arbitrator's conduct which will produce a case judgment.

Market Value

16.06 The method by which a valuer should determine "market value" was discussed at length in *Cunnane v Shannon Foynes Port Company.*[499] In this case, the High Court (Finnegan P) accepted that the valuation of open market value is based on a number of assumptions rather than facts and that it can be assessed based on expert opinion without testing the market. It accepted the expert evidence before it and found that "market value" or "open value" is a concept used to describe a price a willing seller would accept from a willing purchaser. In determining the market value, the valuer may take into consideration the desirability of the property with regard to its size, and other factors, such as splitting it up into lots that would best suit prospective purchasers. He or she should also take into account the yield that a purchaser would expect in the case of investment property and the prices achieved on the sale of comparable property whether sold as investments or with vacant possession. It may also be appropriate to have regard to the cost of construction, depending on the nature of the property. In the absence of comparable properties, a valuation should be conducted with respect to the trends in the market. It was also accepted that the art of valuation often involves subjective adjustments. Finally, the Court found that the incorporation of a "special purchaser", who may be willing to pay more due to a particular attraction he or she may have in the property, should not be necessarily included in the valuation. This is because although such an individual will be willing to pay more than the normal willing purchaser, in practice this is difficult to quantify as he or she may not need to pay an additional amount to obtain the property. Normal market value does not increase just because an individual has knowledge that he or she is getting a property at less that it is worth. It is not set on the basis of a hypothetical individual but rather, on the basis of the worth to the general public. However, a known landlord or a sitting tenant may be taken into account and may provide an avenue to consider a special purchaser due to the "hope value" and "marriage value". The "hope value" is the value in the hope that a non-special

[499] High Court 7 March 2003.

purchaser might eventually be able to re-sell to the special purchaser at an inflated price. "Marriage value" is when a piece of land is more valuable to an adjoining owner than to the general market or where 2 interests in a particular property create a combined value greater than that of the 2 interests valued separately.[500] The Royal Institute of Chartered Surveyors Practice Statement[501] states that the valuer does not have to ignore the existence of the special purchaser but should not take into account such a purchaser's additional bid.

Disturbance

16.07 As mentioned previously, allowance for compensation for disturbance was initially established in case law but it was given statutory recognition in the 1919 Act. In *Horn v Sunderland,*[502] the English Court of Appeal held that what the 1845 Act "gives the owner compelled to sell is compensation – the right to be put, so far as money can do it, in the same position as if his land had not been taken away from him".[503] This reflects the main underlying principle of compensation assessments, namely, equivalence. The principal manner in which to do so is by a claim for disturbance. Disturbance is supplementary to the market value of the land. It does not relate to the damage to the land and the reduction in value of such land, but rather the inconvenience and associated expenses of incidentals arising from the CPO. In *Horn v Sunderland Corporation,*[504] it was also held by the Court that, although rule 1 in the 1919 Act states that the fact that the land is being acquired against the will of the landowner should be irrelevant in the deliberations of the arbitrator, there is an allowance for the fact that the land was compulsorily acquired and that is the additional compensation being paid in the shape of disturbance. The Court also held that the compensation must not exceed the total loss of the landowner as to do so would "put an unfair burden on the public authority or other promoters" and "transgress the principle of equivalence which is at the root of statutory compensation".[505] This was approved by the High Court (Carroll J) in *Gunning v Dublin Corporation,*[506] and by the Supreme Court in *Dublin Corporation v Underwood,*[507] where the Court held that "it would be patently unjust, in my view, for the dispossessed owner to receive less than the total loss which he has sustained as a result of the compulsory acquisition: such a construction of the relevant legislation would be almost impossible to reconcile with the constitutional prohibition of unjust

[500] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 308.
[501] Royal Institute of Chartered Surveyors, Practice Statement, at paragraph 4.2.18.
[502] [1941] 2 KB 26.
[503] *Ibid* at42.
[504] [1941] 2 KB26. The English Court of Appeal held that "in the case of a sale by private treaty or auction, the seller cannot put in his pocket more than the net market value. He can recover no loss to which he is put by his decision to part with his land, but on a compulsory sale the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of re-instatement, because otherwise he will not be fully compensated".
[505] [1941] 2 KB 26.
[506] [1983] ILRM 66.
[507] [1997] 1 IR 69.

attacks on the property rights of the citizens".[508] Conversely, where business being carried out on land is the business of property development, no claim for disturbance will lie given that any profits that the owner would have made out of the land will be reflected in the market value of the land.[509] This is consistent with the Supreme Court decision in *In re the Planning and Development Bill 1999,*[510] where the Court relied on the payment of the use value of the land waiting to be developed, as opposed to market value.

16.08 The English Court of Appeal in *Horn v Sunderland,*[511] held that the owner is entitled to have an element of personal loss taken into the calculation of the fair price of land.[512] This refers to the "loss of money" only and does not encompass the emotional loss of the resettlement from, for example, a family home, which is one of comfort or nostalgia. The Court proposed the following examples:

(1) The cost of preparing the land for the best market;
(2) Incidental loss in connection with the business;
(3) Cost of reinstatement.

16.09 In *Beckett v Midland Railway Co,*[513] the English Court of Common Pleas noted that in order to "entitle a claimant to compensation under the *Lands Clauses Consolidation Act 1845*, 2 things must concur, that he has sustained a particular damage from the execution by the Company of the works authorised by the Special Act, and that the damage was one for which he might have maintained an action if the work was not authorised by Parliament".[514] In *Director of Buildings v Shun Fung Ltd,*[515] the applicant had not entered into any long-term contracts due to the pending CPO as it thought it may not be able to fulfil them. In addition, a significant number of customers took their business elsewhere. In the UK House of Lords, Lord Nicholls set out 3 prerequisites that must be satisfied in order to have a valid claim for disturbance:

(1) There must be a causal connection between the acquisition and the loss;
(2) The loss must not be too remote; and
(3) Losses or expenditure incurred unreasonably cannot be said to have been caused by, or to be the consequence of, the acquisition.

16.10 Galligan and McGrath set out an additional condition, namely that the loss must have been sustained, or must reasonably be expected to be sustained in the future.[516] If a

[508] *Ibid* at 129.
[509] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 580.
[510] [2000] 2 IR 321.
[511] [1941] 2 KB 26.
[512] *Ibid* at 45.
[513] [1868] LR 3 CP 94.
[514] *Ibid.*
[515] [1995] 2 AC 111.
[516] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 572.

loss occurs but the landowner does not intend to counter such loss by a new purchase for example, that is not compensable under the heading of "disturbance".[517]

16.11 Disturbance claims for losses that have not occurred or will not occur in the future are not permitted. A landowner will not be able to claim the costs of moving into a new house if he or she decided to live in a guesthouse. The landowner will not be able to claim for loss of business if it can be established that it was his or her intention to stop working. This is based on the principle of equivalence. A landowner cannot claim for a loss that doesn't exist or even one that they have prevented through proactive steps. In the English case of *Bailey v Derby Corporation,*[518] the applicant owned a builder's yard that was acquired. He bought a replacement yard but rather than transfer his business, he decided to lease it out instead, due to his ill-health. The English Court of Appeal held that he was only allowed to claim for the transfer of his business but not for its total extinction. Galligan and McGrath have suggested that if it could be established proven that his ill-health was as a result of the acquisition, the decision would have been to the contrary.[519] It has also been suggested that where the cost of re-instating a business exceeds what would be payable for the complete closing down of that business, compensation should be limited to the lower figure.[520] This argument could be considered to defy the principle of equivalence and actual loss. Finally, a landowner cannot reap the value of multiple benefits to the land, that is, a landowner cannot claim both loss of future business, such as farming, as well as the development value of the land, as only one could be carried on at a time.[521]

Reinstatement Costs

16.12 There has been considerable discussion in the English and Irish case law on the level of remoteness of the loss. If a person owns a house as an investment, but does not occupy it and chooses to reinvest the purchase money into a new house, Denning LJ suggested in the English Court of Appeal in *Harvey v Crawley Development Corporation,*[522] that he or she would not be compensated for the conveyancing costs, as he or she has made the decision to buy the house as opposed to depositing the money in the bank. The basis for this argument was that the reinstatement costs incurred were as a result of a choice of the landowner in how best to invest the money and the corresponding costs, rather than the compulsory purchase order. The Supreme Court in *Dublin Corporation v Underwood,*[523] however, rejected that suggestion, holding that such a person would have continued to hold the house as an investment, had it not been compulsory acquired. The fact that he or she wishes to replace it with a corresponding investment should not deprive him or her of

[517] Denning LJ in the English Court of Appeal decision in *Harvey v Crawley Development Corporation* [1957] 1 QB 485. In this case, the applicant's home was subject to a CPO and she attempted to purchase a new house. However, after she received the surveyor's report, she realised the house was unsuitable and bought another house. The amount of compensation under dispute included the costs involved in the first house such as solicitor's and surveyor's costs.

[518] [1965] 1 WLR 213.

[519] Galligan & McGrath, Compulsory Purchase and Compensation in Ireland: Law and Practice 2nd ed. (Bloomsbury 2013) at 573.

[520] *Ibid* at 580.

[521] *Horn v Sunderland* [1941] 2 KB 26.

[522] [1957] 1 All ER 504.

[523] [1997] 1 IR 69.

compensation for the full extent of his or her loss. The Court held that the reinvestment costs are "an immediate and direct consequence" of the CPO. The Irish courts therefore, appear more generous than their English counterparts in granting compensation where there is even a tenuous link between the loss and the CPO.

New Property and Disturbance

16.13 An understandable claim may be grounded on the argument that, if the date of valuation and the delayed payment of compensation significantly decrease a landowner's ability to purchase an equivalent home, the difference in market values should be considered under a claim of disturbance. Denning LJ also held in *Harvey* that any higher price a landowner may have to pay for new premises is not normally compensatable because the landowner is "presumed to have obtained value for money in his or her new premises".[524] However, bearing in mind that, as discussed above, other comments by Denning LJ in *Harvey* were not followed by the Supreme Court in the *Underwood* case, this suggestion may also be open to question.[525] It may be that Denning LJ was referring specifically to an owner who was only using the house as an investment – in which case, any increase in value could be realised in any eventual sale – as opposed to an owner/occupier who could only find a suitable equivalent house that was more expensive. However, this appeared to be endorsed by the Supreme Court in *Dublin Corporation v Underwood,*[526] where it was observed that the payment to the claimant of the market value of the properties will enable him or her, so far as money can, to replace the acquired properties. Given that the market value of land is tied to the notice to treat, it would be potentially permissible that any increase in the market value of equivalent houses be compensated under the "disturbance" heading in order to truly leave the landowner in an equivalent position. Another solution may be to tie the payment of compensation to the date of the valuation of the market value of the property.

16.14 If the owner was also the occupier, he or she would be reimbursed for the reinstatement costs such as solicitor's and conveyancing fees. In *Harvey,* Romer LJ felt that this approach was not only correct in law but also as a matter of common sense, given that a contrary view would lead to a high level of discontentment with the CPO system. In conclusion, the Court held that "it is bad enough in itself for a person to be compulsorily dispossessed of his home, but it is worse still if he has himself to bear expenses in finding another house in which to live".[527]

Costs of Attaining Alternative Property

16.15 An owner will generally be compensated for the cost of seeking and acquiring alternative property which, as a general rule, will only extend to comparable property. However, there are exceptions whereby increased costs will be compensated, such as where an owner is forced to buy in a rapidly rising market, or

[524] *Ibid.*
[525] *Dublin Corporation v Underwood* [1997] 1 IR 69.
[526] [1997] 1 IR 69 at 129.
[527] *Ibid.*

only more expensive premises are available. It is open to the landowner to argue that he would not have incurred such costs were it not for the acquisition. The test is what is reasonable in the circumstances.[528] Such costs would include interest payable on loans sought to attain new premises.[529]

Cost of Adapting New Premises

16.16 Although an owner may have to carry out certain works of adaption and repair to make it suitable for purpose, he or she will not be able to recoup these costs where they increase the value of the premises. This is because it will consider the landowner to have received value for money.[530]

Removal Expenses

16.17 The removal expenses will generally be included in disturbance compensation. This will include altering curtains and carpets to make them suitable for the new premises along with the cost of disconnecting, removing, adapting, re-assembling and reconnecting. Other expenses will include the reconnection of telephone systems, provision of computer and related online data lines, new stationary, the notification of customers and, where a business is being closed down, redundancy payments. Furnishings that cannot be moved must be compensated for in the form of the current value of the object to the owner, rather than the replacement cost.[531] This could potentially be unfair to the landowner where the object was perfectly functional but its replacement will require the cost of market value. If the owner sells the objects, he or she will be entitled to the difference between the price achieved and the price to the owner.

Double Overheads

16.18 Where the owner is faced with 2 sets of costs for managing 2 premises, he or she will be entitled to recoup these costs. However, this will most likely be subject to a test of reasonableness and the duty to mitigate.[532]

Increased Overheads

16.19 Where it can be shown that the increased costs are unavoidably incurred and that the landowner did not benefit from them, he or she should be compensated. There is also an effort to balance the costs with the benefits that alternative premises may provide the landowner. For example, additional transport costs may be offset by easier operating conditions.[533]

[528] Galligan & McGrath, Compulsory Purchase and Compensation in Ireland: Law and Practice 2nd ed. (Bloomsbury 2013) at 591.
[529] *Cole v Southwark London Borough Council* [1979] 251 EGD 258.
[530] Galligan & McGrath, Compulsory Purchase and Compensation in Ireland: Law and Practice 2nd ed. (Bloomsbury 2013) at 591-592.
[531] *Ibid.*
[532] *Ibid* at 593.
[533] *Ibid.*

Time and Trouble

16.20 The claimant is entitled to recover for his or her own time spent finding and acquiring new premises and making arrangements for removal. Travelling and out of pocket expenses are also recoverable.[534]

Loss of Goodwill

16.21 The loss of goodwill is the temporary or long-term loss of customers as a result of the acquisition. This will normally be recoverable and is valued by reference to the level of profit earned in previous years in the normal conduct of the business. Extraneous items will be discounted. Personal goodwill depends on personality and the individual nature or expertise of the owner. Local goodwill depends on the location of the premises. Inherent goodwill depends on the nature of the property. Adherent goodwill is based on reputation and past performance.[535] Galligan and McGrath note that the "loss suffered by a dispossessed owner is no less because his goodwill is not marketable. Indeed, it can be argued that it is greater, as the lost goodwill cannot be replaced in the market, but must be built up again over time, a prospect which, understandably, an older person may not welcome".[536]

Alternative Accommodation during Works

16.22 The landowner is also compensated for disturbance where the works on the land retained and the land taken is so severe that it causes the landowner's temporary displacement to another location.

Incidentals

16.23 In *Harvey v Crawley Development Corporation,*[537] the English Court of Appeal explored in detail the day-to-day expenses incurred in moving properties. It held that moving premises involves its own costs outside of the market value of the property such as structural alterations, furnishings, stamp duty, legal costs, surveying costs and even the printing costs of new stationery for a change of address. It even went as far as approving payment of the cost of a purchase that had fallen through and the equivalent losses.

16.24 This approach is similar to the German approach, which is extremely comprehensive in terms of what it considers worthy of compensation.[538] Under the German system, aside from the real asset loss, consequential loss must also be determined. This covers disadvantages caused for the person as a result of the CPO. These include:

(1) Temporary or permanent losses suffering pursuant to owner's profession or livelihood;

[534] *Ibid.*
[535] *Ibid* at 594-595.
[536] *Ibid* at 596.
[537] [1957] 1 All ER 504.
[538] Voss, "Compulsory Purchase in Poland, Norway and Germany – Part Germany" (FIG International Congress, Sydney Australia, 11-16 April 2010) at 17-18.

(2) Depreciation of the remaining property;
(3) Compensation of the physical structures (i.e. in case of partial expropriations);
(4) Removal expenses or costs of substitute living spare, cost of organising a property; and
(5) Broker's cost, notarial deed cost, land register cost, surveying cost, transaction tax, and if replacement property is part of the compensation.

In the case of farming land, this includes:

(1) Damages or losses because of separation of the remaining fields after expropriation;
(2) Additional cost because of enlarged routes to the fields;
(3) Lost profits from harvest which already had been sown;
(4) Compensation of tenants;
(5) Travelling cost for resettlement, including additional manpower, cost of site inspections;
(6) Negotiation cost, expert's advice;
(7) Cost of relocating the business, production downtime;
(8) Expenditures for unusable inventory (if not included in the asset compensation);
(9) Loss of earnings during resettlement period; and
(10) Cost of initial difficulties in the management, change in customers, and related matters.

Disturbance and Tax

16.25 In *Dublin Corporation v Underwood,*[539] the Supreme Court observed that in moving properties, the landowner would sustain additional expenses in the form of stamp duty, legal and agent's fees. In reaffirming the principle of equivalence, he continued, "if he is not paid for these latter sums, he will not have been compensated in full for the loss of his existing investment property". Stamp duty is thus covered by the law of disturbance, but when and how it applies is being developed by the case law.

16.26 Section 99(2) of the *Stamp Duties Consolidation Act 1999* provides that stamp duty will not be chargeable on any instrument under which any land, easement, way-leave, water right or any right over or in respect of the land or water is acquired by the Dublin Docklands Development Authority. The DDDA was subsequently dissolved in 2015 yet this section remains in force. However, it appears to be redundant, given that section 7(2) of the *Dublin Docklands Development Authority 2015* provided that all references to the DDDA should be construed as references to Dublin City Council in respect of any functions transferred to the council. Section 7(1) transferred the power to acquire land under section 18 to the Council but not the power to compulsorily acquire land under section 27. Section 99A of the 1999 Act, which was inserted by the *Finance Act 2006,* provides that stamp duty shall not be chargeable

[539] [1997] 1 IR 69 at 129.

on any instrument under which any land, easement, way-leave, water right or any right over or in respect of the land or water is acquired by the Courts Service. Section 99B, as inserted by the *Sport Ireland Act 2015*, provides the same relief for land or water acquired by Sport Ireland. Section 99C(b), as inserted by the *Harbours Act 2015,* provides that stamp duty shall not be chargeable on any instrument under which ownership of any land easement, way-leave, water right or any other right over or in respect of land or water is transferred under sections 28, 32, 34 and 35 of the Act. Section 100 provides that stamp duty shall not be chargeable on any instrument under which any land, or any interest in land, easement, way-leave, water right or any other right is acquired in the Temple Bar area, as described in the First Schedule in the *Temple Bar Area Renewal and Development Act 1991.*

16.27 Given that the land is forcibly acquired and that the principle of equivalence underpins the process, it could be argued that a system in which certain CPOs are exempt from stamp duty appears unfair. On the other hand, the exemption of CPOs from stamp duty could be considered sensible where, otherwise, one State body (the acquiring authority) is paying stamp duty to another State body (the Revenue Commissioners) with the result of excessive administration, possible cash flow issues and with no net gain to the State.

16.28 Another issue in the area of taxation and compulsory purchase, as noted by Galligan and McGrath, is that a claim for disturbance could be made where a tax liability arises as a result of a compulsory purchase order. What is less clear is whether the denial of retirement relief could be included in such a claim having regard to section 542(1B) of the *Taxes Consolidation Act 1997* (the 1997 Act) which provides that the disposal date and the time from which capital gains will accrue in respect of a disposal of land which has been compulsorily acquired shall be the time on which the compensation is received by the landowner, where that amount is received on or after the 1st of January 2016. This amended the earlier provisions which provided that such accrual was considered to arise from either the date compensation is received or the date of entry by the local authority. Under section 598 of the 1997 Act, if the landowner disposes of a qualifying asset, which would include a chargeable business asset that has been used for the purposes of farming, a trade, profession, office or employment for ten years before the date of disposal and is over 55 years old, he or she will qualify for retirement relief. As the date of disposal is now considered when compensation is paid, as opposed to the date of entry of the local authority, the landowner may not be considered to have been farming the land at the time compensation is paid. As a result, he or she may not qualify for the exemption.

The Duty to Mitigate

16.29 The duty to mitigate arises when the notice to treat is served. As there is no duty before the service of the notice to treat, any expenses incurred before such service will only be recoverable where a notice to treat has subsequently been served. A claimant cannot recover for losses that are reasonably avoidable but which, through

unreasonable action or lack of action he or she has failed to avoid. In *Director of Buildings v Shun Fung Ltd,*[540] the UK House of Lords held that "the law expects those who claim recompense to behave reasonably. If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it".[541]

16.30 As mentioned above, it may be argued that the costs involved in moving a business should generally not exceed what would have been payable for the cost of closing down the business, as otherwise transferring the business would increase the claimant's loss, not mitigate it.[542] This is the approach taken in the English case law[543] and could be considered to disregard a landowner's right to work, and would ultimately affect smaller business owners to the greatest degree. A large company or organisation would have to pay redundancy to its employees and the cost of closing would include a substantially larger amount of money than that of a small company or self-employed businessman. One approach may be that, where a person is forced from their land and required to move their business, the full cost of moving should be recoverable as disturbance. Although this would increase the claimant's loss, such loss would not have occurred had it not been for the acquisition, and this should be taken into account by the arbitrator.

Mitigation of Disturbance before the Notice to Treat

16.31 It had long been accepted, at least in English case law,[544] that any expenses incurred before the service of the notice to treat were not recoverable in a disturbance claim given that the CPO could not become operative before the service of the notice to treat. However, the Irish approach is considerably broader. Rather than permitting any mitigation costs 6 weeks after the first claim has been made and proof of title offered (at which point the CPO is irreversible), it is possible to be reimbursed for mitigation costs incurred before the notice to treat is served. In *Gunning v Dublin Corporation,*[545] the applicant became aware of the proposal to acquire his premises and so, in order to maintain his business and retain his skilled staff, bought and equipped alternative premises before he was made to vacate his current premises. The CPO was made 2 years after the applicant became aware of the proposals, and 2 years after the CPO was made, the notice to treat was served. It was agreed between the parties that had the claimant waited until the notice to treat was served, the expenses and losses would have been higher than those caused by his actual relocation. Also, it would have been more expensive to close the business due to inevitable redundancy payments. The acquiring authority argued that it should only have to pay double overheads and other losses from the date of the service of the notice to treat.

[540] [1995] 2 AC 111.
[541] *Ibid* at 126F.
[542] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 581.
[543] *Director of Buildings v Shun Fung Ltd* [1995] 2 AC 111.
[544] *M (Bloom) Koscher and Sons Ltd. v Tower Hamlet London Borough Council* [1978] 2 EGLR 176
[545] [1983] ILRM 56.

16.32 The High Court (Carroll J) permitted the applicant's claim for disturbance by stating that it seemed to be "eminently practicable, reasonable and desirable in the public interest" that landowners should try to mitigate their losses by reasonable and prudent steps in advance of the notice to treat. It argued that doing so would avoid a great expense on the acquiring authority. The compensation claimed was not for a loss never suffered but rather, a loss suffered in anticipation of the notice to treat. In the Court's opinion, it would have breached the principle of equivalence if the claimant was not able to recover the expense of avoiding an inevitable loss. The claimant can also recover for double overheads insofar as they are reasonable. If the claimant resists possession by the acquiring authority following the expiration of the notice of intention to enter, he or she could not claim double overheads.

16.33 The test for an arbitrator, the Court held, is that, having looked at the entirety of the facts, whether a reasonable and prudent person would have acted as the landowner had. The Court set out 4 conditions, all of which must be satisfied before the arbitrator may award compensation for actions taken before the service of the notice to treat:

1. That the steps take in mitigation are clearly referable to an anticipated notice to treat;
2. That it is possible to show that an inevitable loss consequent on the notice to treat has been avoided;
3. That the steps taken, while not obligatory, are reasonable and prudent and have not been taken for a collateral purpose; and
4. That the cost of the steps taken, in mitigation or losses resulting from these steps, does not exceed the amount which would be awarded if no steps had been taken until after the service of the notice to treat.

16.34 It appears from the second point that success of the claim is contingent on the loss not exceeding what would have been incurred had the landowner waited until after the notice to treat was served. No regard appears to be given as to whether he or she had done so in good faith with a reasonable expectation of mitigating his or her losses. An owner acting in anticipation takes the risk that the notice to treat will never be served. The Court also confirmed that until a notice to treat has been served, the landowner is under no duty to mitigate his or her losses and that "the principles of mitigation must be applied in the light of the fundamental underlying principle of equivalence".

Damage, Severance and Injurious Affection

16.35 Damage, severance and injurious affection arise where the land is severed and the retained land is devalued and its use diminished as a result of such severance. Unlike disturbance, these elements relate purely to devaluation in the land rather than personal losses. Injurious affection is the loss in value to the property; it is not the continuous tort of nuisance which is a separate matter. One example would be a new

motorway that is planned to be built next to the land retained which would depreciate the value of the land due to the noise, fumes and dust. Severance is one form of injurious affection; the other form is the damage done to the land as a result of the acquisition. In order to qualify for injurious affection compensation must be "held with" the lands acquired. The test is whether the landowner can no longer treat the land acquired as part of the land retained. It is not necessary that the lands be held together under the same title. It therefore, appears to be more a physical distinction as opposed to a legal one.

16.36 These elements originate from section 63 of the 1845 Act, which provides that that in addition to the market value of the land, regard should also be had to "damage, if any, to be sustained by the owners of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously effecting such other lands by the exercise of the powers of this or the special act, or any Act incorporated therewith".[546] Section 63 relates to the long-term damage and only relates to land retained. Section 68 also refers to damage; however, this is damage that is temporary in nature and results from the works of the acquiring authority in order to develop the land.[547] Section 68 relates to both land acquired and land taken. In *Metropolitan Board of Works v McCarthy,*[548] the UK House of Lords set out 4 rules as to the requirements of a valid claim under section 68:

(1) The damage must result from the lawful exercise by the acquiring authority of its statutory powers;

(2) The damage must result from an act which would have been actionable but for the statutory powers;

(3) The damage suffered must be damage to the land itself, not personal inconvenience or damage to trade only;

(4) The injury must arise from the execution of the works and not from their subsequent use.

16.37 In the *McCarthy* case, it was also held that the right to compensation existed "where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put in, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value".[549] Such a claim however, must not

[546] Section 63 of the *Land Clauses Consolidation Act 1845* provides that "in estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justice, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchases or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any Act incorporated therewith".

[547] This was confirmed in *Chadwick v Fingal County Council* [2007] IESC 49.

[548] (1874) LR 7 HL 243

[549] *Ibid* at 253.

bestow a higher standard on the authorities carrying out the works. If the authority is carrying out works that would be no worse than a normal landowner, there should be no claim for such compensation. This is supported by the view, also expressed in the *McCarthy* case that "there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the good-will of his business, although of such a nature that, but for the Act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it".[550] It will also be necessary that the damage arose as a result of development or works on the land acquired and not land which was not subject to the CPO.

16.38 The case of *Chadwick v Fingal County Council*[551] involved the payment of compensation for injurious affection in respect of land kept by the landowner and by virtue of activities arising on the land taken. As already noted, section 63 of the 1845 Act provides that, in determining compensation, regard shall be had for damage sustained by the landowner as a result of the severing of the land and injurious affection to the lands retained by the exercise of the Act. The arbitrator in this case queried whether he was correct in asserting that this section provided for compensation in respect of injurious affection only where such was caused by works on the land acquired. The uncertainty arose from whether there was a decrease in value by virtue of the implementation of the scheme underlying the CPO. Whereas the *Pointe Gourde* principle, discussed below,[552] dictates that betterment cannot be taken into account, this question posed by the arbitrator was whether financial disadvantage by virtue of the completed development can be taken into consideration. The High Court (O'Neill J) considered section 68, which provides that any party shall be entitled to compensation in respect of any lands which have been taken or injuriously affected by the execution of works. This was accepted as meaning only temporary works that are performed in order to construct or develop the land, rather than the long term negative impacts of the development itself. The High Court held that "no compensation should be paid where the injury would not otherwise attract damages".[553] On appeal, while the Supreme Court did not agree with that particular point, it held that what was at stake was the non-tortious effect of activities on land retained. An acquiring authority which acted no worse than a normal proprietor will not be liable to pay compensation simply as a result of the CPO. The reasoning for this was that if no land had been taken, no such claim would arise. In other words, as neighbours cannot claim for injurious affection, neither can the landowners of land retained. Instead of elevating the status of the neighbour, it reduced the 2 landowners to a status outside of that warranting compensation for devaluation of their land. However, the Court also noted that the claimant's right to

[550] *Ibid* at 256.
[551] [2007] IESC 49.
[552] Discussed in detail in Issue 16, 16.62.
[553] [2003] IEHC 69.

sue and claims for compensation for damage in relation to land taken remained undisturbed.[554]

16.39 It has been argued, based on English case law, that the compensation for injurious affection is a net sum; where the devaluation may be offset by the betterment that arises from the development.[555] Where the betterment exceeds the injurious affection, no compensation shall be payable. However, given the acceptance of the *Pointe Gourde*[556] principle (that the increase in value due to the underlying scheme is to be disregarded by the arbitrator in assessing compensation) is accepted in Ireland, such a finding might be argued to be inherently unfair and could been seen as seeking to significantly benefit the acquiring authority over the landowner.

Severance making the remainder of the land unusable

16.40 Another issue that arises in relation to the type of acquisition that is carried out - whether it is of the entire property or of a portion of the land - is the power of a landowner to enforce a sale where the remaining land is unfit for its original purpose, for example, a farm that would become unviable, a golf course that would become unattractive to potential members, or a park that would lose most of its open spaces. Section 93 of the 1845 Act provides that if any lands, aside from those situated in a town or built upon, are divided by the acquisition in such a manner as to leave less than half a statute acre (approximately 0.31 acres) on either side, the landowner may require the acquiring authority to acquire that land also. There is an exception, however, where the land remaining can be conveniently combined with adjoining land and where the acquiring authority provides such accommodation works, such as the removal of fences and the levelling of sites, in order to combine the land. Section 94 provides that if it would cost more for the acquiring authority to conduct the accommodation works such as a bridge, culvert or any other communication between such lands, than purchase the land, the acquiring authority may require the landowner to sell the land to the authority, the price of which, shall be determined by arbitration in the event of a dispute.

16.41 It is arguable that the current limit in the 1845 Act could be increased so that the landowner would be able to insist that more than 0.31 of an acre should be acquired depending on the use for which the land is currently being operated. There is also scope to assess whether there are any key distinctions between situations in which compensation for any current and future lack of goodwill will suffice and where there is a necessity to move a business as a result of the remaining land losing all value as a result of the acquisition. If the landowner is a farmer, for example, the loss of land may result in a significant reduction in the amount of animals or machinery he or she may keep, require or use for the produce of certain goods. Such a reduction may amount to an unattractive purchase for another farmer or prospective buyer;

[554] [2007] IESC 49, at paragraph 38. He continued to state that the implication of holding otherwise would be that the compulsory acquisition authorises, in perpetuity, the commission of nuisance on the land acquired.
[555] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 617.
[556] Discussed in detail in Issue 16, 16.62.

therefore, the choice to sell and move elsewhere in order to continue the level of business the landowner was accustomed to, may prove potentially difficult. The fact that a substantial portion of the land remains may not be sufficient to allow the business to continue, especially, if the extensive nature of the land was the defining characteristic of the business. In such an instance, compensation for a loss of goodwill may not be sufficient. Nonetheless, it may also be considered unduly burdensome to insist that the authority acquire all of the land. Without guidelines on the issue, there could be potential problems in relation to the duty to mitigate and when that duty may arise if a landowner is unsure what he or she will be compensated for.

Accommodation Works

16.42 An acquiring authority may offer to carry out certain accommodation works in order to reduce the damage; however, it is under no duty to do so unless the CPO scheme requires it. It may also not include the cost of accommodation works in any unconditional offer provided to the landowner. The landowner does not have to accept any offer of accommodation works nor, does he, she or the arbitrator have any power to insist that such works be done. If accommodation works are performed, the arbitrator can take this into consideration. Works carried out as part of the scheme are not accommodation works even if they benefit the landowner's land. Such works will be located on the acquired land and the landowner will have no responsibility to maintain them.

Valuation Date

16.43 The High Court (Carroll J) in *Gunning* also stated that the value of the land at the time of the service of the notice to treat must be interpreted as referring to market value of the land only, excluding "other elements which go up to make the entire compensation". The element of disturbance, the Court held, should be determined upon the date upon which the award is made with regard being had to actual and estimated future losses.[557] Whether or not this would include the severed land is a point of contention. McDermott and Woulfe in the 1st edition of the leading Irish textbook commented that "it is clear from the context that the 'other elements' referred to are disturbance items and do not include compensation for severance and other injurious effects which are to be valued as at the date of service of the notice to treat".[558] However, in the 2nd edition of McDermott and Woulfe's book, Galligan and McGrath do not offer an interpretation but rather point to Butler's comment that it is "with some caution I would urge that this statement would not appear to be entirely in accord with the words of the section".[559] Galligan and McGrath note, however, that the comments of the High Court (Carroll J) in this regard are *obiter* given that it was a disturbance claim that the Court had to determine. It could be argued that the plural

[557] *Ibid* at 62.
[558] McDermott & Woulfe, Compensation and Compulsory Purchase in Ireland 1st ed (Butterworths 1992) at 176, quoted by Butler, Keane on Local Government 2nd revised ed (First Law 2003) at 296.
[559] Butler, Keane on Local Government 2nd revised ed (First Law 2003) at 296.

use of "element" would suggest that disturbance, damage and injurious affection are assessed at the date of award, as opposed to the date of the service of the notice to treat, given the standard grouping of these terms in assessing compensation. Disturbance is taken on its own and used to assess both personal and business inconveniences and is a broad term encapsulating a great many number of financial losses. Injurious affection and damage are usually taken together in referring only to the effect on the remaining and severed land.

16.44 In determining then the date of valuation should arise, it may be useful to take the approach of the UK House of Lords in the *Bwllfa*[560] case, which asked "why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?" There may be potential merit in determining injurious affection and market value together as both affect the land value and assess disturbance at the date on which compensation is paid so as to have the most recent information possible which will provide accuracy rather than guesswork. Future costs of disturbance will still have to be estimated but the more progress that has been made and time that has passed, the clearer the figure may be.

The Rules

16.45 By the end of the 19th century and in the period preceding World War I (1914-1918), the role of public authorities in the United Kingdom became much more important. Following the end of World War I, it was imperative for these authorities to have powers to compulsorily acquire land for reconstruction[561] without excessively weakening (already depleted) public funds. As a result, the *Acquisition of Land (Assessment of Compensation) Act 1919* was enacted. The 1919 Act details the rules to be taken into consideration in assessing compensation. Initially, there were 6 rules, but the Act was subsequently amended by section 69[562] and the Fourth Schedule of the *Local Government (Planning and Development) Act 1963*[563] (the 1963 Act) and section 48 of the *Planning and Development (Strategic Infrastructure) Act 2006* (the 2006 Act). When the 1963 Act was repealed by the *Local Government (Planning and Development) Act 1990*, section 69 was saved by section 265(3)[564] of the 2000 Act. During the Oireachtas debates on the 1963 Act, the sponsoring Minister stated that it preserved the basis of the 1919 Act in recognising the basis of compensation as market value. He stated that "the additional rules set out in the

[560] *Bwllfa and Merthyr Dare Steam Collieries Ltd v The Pontypridd Waterworks Co* [1903] AC 426.

[561] Law Commission for England and Wales, Consultation Paper, Towards a Compulsory Purchase Code: (1) Compensation (No. 165 2002) at 12, quoting The Scott Committee, Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918) at paragraph 5.

[562] Section 69 was subsequently repealed by the *Local Government Act 1990* but continues to apply as section 2 of the 1919 under s.3(2) of the 1990 Act and also s.265(3) of the *Planning and Development Act 2000*.

[563] The ten additional rules set out in the Fourth Schedule of the 1963 Act only apply where compensation is to be paid by a planning or local authority.

[564] Section 265(3) provides that section 2 of the *Acquisition of Land (Assessment of Compensation) Act 1919* , as amended by section 69(1) of the Act of 1963 shall, notwithstanding the repeal of section 69 of the Act of 1963 by the Act of 1990, apply to every case, other than a case under Part XII or the Act of 1990, where any compensation assessed will be payable by a planning authority or any other local authority.

Fourth Schedule are simply recognition that land-use planning has become one of the facts of life".[565]

16.46 The power to compensate was not conferred by the *Acquisition of Land (Assessment of Compensation) Act 1919*, rather it lists the criteria to be taken into account in assessing compensation. It is important to note that these rules only cover compensation determined other than by agreement. The 1919 Act is now the basis for the assessment of compensation for approximately 64 pieces of legislation. Section 83(2) of the 1966 Act provides that any acquisition of land, other than by vesting order, shall be determined in accordance with the 1919 Act. Section 265(3) of the 2000 Act provides that the 1919 Act will apply where any compensation assessed will be payable by a planning authority or any other local authority.

The compensation rules in the 1919 Act, as amended, are as follows:

Rule 1

No allowance shall be made on account of the acquisition being compulsory

The 1919 Act was drafted with the intention of tackling the rising issue of inflated compensation that was being provided to landowners on the basis of an unspoken sympathy for the disruption that was being forced upon them.[566] The 1918 Scott Report, whose recommendations were implemented in the 1919 Act, commented that the "compulsory acquisition of land to any great extent first took place in connection with the railway development in the first half of the 19th century, and public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise undertaken for profit rather than the interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventures, led to sympathetic treatment by the tribunal which assessed the compensation payable to that owner".[567] Prior to the 1919 Act, an additional percentage was usually attached to the market value of the property as a result of the inconvenience forced on the landowner. The percentage could be anywhere from 10 to 20% of the market value.

[565] Seanad Debates, 31 July 1963, Second Stage Speech of Minister, Local Government (Planning and Development) Bill 1962, col. 56.

[566] The English Court of Appeal in *Horn v Sunderland* [1941] 2 KB 26, at 40, stated that "[t]he main object of the Act of 1919 was undoubtedly to mitigate the evil of excessive compensation which had grown up out of the theory evolved by the courts, that, because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller to a willing buyer. The word "compensation" almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that, unless he received the price which fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".

[567] The Scott Committee, Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918) at paragraph 8, quoted by the Law Commission for England and Wales, Consultation Paper, *Towards a Compulsory Purchase Code: (1) Compensation* (No. 165 2002) at 11.

However, it did not take into account the additional incidental damage.[568] In England, and Wales and in Northern Ireland, there is a 2.5% increase in compensation for an occupier and a 7.5% increase for an owner of land compulsorily acquired.[569] This concept was introduced to provide an acknowledgement that the landowner is displaced from his or her property against his or her will.

Rule 2

The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant[570]

16.47 The Scott Report[571] recommended that the "value" should be that of market value[572] alone and not include any auxiliary intangible harms that the landowner must endure as a result of the CPO. The Report also recommended, arguably paradoxically, retaining compensation based on damage, injurious affection and disturbance, which are expanded upon under Rule 6, below. Rule 2 implemented this recommendation. The crux of Rule 2 is that no financial allowance is to be made on account of the purchaser or the seller being unwilling to carry out the transfer of land.[573] Butler submits that Rule 2 does not specifically refer to land taken or severed land that remains depleted, and that, therefore, it must apply to both.[574] However, compensation paid on the severed land is not paid as "if sold in the open market". The depreciation in value of the severed land is not taken into account for the purposes of any losses made from future sales. What is taken into account is whether the use or the enjoyment of the land is depreciated by virtue of the land taken. This would include, for example, the loss of earnings arising from fewer cows grazing or the

[568] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 306.

[569] This was introduced into the *Land Compensation Act 1973* as section 33A by section 106 of the *Planning and Compulsory Purchase Act 2004* in England and Wales and in Northern Ireland, by the *Land Acquisition and Compensation (Amendment) Act 2016.*

[570] The Supreme Court in *Dublin Corporation v Building and Allied Trades Union* [1996] 2 ILRM 547 stated that "the compulsory purchase procedure under which the corporation acquired the land in question from the union is different in almost every respect from a purchase by agreement. Although Rule (2) provides for the assessment of compensation on the basis of the value of the land on the open market, some of the other rules, and the manner in which they have been judicially construed, make it clear that the assessment of compensation is more in the nature of an award of damages for the expropriation of his property against the wishes of the owner. Although the acquisition is effected in the public interest, both parliament and the courts have been at pains to ensure that the award of compensation reflects, not merely a price that might have been agreed by a willing vendor and purchaser, but also all the elements of loss suffered by someone disposing of land against his will".

[571] The Scott Committee, Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918).

[572] In *Inland Revenue Commissioners v Clay and Buchanan* [1914] 1 KB 466, the English Court of Appeal stated that "the value of the land, "on the open market" means such amount as the land might be expected to realise if offered under conditions, enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale".

[573] In *Vyricherla Narayana Gajapaticaju v Revenue Divisional Officer, Vizagapatam* [1939] AC 30, an appeal from India, the Commonwealth Privy Council stated that "the inclination of the vendor to part with his land and the urgent necessary of the purchaser to buy must, alike, be disregarded. Neither must he be regarded as acting under compulsion".

[574] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 307.

build-up of traffic causing more concentrated pollution and noise. This is what the landowner will be compensated for and therefore, it is submitted that this rule solely applies to land taken under the CPO.

16.48 Butler also notes, that the "expected" in "expected to realise" refers to the expectations of a properly qualified person who has taken pains to inform themselves of all the particulars ascertainable about the property, and its capabilities, the demand for it and the likely buyers".[575] Land that has been granted planning permission will be more valuable according to Butler,[576] but the specific nature of planning permission and the likelihood of the acquiring authority's larger scale development (especially given the provisions governing applications requiring an Environmental Impact Statement (EIS) under section 34 of the 2000 Act)[577] would suggest that a reapplication for planning permission may be required. This would be unlikely to increase value. Although as with Rule 3, below, it appears that the land cannot merely benefit the adjacent landowner but rather, it must have a particular special use. Alternative land that is of equivalent quality will not suffice to be considered marriage value; it must be, for example, the only point of access rather than a better point of access.[578]

Rule 3

The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: Provided that any bona fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration

16.49 This is the first "disregard" rule. The first aspect that is disregarded is the "special suitability or adaptability of the land".[579] The English case law is to the effect that this refers to the quality of the land as opposed to the needs of a particular purchaser".[580] In *Batchelor v Kent County Council,*[581] it was held that a piece of land that provided the best access to the development land was not "specially suitable", despite being the most suitable. If the purchaser is able to pay more than the general market price because of an enhanced benefit he or she would specifically take from the land, then

[575] *Ibid* at 307.
[576] *Ibid* at 308.
[577] Section 34 of the 2000 Act sets out a number of detailed requirements to notify the public of such an application, as required by the EU EIA Directive: see the discussion of the EIA Directive ion Issue 10 above.
[578] *Laing Homes Ltd v Eastleigh Borough Council* [1979] 250 EG 350.
[579] In *In re Lucas and Chesterfield Gas and Winter Board* [1909] 1 KB 16, at 30, it was held that "special adaptability for some purpose or other is the very basis of the market value of all land...in agricultural land extra fertility, in town land advantages of site are true cases of special adaptability, farming or building purposes".
[580] *Lamb v Secretary of State for War* [1955] 2 All ER 3 at 6.
[581] [1989] 59 P & CR 357.

the arbitrator can take this into account. If however, there is no general market use for which the purchaser wishes to purchase the land, then the arbitrator must disregard the added value to the purchaser. This is particularly relevant to a planning or local authority in that, the arbitrator cannot take into account of any purpose for which the land may be used if such a use would not exist but for a statutory power.[582]

Rule 4

Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account

16.50 Rule 4 is the second "disregard rule" and should be read in conjunction with rule 12 and part 2 of the Fourth Schedule of the 1966 Act. Any use or material that increases the value of the land shall be disregarded if such use or material is:

1. Restrained by the court;
2. Contrary to law; or
3. Detrimental to the health of the inhabitants or to the public.

An example of this would include development that did not have planning permission.

Rule 5

Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement

16.51 Rule 5 is known as the "equivalent reinstatement rule" and should be read in conjunction with Rule 7. Rule 7 provides that "the reasonable cost" in Rule 5 shall mean the "cost not exceeding the estimated cost of buildings such as would be capable of serving an equivalent purpose over the same period of time as the buildings compulsorily acquired would have done, having regard to any structural depreciation in those buildings". In the English case *Harrison and Hetherington Ltd v Cumbria County Council,*[583] the Court held that the word "general" qualifies demand, and not the word "market". The second part of this definition upholds the equivalence principle. It assesses the value of the buildings on the basis of the cost of the development of another building of the same specifications undoubtedly more

[582] In *Corrie v Central Land Board* [1954] 4 P & CR 276 it was held that the "'no market' element in the problem is not conditioned by the fact that the particular purchaser has the key to the use, it is dependent upon his needs".
[583] [1985] 50 P & CR 396.

expensive as opposed to their current depreciated value. It should be kept in mind that this is not land which is inhabitable but rather it is land that does not have a general market value such as churches, schools, hospitals or businesses that require a specific license.[584] The land would have had to be used mainly for a particular purpose that could not be continued following the compulsory acquisition. In *Trustees of Zoar Independent Church v Rochester Corporation,*[585] it was held that the test was not whether the congregation was to be re-instated but whether the purpose had to be re-instated in another place. If, however, the purpose is not reinstated in another location, there will be no compensation, or at least, there is no provision for disbursing such compensation. In *Dublin Corporation v Building and Allied Trade Union,*[586] the Supreme Court stated that this rule provides a mechanism "for compensating the owner in full where he would not be fully compensated by being awarded the open market value".[587] This rule provides discretion to the arbitrator in allowing him or her to determine whether the relocation is intended to be *bona fides*.

Rule 6

The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land

16.52 This is known as the "disturbance" rule and has been discussed in detail above.

Rule 7

In the case of a compulsory acquisition of buildings, the reference in Rule (5) to the reasonable cost of equivalent reinstatement shall be taken as a reference to that cost not exceeding the estimated cost of buildings such as would be capable of serving an equivalent purpose over the same period of time as the buildings compulsorily acquired would have done, having regard to any structural depreciation in those buildings

16.53 This rule is to be read in conjunction with Rule 5; see above. It is also subject to article 2 of Part 2 of the Fourth Schedule to the 1966 Act, which provides that where a property or building is in defective sanitation or disrepair, the compensation shall be the value of the premises less the cost of bringing the property up to an acceptable standard.

Rule 8

The value of the land shall be calculated with due regard to any restrictive covenant entered into by the acquirer when the land is compulsorily acquired

[584] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 312.
[585] [1974] 3 All ER 5.
[586] [1996] 1 IR 468
[587] *Ibid* at 480.

16.54 This rule is known as the "first regard" rule. A restrictive covenant can be made over leasehold or freehold titles between 2 signatories, and can impose positive and negative obligations. However, it is only the negative obligations that survives the contract of sale and are imposed on future purchasers of the land. Such covenants usually arise when a landowner sells only part of his or her land and wishes to maintain the enjoyment of his or her land through certain conditions. This rule applies to the land acquired and any restrictive covenant the acquiring authority may create, and provides that any such covenant created by the authority after the acquisition cannot be taken into consideration by the arbitrator so as to decrease the compensation. Before the *Land and Conveyancing Law Reform Act 2009* (the 2009 Act), the covenant could not be set aside until it was released by the original owner who imposed it, or by any subsequent owner who continued the covenant following the sale with the imposer of the covenant. However, it is notable that section 49(1) of the 2009 Act abolished the rules in relation to freehold covenants. Section 50 allows for an application to the courts for the removal of such a covenant where its continuance would "constitute an unreasonable interference with the use and enjoyment of the servient land". Section 50(2)(c) provides that the Court must have regard to the development plan of the area under the 2000 Act.[588] Section 50(3) provides that where any such removal would cause a "quantifiable loss" to the dominant owner, it may include a requirement to pay compensation to the owner such as the court thinks fit.

Rule 9

Regard shall be had to any restriction on the development of the land in respect of which compensation has been paid under the Planning and Development Act 2000.[589]

16.55 This is the "second regard" rule, and relates to compensation paid upon the refusal of a grant of planning permission under Part XII of the 2000 Act which provides for compensation to be paid by the planning authority, where an individual's land is devalued as a result of planning permission being refused, revoked or modified. If compensation has been paid to a landowner under this rule, no development can be carried out on the land unless the compensation is repaid to the planning authority. Such an amount could possibly be repaid by the landowner or deducted from the amount of compensation payable to the landowner.

Rule 10

Regard shall be had to any restriction on the development of the land which could, without conferring a right to compensation, be imposed

[588] It also states that the court must have regard for any change in the character of the dominant and subservient land or their neighbourhood (section 50(2)(b)), any planning permission granted (section 50(2)(d)) or any other matter which the court considers relevant (section 50(2)(i)).

[589] This originally referred to the *Local Government (Planning and Development) Act, 1963*, which was repealed and replaced by the 2000 Act.

under any Act or under any order, regulation, rule or bye-law made under any Act

16.56 This is the "third regard" rule. It relates to either the acceptance that certain services may not be available to the property but may be made available at a later date, or the view that there is such an extreme lack of services that it would lead to a reduction in compensation. In *In re Deansrath Investments Ltd,*[590] the High Court (Pringle J) stated that "the arbitrator must assume that the hypothetical purchaser in the open market is conscious of the fact that restrictions could be imposed on the development of the land without the payment of compensation, the result of which would be to reduce the value of the land for potential development".[591] Butler comments that this rule is of no effect, as it does not affect rule 2 in any way, and the arbitrator is still permitted to consider the "hope value"[592] of such lands that is based on the expectation of a purchaser that services would ultimately be provided for the land.[593]

Rule 11

Regard shall not be had to any depreciation or increase in value attributable to the land, or any land in the vicinity thereof, being reserved for any particular purpose in a development plan, or inclusion of the land in a special amenity area order

16.57 This is the "third disregard" rule. If the land being acquired is set apart from other land in the surrounding area and zoned for a particular purpose, that is, if a road was to be built next to the land that may increase the value of the land due to better access, this shall not be taken into account by the arbitrator when such development is unfinished or during the planning stage. However, once the development progresses from a plan to a finished work, the arbitrator can take account of it. In *Dublin Corporation v McGinley and Shackleton,*[594] the High Court (McWilliam J) stated that "reservations themselves are not matters to be taken into account in assessing the value of land under the compensation rules but when such reservations crystallise into a result in the imposition of a specific condition affecting the user of the property of an owner, regard must then be had to such a condition".[595] In this case, a bypass road was substantially completed on the date the notice to treat was served, but not yet open to traffic. The Court held that the land was to be assessed as if the road was fully completed and not as if the land was reserved by the development plan. However the land must be part of the land featured in the development plan or special amenity area order, it cannot be independent. In *Monastra Developments Ltd v Dublin County Council,*[596] the High Court (Carroll J) stated that "it is all a matter of scale. There must be a point when an area is large

[590] *In re Deansrath Investments Ltd* [1974] 1 IR 228.
[591] *Ibid*.
[592] "Hope Value" is an element of market value, which reflects the prospect of some more valuable future use or development in excess of the existing use.
[593] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 316.
[594] High Court 22 January 1986.
[595] *Ibid.*
[596] [1992] 1 IR 468.

enough in its own right not to be considered as set apart from other lands adjoining it".[597]

16.58 In *Dublin County Council v Short,*[598] the High Court (McMahon J) stated that "the intention of the rule is to protect the owner from the detrimental effect on the value of his land of the reservation of the land for the particular purpose for the benefit of the community and to the ensure that owners of other land do not profit from it".[599] The Court added that the arbitrator can only have regard for the purpose that the land is currently zoned for, even if the surrounding areas are zoned for an alternative purpose, that is, agricultural, residential or industrial. The Court also pointed out however, that the same words, "reserved", "particular purpose" or "zoned" cannot have the same meaning as section 10 of the *Local Government (No. 2) Act 1960*. Otherwise, the rule could be interpreted as requiring the arbitrator to disregard all zoning. Thus, as Galligan and McGrath note, a distinction is drawn between zoning for a particular purpose and reserving for a particular purpose.[600]

Rule 12

No account shall be taken of any value attributable to any unauthorised structure or unauthorised use

16.59 This is the "fourth disregard" rule. Along with any unauthorised structure[601] or unauthorised use,[602] it appears that any element of disturbance that is attributable to the unauthorised structure or use must be disregarded. This is suggested by the wording "any value" not "the value of the land". In *Re Deansrath Investments Ltd,*[603] the Supreme Court stated that Rules 7-16 are intended to relate back to the words "subject as herein provided in Rule 2".[604] As Rule 2 only concerns itself with the market value of the land, it appears that disturbance is not included. In *Dublin County Council v Healy and Shackleton,*[605] the High Court (Barrington J) held that "the complaint is that the unauthorised use has diminished the value of the lands. It can hardly be said therefore that there is 'any value' attributable to any unauthorised use".[606] Failure by the planning authority to take enforcement proceedings under

[597] *Ibid* at 471.
[598] [1983] ILRM 377.
[599] *Ibid*.
[600] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 548.
[601] Section 2 of the 2000 Act provides that an "unauthorised structure" means a structure other than— (a) a structure which was in existence on 1 October 1964, or (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act).
[602] Section 2 of the 2000 Act provides that "unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than— (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject; "use", in relation to land, does not include the use of the land by the carrying out of any works thereon.
[603] [1974] 1 IR 228.
[604] *Ibid* at 237.
[605] High Court 2 March 1984.
[606] *Ibid*.

Part VIII of the 2000 Act within the time limits will not change the status or "authorise" the structure or use.

Rule 13

No account shall be taken of the existence of proposals for development of the land or any other land by a local authority, or the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by a local authority

16.60 This is the "fifth disregard" rule. In *Re Murphy,*[607] the Supreme Court held that this rule was simply common sense, given that in its absence, a local authority would be subject to a significantly inflated price when compared to any other purchaser. The Court held that it would not be in the public interest for compulsory acquisition only to be effected in prohibitively high terms.[608] In *Re Deansrath Investments Ltd,*[609] the Supreme Court adopted the view of the English Court of Appeal in *Lucas and Chesterfield Gas and Water Board,*[610] which held that:

> "The owner receives for the land he gives up their equivalent i.e. that which they were worth to him in money. His property is therefore not diminished in amount but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of compulsory powers".[611]

The Pointe Gourde principle: no compensation for increased value as a result of the underlying scheme of the CPO

16.61 This rule correlates well with the *Pointe Gourde* principle, which was developed by the UK House of Lords in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands.*[612] In this case, the defendant wished to compulsorily acquire a quarry in order to establish a naval base, which was to be operated by the United States military. The value of the land would have increased due to the material required to develop such a base. The UK House of Lords concluded that the value of the land which has been compulsorily acquired will not be increased by any benefit conferred on it by the underlying scheme. As Butler notes, "where the underlying scheme may result in the decrease in the value of the property this must also be ignored".[613] This reinforces the provision that the date on which the notice to treat is served is the valuation date, regardless of the loss to either the landowner or the acquiring authority. In *Deansrath,*[614] the Supreme Court held that rule 13 goes

[607] [1977] IR 243.
[608] *Ibid* at 254.
[609] [1974] IR 228.
[610] [1909] 1 KB 16.
[611] *Ibid* at 29.
[612] [1947] AC 565.
[613] Butler, *Keane on Local Government* 2nd revised ed (First Law 2003) at 305.
[614] *Re Deansrath Investments Ltd* [1974] IR 228.

beyond the *Pointe Gourde* principle, in that it is not a method of preventing a claimant from obtaining the market value of his lands, but rather a method of preventing him from getting more than the market value. This principle is also included in equivalent CPO legislative codes of other European jurisdictions. In Belgium, for example, the rule is known as the planological neutrality rule.

16.62 The *Pointe Gourde* principle states that, in determining compensation, the arbitrator cannot consider the increase or decrease in value due to the underlying scheme. If the authority is acquiring the land to build a road, the arbitrator cannot offset the compensation against the increased value of better access provided by the road. This idea contrasts with the principle of "betterment," which the 1974 Kenny Report on the Price of building Land described as the increase in the price caused by the works.[615] There is a further consideration where neighbours and other people are living in the area. Neighbours are not entitled to compensation, but may benefit from the scheme underlying the CPO. When the neighbours benefit, they are not liable for any levies or increased duties (aside from possibly property tax), but when a neighbour's land is devalued as a result of the CPO, there can be no claim for compensation. This is discussed further below. The 1974 Kenny Report,[616] noted that one legislative attempt, the *Town and Regional Planning Act 1934,* had been made in the State to recover part of betterment for the community but no claim had ever been made under it when it was repealed by the *Local Government (Planning and Development) Act 1963.*

Rule 14

Regard shall be had to any contribution which a planning authority would have required as a condition precedent to the development of the land

16.63 This is the "fourth regard" rule. Galligan and McGrath suggest that this rule has little effect because "the market is well aware of the existence of such conditions and their impact on costs. It does not need to be reminded that increased development costs affect the value of land".[617]

Rule 15

In Rules (9), (10), (11), (12), (13) and (14) "development",[618] "development plan",[619] "special amenity area order",[620] "unauthorised

[615] Kenny, Committee on the Price of Building Land, Report to the Minister for Local Government (Dublin, 1974).
[616] *Ibid.*
[617] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed. (Bloomsbury 2013) at 558.
[618] Section 2 of the *Planning and Development Act 2000* provides that "development" has the meaning assigned to it by section 3, and "develop" shall be construed accordingly. Section 3 provides that "Development" under the Act means, save where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land
[619] Section 2 of the *Planning and Development Act 2000* provides that "Development plan" has the meaning assigned to it under section 9(1). Section 9(1) provides that every planning authority shall every 6 years make a development plan. The term "development plan" itself is not defined.

structure",[621] "unauthorised use",[622] "local authority"[623] and "the appointed day"[624] have the same meanings respectively as in the *Planning and Development Act 2000*.

16.64 This rule contains references to definitions in the *Planning and Development Act 2000*.[625]

Rule 16

In the case of land incapable of reasonably beneficial use which is purchased by a planning authority under section 29 of the *Local Government (Planning and Development) Act 1963*, the compensation shall be the value of the land exclusive of any allowance for disturbance or severance

16.65 A landowner was previously able to insist that the local authority acquire his or her land where permission was refused and the land was deemed not to have a reasonable beneficial use as a result. This provision has since been repealed by the 2000 Act, leaving the rule with no further effect.[626]

Rule 17

The value of any land lying 10 metres or more below the surface of that land shall be taken to be nil, unless it is shown to be of a greater value by the claimant

[620] Section 2 of the *Planning and Development Act 2000* provides that "special amenity area order" means an order confirmed under section 203. Section 202 is actually the section that defines "special amenity order" as an area declared as such due to either its outstanding natural beauty or its special recreational value. The order may states the objective of the planning authority in relation to the preservation or enhancement of the character or special features of the area, including objectives for the prevention or limitation of development in the area.

[621] Section 2 of the *Planning and Development Act 2000* provides that an "unauthorised structure" means a structure other than – (a) a structure which was in existence on 1 October 1964, or (b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act)

[622] Section 2 of the *Planning and Development Act 2000* provides that "unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than – (a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission of any condition to which that permission is subject.

[623] Section 2 of the *Planning and Development Act 2000* provides that "local authority" means a local authority for the purposes of the Local Government Act, 2001 (as amended by the *Local Government Reform Act 2014*. Section 3 of the 2014 Act provides that local authority has the meaning given to it by section 2(1) of the *Local Government Act 2001* as amended by section 5 of the 2014 Act. Section 5 provides that "local authority" shall be defined as (a) in relation to a municipal district, the county council or the city and county council in which the municipal district is situated, and (b) in every other case – (i) a county council, (ii) a city council, (iii) a city and county council. Municipal districts are determined under SIs 40-44, 50-70 of 2014.

[624] "Appointed day" is not defined under the *Planning and Development Act 2000.*

[625] This was previously the definition in the *Local Government (Planning and Development) Act 1963* until section 265(2)(b) and (c) of the 2000 Act which provided for a continuation of repealed enactments.

[626] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed. (Bloomsbury 2013) at 568.

16.66 This rule concerning the substratum of land[627] was introduced by section 48 of the *Planning and Development (Strategic Infrastructure) Act 2006* as a reaction to the proposed development of a metro system in Dublin. At the time of writing (December 2017), it appears that the metro system may be developed, with work scheduled to begin in 2021. If this proceeds, Rule 17 is likely to become increasingly relevant over the coming years. Dodd notes that this rule constitutes a rebuttable presumption and that it also applies where a person other than a local authority may be liable to pay compensation.[628] This rule should arguably be read in conjunction with rule 13 and the *Pointe Gourde* principle, under which compensation will not be payable for any development that would have been impossible without a statutory power or resources of the acquiring authority. An individual's development of his or her land deeper than 10 metres into the ground is arguably unlikely but nonetheless possible.

16.67 The rules governing the assessment of compensation in the 1919 Act, as amended, could potentially be seen as over-complicated and in some instances redundant. In particular, the fact that Rules 14 and 16 are no longer relevant reflects the need for a re-evaluation. While the substance of the rules is certainly important, the fact that they are grounded in 1919 legislation with amendments from 1963 onwards means that the language is often unclear and antiquated. The Commission seeks views on a range of matters which are intended to limit potential divergences in their interpretation or excessive reliance on case law.. These are: whether injurious affection should be abolished, or if it is retained should the concept of betterment offset the damage done and if whether neighbours should be able to claim for injurious affection; whether the compensation paid in respect of a business be the lesser of the cost of moving or the cost of closing the business down; and whether the rules in the 1919 Act be replaced with updated and fully explored concepts such as loss of goodwill, double overheads, and incidentals.

[627] Defined in the *Transport (Dublin Light Rail) Act 1996*, as inserted by s.7(b) of the *Roads (Amendment) Act, 1998* as "any subsoil or anything beneath the surface of land required – (a) for the purposes of a tunnel or tunnelling or anything connected therewith, or (b) for any other purpose connected with a light railway order".

[628] Dodd, The Planning Acts 2000-2007, Annotated and Consolidated 1st ed (Round Hall 2008) at 647.

QUESTIONS FOR ISSUE 16

16(a) Do you consider that the rule for assessment of compensation under the heading of "injurious affection" should be abolished?

16(b) if the answer to (a) is No, then (i) do you consider that the concept of betterment should offset the devaluation of land and (ii) do you consider that neighbours should be able to claim for injurious affection?

16(c) Do you consider that acquiring authorities should be required to purchase severed land that is greater than 0.31 of an acre in size?

16(d) Do you consider that acquiring authorities should be required to acquire the entirety of the land if the use for which the land was previously being used can no longer be achieved as a result of the acquisition?

16(e) Do you consider that the compensation paid in respect of a business should be the lesser of the cost of moving or the cost of closing the business down?

16(f) Do you consider that the Rules in the 1919 Act should be replaced with updated concepts such as (i) loss of goodwill, (ii) double overheads and/or (iii) incidentals?

Please type your comments (if any)

ISSUE 17

NEIGHBOURING LANDOWNERS

Capacity of a Local Authority to Sue and be Sued

17.01 Section 11(7)(a) of the *Local Government Act 2001* provides that a local authority shall continue to be a body corporate with perpetual succession and power to sue and be sued in its corporate name and to acquire, hold, manage, maintain and dispose of land or any interest in land. In *Emerald Meats Ltd v Minister for Agriculture,*[629] it was noted that public authorities do not enjoy any special position in the law of torts and that the general law of torts, which includes nuisance, applies equally to public authorities. However, there is a defence to claims of nuisance against a local authority where it was acting in accordance with a statutory power.[630] In *Gunning v Dublin Corporation,*[631] the High Court held that compulsory acquisition could not be considered a tortious act itself, as it is lawful under statute. However, there are exceptions in relation to local authorities and tortious acts such as trespass and nuisance. Although they can be sued, there are statutory defences whereby, the local authority was acting in accordance with a statutory power; therefore, a local authority can only be found liable for nuisance where there is negligence.

17.02 The *Wandsworth to Croydon Railway Act 1801* was the first piece of legislation on railways, and although it ensured that the landowner would be compensated, it introduced a statutory protection for the purchasing railway companies from claims in nuisance by those affected by nearby railway lines. People in adjacent areas could claim in negligence but not for any interference with the enjoyment of their surroundings. Section 9 of the *Railways Act (Ireland) 1851* provides that the determination of compensation is described as "the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the company". This provision, in using the term "any land" rather than the land of the person in respect of whom the CPO will be made, would appear at first glance to open the door to neighbours claiming compensation, but the case law is so, that this is not the case.

[629] [1997] 1 IR 1 at 20, Also in *Larkin v Joosub and Dublin City Council* [2007] 1 IR 521 it was held that as public bodies, local authorities are subject to the same common law of tortious liability as private individuals or companies.

[630] Keane, *Law on Local Government in the Republic of Ireland* (Law Society of Ireland 1982) states that "where a statute authorises the doing of a particular act by a local authority, no action will lie at the suit of any person in respect of that act, even if it causes damage, provided it is done without negligence" at 52. Also in the UK House of Lords decision *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, at 435, Lord Blackburn stated that "I think if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law, that damage could be prevented, it is within this rule negligent not to make such reasonable exercise of their powers."

[631] [1983] ILRM 56.

17.03 In the UK House of Lords decision *Metropolitan Board of Works v McCarthy*[632] Lord Penzance commented that:

> "There are many things which a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law, these things are *danna absque injuria* [loss without injury], and for them no action lies. Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation, because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third parties who, for the public benefit, have been compulsorily substituted for the original owners?"

17.04 While this may be so, it must also be remembered that the tort of nuisance allows a landowner to succeed in a claim for nuisance if his or her neighbour's conduct amounts to a continuous and unreasonable interference with the enjoyment of a person's land. At the same time, as has been said, a person who dislikes the noise of traffic must not set up home in "the heart of a great city".[633] Conversely, a person who sets up home in a quiet area of the countryside, possibly even to avoid the noise of a great city may have a greater expectation of peaceful enjoyment of that land. A landowner may take a claim against both a neighbour and a public authority; if a claim would not succeed against his or her neighbour, it would not succeed against the public authority, and conversely if a claim could succeed against his or her neighbour, it could also succeed against the public authority.

17.05 The case of *Kelly v Dublin County Council*[634] involved a defendant who owned a vacant cottage that immediately adjoined the plaintiff's residence. The defendant used the cottage for the purpose of storing vehicles and materials. In order to do so, it had to set about clearing a large area of waste ground behind the cottage, levelling the site and re-surfacing it to make it suitable for the proposed purpose. The plaintiffs argued that the site was plagued by noise, vibration, dust, diesel fumes, bad language and a particularly penetrating noise caused by using a disc cutter on metal barrels. They also complained of the workers trespassing over their land to the extent that they had not been able to make any use of their own back garden. The High Court (O'Hanlon J) stated that the law as it stands is that work carried out in exercise of what has been referred to as an "absolute" statutory power does not give rise to a claim for damages for nuisance resulting from that in the absence of negligence in the manner in which the statutory powers are exercised.[635]

17.06 The plaintiffs argued that this defence did not extend to ancillary activities such as had occurred in their case. Even if this was not the case, they argued that there was negligence on the defendant's part. The Court relied on the English Court of Appeal's

[632] (1874) LR 7 HL 243, at 261.
[633] Heuston, *Salmond on the Law of Torts*, 17th ed (Sweet & Maxwell Ltd., 1977), at 56.
[634] High Court, 21 February 1986, followed in *Convery v Dublin County Council* [1996] 3 IR 153.
[635] This is supported by *Superquinn Ltd v Bray Urban District Council and Ors* [1998] 3 IR 542, *Clifford v Drug Treatment Centre Board*, High Court 7 November 1997 and McMahon & Binchy, *Law of Torts* 3rd ed. (Bloomsbury 2000) at paragraph 24.93.

decision in *Rapier v London Tramways Co.*[636] that the statutory authorisation provided to the defendants under the English *Local Government Act 1925* did not extend to the provision and use of a depot for vehicles and materials. *Rapier* involved a tramway company that was empowered to construct a particular tramway and whose directors assumed they were authorised to use animal power in the construction thereof. As a result, the defendant company used stables for horses, which were a source of nuisance to the occupiers of the adjoining premises. The English Court of Appeal had found that the stables were a natural consequence of the use of animal power, and could not find any clause in the English 1925 Act warranting a restriction on the exercise of discretion by the directors, except the duty to take reasonable care. The High Court in *Kelly* continued by quoting from Clerk and Lindsell,[637] which referred to a "discernible tendency in fairly recent times for the courts to interpret 'necessary implication' and 'reasonably incidental' in the light of social utility…If the interference is very small in comparison with the public advantage to be derived from the activity complained of it has sometimes been held that the statutory authority is sufficient justification".[638] This is of particular relevance for compulsory purchase orders. Local authorities, by their very nature, are created for public service purposes, and so it can be argued that there is social utility in any exercise of their powers. However, with regard to CPOs, there is a specific constitutional provision insisting that any interference in the property rights of the individual can only occur "in the exigencies of common good".

17.07 The High Court in *Kelly* also held that the onus of proof lies on the party relying on the statutory authorisation to commit what would otherwise be an actionable nuisance, to satisfy the Court that the nuisance was an inevitable result of the exercise of the statutory powers. However, the Court also noted that the plaintiffs had become somewhat obsessed with the defendant's activities, and in doing so, magnified the legitimate cause of complaint. It commented that the major complaints were related to the levelling and resurfacing of the site, which is work that any property owner, even in a residential district, may have to carry out from time to time. This ties in with the approach of the UK House of Lords in *Metropolitan Board of Works v McCarthy*[639] that it is the case that, throughout a long term neighbouring relationship, there will be works carried about by a neighbour which, although they may encroach on the neighbouring inhabitant's peaceful enjoyment of their property, constitute a condition of living in a residential area. Nevertheless, the High Court in *Kelly* was satisfied that a serious nuisance did exist and continued over a long period of time.

17.08 In determining that the plaintiffs should succeed in their claim for damages, the Court in *Kelly* made the following observations:

1. The back garden of a dwelling house situation was a very unsuitable place to choose for the Council's activities as described in the present case;

[636] [1893] 2 Ch 588.
[637] *Clerk and Lindsell on Torts*, 15th ed (1982).
[638] *Ibid,* paragraph 1-158.
[639] (1874) LR 7 HL 243, discussed above at paragraph 17.03.

2. It is a virtual certainty that no responsible planning authority would ever have granted permission for the user which was made of the site in question; and
3. No evidence was put before the Court to show that the Council had no alternative or no reasonable alternative but to use this particular site for these purposes, or to suggest that the Council would have been involved in quite unreasonable difficulty and/or expense in procuring an alternative site.

17.09 In *Smyth v Railway Procurement Agency*[640] the High Court (Laffoy J) found that the presence of a new light rail tramway beside the plaintiffs' home did not constitute a nuisance. The tramway was built following the making of a statutory Light Rail Order (LRO), which, under section 13 of the *Transport (Dublin Light Rail) Act 1996* was tantamount to a CPO. This case took the statutory defence one step further in the case of a CPO, as the Court held that if the light rail tramway was operating within the terms of the LRO, then it was operating in accordance with the law. The Court also held, however, that the defendants had not complied with condition 28 of the LRO, in that they had not submitted "daytime and night time limits" because the defendants submitted that the main sources of nuisance were ambient noise outside of their control. The Court acknowledged that the relevant local authorities, as planning authorities under the *Planning and Development Act 2000*, had approved the defendants' approach, but the Court also concluded that they were still bound to comply with the condition. In ultimately finding that no nuisance existed in this case, the Court placed particular emphasis on the evidence of the first defendant, the Railway Procurement Agency that the noise levels measured at the plaintiffs' home were within the parameters predicted in the Environmental Impact Statement prepared by the developers in its application under the LRO. The Court stated that the test would be whether the level of noise would infringe on an ordinary person with reasonable objectives in the particular circumstances of the case.

17.10 The aspect of the *Smyth* case that is most relevant to the issue of CPOs is that the plaintiffs had argued that statutory immunity is unconstitutional where there is no provision for compensation. The High Court distinguished this case and Kelly from the *Superquinn* cases in that, in those cases, there was no reference to the Constitution and further, that neither case was concerned with the "type of legislation at issue in this case, which authorises a public authority to create the infrastructure for a major public transport facility in a particular location and to operate the transport facility in that location".[641] In conclusion, the Court held that the first defendant was operating under the terms of the LRO, a power it possessed by virtue of section 4(2) of the *Local Government Act 2001.* In doing so, it was operating in accordance with an Act of the Oireachtas and the secondary legislation made under it, both of which enjoyed the presumption of constitutionality and that, the Court held, represented a complete answer to the plaintiff's claim.[642] Of course, the presumption

[640] [2010] IEHC 290.
[641] *Ibid* at paragraph 2.08
[642] *Ibid* at paragraph 11.32.10.

of constitutionality can be rebutted and a more in-depth analysis of this matter may be warranted given the high degree of deference shown to local authorities when carrying out works. In *Tuohy v Courtney,*[643] the Supreme Court held that "the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights".[644]

[643] [1994] 3 IR 1.
[644] *Ibid* at 47.

QUESTIONS FOR ISSUE 17

17(a) Do you consider that there should be a right to compensation for neighbouring landowners for any damage or encroachment on their land arising from a CPO?

17(b) Do you consider the current scope of the defence of statutory authority in the CPO context is appropriate or does it require modification?

Please type your comments (if any)

ISSUE 18
ARBITRATION

Appointing an Arbitrator

18.01 Once the notice to treat has been served, and if the parties cannot come to an agreement on the final amount of compensation, either party can apply to the Land Values Reference Committee[645] to have a property arbitrator appointed to value the lands under the *Property Values (Arbitration and Appeals) Act 1960* and the *Property Values (Arbitration and Appeals) Rules 1961*. The arbitrator will then determine the amount of compensation to be paid following the principles and rules discussed in Issue 16. An arbitrator may be appointed any time after 14 days have passed since the notice to treat was served. In 2014, 1 full-time property arbitrator and 7 part time arbitrators were employed and these were considered capable of meeting current demand.[646] The Land Values Reference Committee may appoint one or more persons as property arbitrators under the *Property Values (Arbitration and Appeals) Act 1960*. The appointment of an arbitrator is commonly performed under section 1 of the 1919 Act which provides that any land compulsorily acquired by any government department, any local authority[647] or public authority[648] which is under review for compensation, other than agreement, shall be determined by an arbitrator.[649] In *Manning v Shackleton*[650] the Supreme Court held that the purpose of the arbitration procedure is to enable "an independent and suitably qualified" person to determine compensation in the absence of agreement. Such a person is bound to act in accordance with natural justice and fair procedures as he or she will be operating in a quasi-judicial manner.[651] The arbitrator operates completely independently and provides his or her own office. He or she is answerable only to the Reference Committee and to the courts and "thus is insulated from pressure from public

[645] Section 1(5) of the 1919 Act, as amended by section 1 of the *Acquisition of Land (Reference Committee) Act 1925* provides that the Land Values Reference Committee consists of the Chief Justice, the President of the High Court and the President of the Society of Chartered Surveyors Ireland.

[646] Vol. 857 Dáil Eireann Debates, 11 November 2014, Written Answers, No. 3, Question 310.

[647] Section 2 of the Planning and Development Act 2000 provides that "local authority" means a local authority for the purposes of the *Local Government Act 2001,* (as amended by the *Local Government Reform Act 2014*. Section 3 of the 2014 Act provides that local authority has the meaning given to it by section 2(1) of the Local Government Act 2001 as amended by section 5 of the 2014 Act. Section 5 provides that "local authority" is defined as (a) in relation to a municipal district, the county council or the city and county council in which the municipal district is situated, and (b) in every other case – (i) a county council, (ii) a city council, (iii) a city and county council. Municipal districts are determined under SIs 40-44, 50-70 of 2014.

[648] Section 2 of the *Local Government Act 1991*, as amended, defines a public authority as (a) A Minister of the government, (b) the Commissioners of Public Works in Ireland, (c) a harbour authority within the meaning of the *Harbours Act 1946*, (d) the Health Service Executive established under section 6 of the *Health Act 2004*, (e) a board or other body (but not including a company established under the Companies Act 2014) established by or under statute, (f) a company in which all the shares are held by, or on behalf of, or by directors appointed by, a Minister of the Government, (g) the Child and Family Agency established under section 7 of the *Child and Family Agency Act 2013,* and (h) such other body as may be prescribed by regulations made by the Minister for the purposes of any provision of this Act.

[649] Section 4 of the *Property Values (Arbitration and Appeals) Act 1960* confirms that this arbitrator is confirmed as a property arbitrator as opposed to an official arbitrator.

[650] [1996] 3 IR 85

[651] *Ibid* at94.

representatives or officials".[652] There is also no financial limit to the property arbitrator's jurisdiction.

The involuntary nature of arbitration

18.02 Property arbitration is not an avenue chosen by either party in favour of a court proceeding.[653] There is no option to have the land valued by the courts. Where there is a disagreement, arbitration is the only option available to either party. In *Blascaod Mór Teo v Commissioner of Public Works in Ireland,*[654] the applicants argued that the arbitrator under the 1919 Act is imposed and not agreed upon, and therefore, such a practice was repugnant to the Constitution and to the requirement of fair procedures given that the arbitrator is not required to give reasons explaining and justifying the amount of the award.[655] In response, the High Court held that the provisions of the 1919 Act have not been challenged or found to be repugnant over the years. They have been frequently referred to and adopted by the legislature (at the time of the case coming before the court, the 1919 Act had been referred to in at least 78 Acts of the Oireachtas) which, the Court held, was an indication of its consistency and compatibility with the Constitution. This finding does not seem very compelling; there may be many reasons why a failure to give reasons is compatible with the Constitution, but a finding that it is constitutional because it has always been considered so, without giving further explanation or legal discussion arguably results in an incomplete assessment of the Act. The Court went on to state that assessing the market value of the lands would appear to be a question of adjudication on a conflict between the parties and to be an exercise of judicial power rather than simply an administrative matter.[656] The Court found a distinction, however, when compared to that of a personal injury award assessment. It stated that the property arbitrator is assessing a value and is not performing the function of measuring damages which requires the determination of rights necessary for the assessment of compensation in respect of personal injury awards.[657] The policy underlying the arbitration process was to streamline the process and free up the courts. However, such an approach might be considered non-compliant with the principles of fair procedures and administrative justice if there is no appeal from one arbitrator's decision. The fact that justice is time-consuming may not constitute a sufficient justification to deny an individual placed in the situation against his will.[658]

[652] McDermott, "Statutory Arbitration" (1999) 2 IBL 9.

[653] In *Manning v Shackleton* [1996] 3 IR 85, the Supreme Court held that "the purpose of the arbitration procedure prescribed by that Act is to enable an independent and suitably qualified person to determine what is appropriate compensation for land compulsorily acquired where the owner and the acquiring authority cannot agree on the amount" at 94.

[654] [1998] IEHC 38 at paragraph 211.

[655] *Ibid* at paragraph 214.

[656] *Ibid* at paragraph 235.

[657] *Ibid* at paragraph 250.

[658] In *The State (Haverty) v An Bord Pleanála* [1987] 1 IR 485, at 493, the High Court (Murphy J) observed that: "the essence of natural justice if that it requires the application of broad principles of common sense and fair play to a given set of circumstances in which a person is acting judicially. What would be required must vary with the circumstances of the case. At one end of the spectrum it would be sufficient to afford a party the right to make informal observations and at the other, Constitutional justice may dictate that a party concerned should have the right to be provided with legal aid and cross-examine witnesses supporting the case against him. I have no doubt that on appeal to the planning board, the right of an objector – as distinct from a developer exercising property

Appealing the arbitrator's decision

18.03 A property arbitrator's award cannot be appealed or reviewed on the basis of apparent miscalculation.[659] Section 6(1) of the 1919 Act provides that the decision of the official arbitrator upon any question of fact, shall be final and binding on the parties however, the arbitrator has the power to state a case to the High Court on a question of law. Under section 6(2), the decision of the High Court upon any case so stated shall be final and conclusive, and shall not be subject to appeal to any other court. The arbitrator may also be directed by either party to state a case to the High Court. If he or she refuses, the party who had made the request may apply to the High Court for an order directing the arbitrator to state a case.

18.04 Galligan and McGrath state that if the arbitrator does not adjourn the hearing while the case is being stated, there is authority under the earlier Arbitration Acts that would find the arbitrator to be guilty of misconduct.[660] Neither the UNCITRAL Model Law nor the *Arbitration Act 2010* provide for a case stated. However, Article 34 of the UNCITRAL Model Law on Arbitration however, which the *Arbitration Act 2010* implemented, provides for provisions, under which, recourse to the court against an arbitral award is permitted. These include where the party making the application has furnished proof that:

(1) A party to the arbitration lacked capacity;
(2) The agreement is not valid under the law of the State;
(3) The party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
(4) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(5) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this [UNCITRAL Model] Law which the parties cannot deviate from, or failing such agreement, was not in accordance with this Law.

rights – the requirements of natural justice falls within the former rather than the latter range of the spectrum this flows from the nature of the interest that is being protected, the number of possible objectors, the nature of the function exercised by the Planning Board and the limited criteria by which appeals are required to be judges and the practical fact that in any proceedings, whether oral or otherwise, there must be finality".

[659] In *Keenan v Shield Insurance Co Ltd* [1988] IR 89, at 96, the Supreme Court held that "it ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate…in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term" .

[660] Galligan & McGrath, Compulsory Purchase and Compensation in Ireland: Law and Practice 2nd ed. (Bloomsbury 2013) at 503 referring to *Re Palmers & Company and Hosken and Company's Arbitration* [1898] 1 QB 131, CA.

18.05 The award may also be set aside under the 2010 Act where the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of this State or the award is in conflict with the public policy of the State. An application for setting aside an award must be made within 3 months from the date on which the party making the application had received the award.

Duty to Give Reasons

18.06 In *Manning v Shackleton*[661] the question arose as to whether the arbitrator must give reasons for his or her award. Prior to the enactment of section 31(2) of the *Arbitration Act 2010*, the arbitrator did not have to give reasons for his or her judgment but rather, only had to give the headings under which certain amounts were placed.[662] As arbitration valuations may only be reviewed on a question of law or on the perceived misconduct on the part of the arbitrator, recovering on such a basis would represent a difficult challenge without the requirement to disclose the method used in determining the award.[663] The duty to give reasons also provides for increased consistency, transparency and public confidence. In *Manning*, the applicant was subject to a CPO over his land and was awarded £156,280 in compensation. This was less than the £175,000 unconditional offer[664] offered by the acquiring authority. Under section 5(1) of the 1919 Act, if the amount awarded is less than the unconditional offer, the applicant must pay the costs. Following the refusal of the arbitrator to give reasons after a subsequent request by the plaintiff, the plaintiff sought an order of *certiorari* quashing the order, as no breakdown of the award had been furnished. He argued that without the reasons he would be unable to formulate his appeal against the award or calculate his capital acquisitions tax. He also argued that the arbitrator was exercising a judicial function and therefore had to advise on his or her reasons.

18.07 The High Court (Barron J) stated that this was not a convincing argument, as the plaintiff had the option of having the award separated into the various headings. The Court stated that by continuing the hearing without a request for such a breakdown, the applicant was effectively acquiescing to the process. It continued to state that the:

> "giving of reasons by a person or body required to act judicially may be compelled by this court when such reasons are necessary to determine whether such a power has been validly exercised. It is not an essential obligation and arises only when required to prevent an injustice or to ensure that not only has injustice been done but is seen to have been done. The absence of reasons in the award itself does not invalidate it. The question is,

[661] *Manning v Shackleton* [1994] 1 I.R. 397

[662] Section 3(3) of *the Acquisition of Land (Assessment of Compensation) Act 1919.*

[663] This assertion is supported by the judgment of the High Court (Blayney J) in *International Fishing Vessels Ltd v Minister for the Marine* [1989] 1 IR 149 at 155 and the Supreme Court in *Meadows v Minister for Justice* [2010] 2 IR 701 at 732.

[664] The unconditional offer given to the applicant included undertakings as to accommodation works to be provided by the acquiring authority such as providing a three bar concrete post, relocating existing field gates, making provision for a connection to the public water main etc. As a rule, the unconditional offer must not include the accommodation works or costs, *Manning v Shackleton* [1994] 1 I.R. 397 at 403-404.

> whether, if reasons are not now given, justice will neither be done nor be seen to be done".[665]

18.08 In the Supreme Court, it was held that "the respondent, in conducting arbitration proceedings under the provisions of the Act of 1919, was bound to act in accordance with well-established principles of natural justice and fair procedures. One can indeed go further and describe his functions under the relevant legislation as quasi-judicial in nature".[666] Relying on *The State (Creedon) v Criminal Injuries Compensation Tribunal*[667] which held that there are instances in which fair procedures insist upon reasons being given for a decision, the Court concluded that the High Court order should be substituted for an order of *mandamus* directing the respondent to specify the amount awarded in respect of his findings of fact, the legal arguments that were advanced and his findings in respect of such arguments and a breakdown of the contents of the award, particularly in relation to the sum of £156,280. Despite this conclusion, this case was often relied upon as evidence of the absence of an arbitrator's duty to give reasons. This was due to the Court's finding, that:

> "[t]he fact that the arbitrator does no more than determine the amount of the compensation and, if required, segregate it under general headings does not in any way inhibit the specific supervisory jurisdiction conferred on the High Court in respect of such arbitrations by the Act of 1919 and the *Arbitration Act 1954*, nor the general jurisdiction which may be invoked in an appropriate case by means of the judicial procedure".[668]

18.09 The Supreme Court also noted that if every person who felt aggrieved by the arbitrator's decision was allowed to change it, there would be a "multiplicity of applications of dissatisfied claimants or acquiring authorities which, although doubtless couched in the language of judicial review, would be in effect attempts to appeal from the award. Such a consequence would be inconsistent with the policy underlining the arbitration procedure".[669]

Article 6 of the ECHR

18.10 The main issue in relation to arbitration awards would be the lack of power to appeal the substance of the award. In the jurisprudence of the ECtHR, it is normally the case that an applicant who is unable to bring a civil matter[670] before a tribunal on its

[665] *Manning v Shackleton* [1994] 1 IR 397 at 403-404.
[666] *Manning v Shackleton* [1996] 3 IR 85 at 94.
[667] [1988] IR 51 at 554, the Supreme Court held that "I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear ... to be consistent with the proper administration of functions which are of a quasi-judicial nature" .
[668] *Manning v Shackleton* [1996] 3 IR 85 at 96.
[669] *Manning v Shackleton* [1996] 3 IR 85 at 97.
[670] The concept of civil rights and obligations is not to be interpreted solely by reference to the respondent State's domestic law. Article 6 para 1. Applies irrespective of the status of the parties, of the nature of the legislation which governs the manner in which the dispute is to be determined and of the character of the authority which has jurisdiction in the matter; it is enough that the outcome

merits will normally be found to have his right to a fair trial under Article 6 of the ECHR violated. In *Stran Greek Refineries and Stratis Andreadis v Greece*[671], the ECtHR held that as the applicant's right under the arbitration award was "pecuniary" in nature, their right to recover sums awarded by the arbitration court was therefore a "civil right" within the meaning of Article 6.[672] In this case, the State enacted legislation that rendered the State's contract with the applicant outside of the arbitration tribunal's jurisdiction while the arbitration proceedings were ongoing. It also provided that arbitration awards already determined within the time stated shall no longer be valid or enforceable. The Court of Cessation held that its adoption aimed to remove the courts from determining the applicant's award and therefore, violated the separation of powers. Under domestic law there was no possibility of appealing the merits of the award. However, this point was not substantially engaged with by the Court who focused on the separation of powers issue in finding a violation of the applicant's right to a fair trial. The Court first held that it was not in a position to approve or disapprove the substance of the arbitration award, which was reiterated in *Akkus,*[673] and that; a claim to such an award was considered a "possession" for the purposes of A1P1.

18.11 In *Sporrong and Lonnroth v Sweden*[674] the applicants could have appealed to the Supreme Administrative Court; however, this was accepted to be an extraordinary remedy that was exercised very rarely. The Court held that there had been a violation of Article 6 as there was no independent tribunal that could examine the merits of the case. These cases may be argued to provide some support for the argument that the lack of an appeal mechanism from the award of the arbitrator on its merits could potentially be in violation of Article 6 of the ECHR. The lack of an appeals process based on the substance of the award is only compounded by the fact that there is only one property arbitrator who will make the decision. Section 13 of the *Arbitration Act 2010* provides that the default number of arbitrators shall be one unless otherwise agreed by the parties.

18.12 In relation to compensation assessments, the property arbitrator is very much in a position of value whereby his or her expertise in valuation will determine the correct amount of compensation based on established principles. Therefore, one approach might be to continue the practice of refusing appeals based on merit and respecting the arbitrator's skills and expertise. However, the lack of required legal expertise for the position of arbitrator could potentially reduce the possibility for an assessment of fair procedures in making the award.

18.13 A possible solution could be to increase the number of property arbitrators so as to have a panel of 3. This could potentially provide a wider breadth of knowledge and

of the proceedings should be decisive for private rights and obligations, *Allan Jacobsson v Sweden* Application No. 10842/84 at paragraph 72.

[671] Application No.13427/87.

[672] *Ibid* at 40. It also held that "the outcome of the proceedings brought in the ordinary courts by the State to have the arbitration award set aside was decisive for a "civil right".

[673] *Akkus v Turkey* Application No. 19263/92, at paragraph 28.

[674] Application No. 7151/75, 7152/75.

opinion and could be fairer. Compensation under the *Minerals Development Act 1940* was determined by a panel of 3, composed of a legal professional who was either a barrister or solicitor with ten years' experience and 2 ordinary members, one of whom was to be a property arbitrator, with the second being an officer of the Minister.[675] The *Minerals Development Act 2017,* which repealed and replaced the 1940 Act, largely retained the same process but the officer of the Minister is now replaced by a property arbitrator.[676] Originally section 1(1) of the 1919 Act provided that any question of disputed compensation should be referred to, and determined by, a panel of arbitrators. This was amended by section 4 of the *Property Values (Arbitrations and Appeals) Act 1960* to a single property arbitrator. In the Oireachtas debates on the 1960 Act, it was stated that it was the practice, since the establishment of the State, to employ one arbitrator only, as it was found that the combined work involved could be done satisfactorily by a single person.

18.14 The issue is not that the property arbitrator would be assumed to be biased or unfair, but rather that there is an element of discretion in the assessment of the other elements aside from market value.[677] An increased number of arbitrators could arguably be seen as being required to establish that justice is not merely being done but is also seen to be done.[678] This sentiment is supported by the views expressed in the Supreme Court in *Dublin Wellwoman Centre Ltd v Ireland*[679] that "the concept of the perception of the administration of justice, as well as the content of justice is an important factor as in years gone by" especially with consideration to "the modern communications media and an increasingly educated and enquiring society".[680] Such a process could allow arbitration to remain a "one stop shop" and provide certainty without the possibility of appeal on its merits. On the other hand, having only one arbitrator who is qualified in matters of valuation and who is subject to a review of his or her conduct may be sufficient, and could operate as a cost cutting measure for the State.

[675] Section 33 of the *Minerals Development Act 1940.*
[676] Section 155 of the *Minerals Development Act 2017*
[677] Vol. 185, Dáil Eireann Debates, Second Stage Speech, Property Values (Arbitrations and Appeals) Bill, 1960, 14 December 1960.
[678] *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256.
[679] [1995] 1 ILRM 408.
[680] *Ibid* at 422.

QUESTIONS FOR ISSUES 18

18(a) Do you consider that the grounds for setting aside an award under the 1919 Act should be expanded to include the merits of the decision based on, for example, instances in which there is independent evidence establishing that the final figure was insufficient?

18(b) Do you consider that there should be more than one property arbitrator determining the compensation payable?

Please type your comments (if any)

ISSUE 19

DETERMINING TITLE

Requirement to provide proof of title

The 1845 Act

19.01 Under the 1845 Act, when the arbitrator (now split into the 2 separate roles of inspector and arbitrator) publishes notice of his or her appointment, he or she shall also state in the notice that he or she requires all those claiming to have an interest in the land required for the purposes of the railway, or those who seek compensation for any injury to any lands injuriously affected by the execution of works of the acquiring authority, to make a short statement in writing concerning the nature of the claim.[681] Section 20 of the Act provides a further power for the acquiring authority to require evidence of title in respect of any land subject to the CPO.

The 1960 Act

19.02 Section 10(4)(a) of the 1960 Act provides that the provisions of section 79 of the 1966 Act shall apply to any order made under section 10. Section 79 of the 1966 Act provides that, when the CPO becomes operative, a notice to treat shall be served on every owner, lessee, and occupier of the land, requiring each of these recipients to state within a specified period (not being less than one month from the date of service of the notice to treat) the exact nature of the interest in respect of which compensation is claimed by him and details of the compensation claimed. It is also noted that, it would often be the case that the occupier is the only person who knows who retains the title therefore; this section could possibly remain unchanged. Section 7 of the *Landlord and Tenant (Ground Rents) Act 1967* contains a similar provision requiring a person with an interest or apparent interest in the land to provide information regarding the nature of any incumbrance on the land, and the name and address of the person who is entitled to the superior interest in the land.

Failure to Produce Title

The 1845 Act

19.03 Under section 75 of the 1845 Act, if the landowner has failed to adduce a good title of the land to the satisfaction of the authority, it shall be lawful for the authority to execute a deed poll, which will permit the vesting of the land absolutely in the authority once the acquiring authority deposits the compensation into the Bank of Ireland. From this, the authority shall be entitled to immediate possession of the land.

[681] Section 8 of the 1845 Act.

The 1966 Act

19.04 Section 76(2)(g) and the Third Schedule of the 1966 Act provide that if it appears to the housing authority that the person making any claim for purchase money or compensation is not absolutely entitled to the land, estate or interest, or if the title to such land, estate or interest is not satisfactorily shown to the housing authority, and the purchase money or compensation does not exceed £40,000, the authority may pay the amount into the Circuit Court and by doing so, vest the interest in itself.

Practical Issues with Determining Title

19.05 The difficulty of being unable to determine good title was evident in *Jackson Way Properties Ltd v Dun Laoghaire-Rathdown County Council,*[682] in which the plaintiff sought a mandatory injunction requiring the defendant Council to comply with the arbitrator's award for compensation in respect of his lands that were compulsorily acquired. Following the CPO, and 10 years after the notice to treat was served, the Council had taken possession of the applicant's land and used it to construct part of a motorway, without paying compensation.

19.06 The plaintiff's land was subject to a number of burdens, namely a covenant not to erect any buildings on certain parts of the land. The arbitrator proceeded as if the land had no possible restrictions, following assurances by the plaintiff that the land was an unencumbered freehold title subject only to certain easements. A year into arbitration, the solicitor for a third party, wrote to the defendant Council to advise it that the third party benefited from a restrictive covenant registered on the lands of the plaintiff. The defendants requested that the arbitrator make 2 award decisions, one as if the land was unencumbered and one as if it was held under a restrictive covenant. This would be as opposed to having the court determine proper title first and then revert back to the arbitrator, because the arbitrator cannot make decisions based on title. The plaintiff argued that there was a presumption that the title was unencumbered unless it was proven otherwise and that the arbitrator should proceed on such a basis. The arbitrator agreed with the plaintiff and decided on an award of €12,860,700 for the land but only once proper title was confirmed. The next steps would normally involve the landowner producing his title to the acquiring authority, which would then investigate the title, and subject to being satisfied that the title was retained by that person, would proceed with the CPO and payment of compensation.

19.07 The defendant had still not provided this compensation to the applicant 5 years later, claiming that the landowner had not proven that his title was free from a restrictive covenant. The defendant counter-claimed the against the plaintiff's claim of enforcement, requesting that the award of the arbitrator be set aside based on the absence of proof of proper unencumbered title. Meanwhile, the third party had initiated separate proceedings claiming €5,850,000 against the defendant, the outcome of which was still to be determined at the time of the hearing. The plaintiff,

[682] [2015] IEHC 619.

while not accepting the existence of a restrictive covenant, argued that this alone proved that he was entitled to at least €7,010,700 which he wished to see enforced. The defendants argued that the sum awarded was for land unencumbered by any restrictive covenants, and that it could not be enforced until proof of an unencumbered title was provided. It could not be enforced on a piecemeal basis. They also argued that the third party had not been afforded the opportunity to negotiate their compensation, and the court agreed, stating that they were quite entitled to amend their claim right up to the arbitration of that claim. During the course of the proceedings between the plaintiff and the defendant, the plaintiff sought to join the third party as a notice party; however, it subsequently became clear that the plaintiff would need to instigate separate proceedings to challenge the third party's claim. These proceedings began in March 2010. In its conclusion, the Court stated that the compensation was still in dispute and therefore, no award could be provided. The Court also commented that the plaintiff had waited 9 years before taking an action against the third party in which to confirm that no restrictive covenant was imposed on the land. Therefore, the defendant could not be blamed for the delay, even though the Council had avoided the enforcement of an award made by the arbitrator for the same period of 9 years.

19.08 The Court stated that if the plaintiff's interest in the lands acquired, as of the date of the service of the notice to treat, was subject to a restrictive covenant, then the determination of the property arbitrator would in effect, be moot. The land was assessed on the basis of it having a development value. If a restrictive covenant was in effect over the land then the value of the land would significantly decline. The real issue in this case was that the defendant did not add the third party to the case in the name of judicial expediency. There is also an onus throughout this case in which the burden of proof lay on the applicant to show that a restrictive covenant did not affect his land as opposed to a burden on the third party or the acquiring authority to prove the existence of such.[683] Section 79 of the 1966 Act provides that, once the notice to treat is served, the landowner must provide "the exact nature of the interest of which compensation is claimed by him and details of the compensation claimed". Section 18 of the 1845 contains similar wording. Also, the arbitrator made his award in 2003, and so the pre-2009 Act[684] rules applied to the registration of freehold covenants. It should also be noted that section 41 of the *Arbitration Act 1954*[685] allowed for an

[683] The High Court (Binchy J) noted that "the plaintiff failed to produce any evidence that the restrictive covenant appearing at entry numbers 4 and 5 on the folio did not affect the lands being acquired by the defendant", *Ibid* at paragraph 18.

[684] Under section 69(1)(k) of *the Registration of Title Act 1964* "any covenant or condition relating to the use or enjoyment of the land of any specified portion thereof" may be registered. Section 69(1)(kk), as inserted by the 2009 Act, extends this to freehold covenants. Subsection 2 provides that such a burden may be registered under this section on the application of the registered owner of the land. As it is a negative covenant that will carry over through multiple purchasers (as was held in *Cardiff Meats Ltd v McGrath & Ors* [2007] IEHC 219), it would stand to reason that the landowner who benefits would not be using or enjoying the land. It would be the landowner who is prevented from using or enjoying the land. There is no incentive for such a landowner to register the burden against his or her interest. Similarly, in sending an application to the land registry for first registration of a freehold or leasehold property, each landowner must make an oath over his or her land, stating the nature of the benefit and the existence of any encumbrances on the land. Subsection 3 provides that "any covenant or condition registered under this section may be modified or discharged by order of the court on proof to the satisfaction of the court that the covenant or condition does not run with the land, or is not capable of being enforced against the owner of the land".

[685] Applied by section 7 of the *Arbitration Act 1980* and subsequently repealed by the *Arbitration Act 2010.*

application for leave to enforce the award of the arbitrator but in this case, the motorway had been built, and the acquiring authority had entered onto the lands and built the road without paying the compensation.[686]

19.09 Although it could be argued that it is solely the responsibility of the landowner to offer proof of his ownership of the land through producing his or her title, given the lax registration and enforcement of restrictive covenants, it may also be considered unduly onerous to expect the landowner to prove the absence of something, rather than to expect the benefitting owner to prove its existence. As Mee and Murphy note, a restrictive covenant only constitutes an equitable interest in the land and the "equitable rules surrounding the passing of the benefit and the burden of restrictive covenants are complicated and somewhat uncertain".[687] Similarly, Maddox notes that "the former law relating to freehold covenants has been particularly problematic given its anomalous nature and seemingly arbitrary range of obligations in which could or could not be enforced".[688]

19.10 *Jackson Way* is an extreme example of how the difficulties of assessing title can cause extreme time delays and significant financial expenditure when handled by the courts. One solution may be to permit the arbitrator to assess disputes of title and insist that a legal qualification or significant experience establishing title is an essential requirement for the position. In the Government's policy document, "*Accommodating Change – Measuring Success: Property Asset Management Delivery Plan*", it states that the investigation of title should be conducted by a suitably qualified legal person acting for the State.[689] The individual who is suitably qualified could also re-join the panel system of 3 which would provide for varied judgment on valuations. The question of whether an arbitrator has jurisdiction to determine title has been answered in the affirmative in the English case *Union Railway (North) Ltd v Kent County Council Land Tribunal.*[690] It has subsequently been argued that a similar approach could operate well in this jurisdiction, especially where 2 parties claim the identical title.[691]

[686] The High Court, on one of the many occasions in which the case came before it seeking an interlocutory injunction stated, "The reality is that we all have the pleasure on driving on the M50. It is there, Dun Laoghaire County Council have it. They haven't had to pay out any money for getting Jackson Way's lands. I mean there is an underlay, it seems to me, of injustice", *Jackson Way Properties Ltd v Dun Laoghaire/Rathdown County Council* [2015] IEHC 619 at paragraph 28.

[687] Mee & Murphy, "Reform of the Law of Covenants". https://www.ucc.ie/law/irlii/articles/Reform%20of%20the%20Law%20of%20Covenants.htm

[688] Maddox, "Land Law", in Byrne and Binchy (eds), *Annual Review of Irish Law 2010* (Round Hall, 2011) 252 at 266.

[689] Office of Public Works, *Accommodating Change – Measuring Success: Property Asset Management Delivery Plan* (June 2016) at 12.

[690] [2008] 2P, CR 22, [2009] JPL 1607.

[691] Flanagan "CPO Compensation – Arbitration Process & Assessment: Time for Amendment", 13th Annual Planning and Environmental Law Conference 2016 (5 November 2016). He argues that "it would appear that both the award and the costs associated and incurred in making an award are wasted when the award cannot be taken up".

QUESTION FOR ISSUE 19

19 Do you consider that an arbitration panel, as discussed in Issue 18, should include a suitably legally qualified individual, who could determine title?

Please type your comments (if any)

ISSUE 20

PRIORITY PAYMENTS TO THE REVENUE COMMISSIONERS

20.01 Under section 81(2) of the 1966 Act, where a housing authority, before making a vesting order, becomes aware that the land to be acquired is subject to any annuity or other payment to the Irish Land Commission or to the Commissioners of Public Works in Ireland, or to any charge for estate duty or succession duty payable to the Revenue Commissioners on the death of any person, the authority shall inform the Irish Land Commission, the Commissioners of Public Works in Ireland or the Revenue Commissioners, as the case may be, of the intention to make the order. Similarly, this issue also arises where the person being compensated has an outstanding debt to Revenue or the Department. For example, if X owes €10,000 in tax arrears and the Council is acquiring some of X's land for road widening, the Council is obliged to pay €10,000 of the compensation to the Revenue Commissioners and pay the balance only to X. Certain legislation, such as the *National Asset Management Act* 2009 provides that the body acquiring the land shall notify the Revenue Commissioners of the acquisition if it becomes aware, before the making of the order, that the landowner is subject to a liability for estate duty, succession duty or inheritance tax.[692] The question that arises is whether this should remain the position, or should be extended to cover all debts due to State organisations, or should be repealed, with the State bodies left in the same position as any other creditor with the right to apply to garnish the compensation or have a receiver appointed over it.

20.02 The statutory provision that provides for this is section 1002 of the *Taxes Consolidation Act 1997.* This allows the Revenue Commissioners to make an order of attachment on a third-party debt without the need for a court order, though subject to the taxpayer making an application for judicial review within the 10 day notice period after the notice of attachment is received. A final demand letter must be sent to the taxpayer 7 days before the notice of attachment is sent. Attachment can only be made where there is a minimum debt of €1,000 and a default period of at least one month is required before general attachment can be used (as opposed to attachment on earnings). The Revenue Commissioners must have "reason to believe" that the attachee may have a debt due to the taxpayer and section 1002(15) provides that any obligation on Revenue to maintain secrecy, or any other restriction on the disclosure of information, shall not apply to the information provided to the attachee in the notice of attachment (such as name, address, amount due to Revenue). The attachee/third party must respond within 10 days to acknowledge whether such a debt exists and if they do not deliver such a return within the time specified, they will be subject to a fine of €3,000. They must also send the aggregate amount due to

[692] Section 168 of the 2009 Act.

Revenue within the ten-day period. Section 1002 only binds the amount due by the taxpayer, not the entire debt owed by the third party to the taxpayer.

20.03 The Revenue's *Guidelines for Attachment, Tax and Duty Manual* states that suitable attachees include other entitles from which the taxpayer is due to receive once-off payments, for example compulsory purchase orders. The Guidelines also state that proceeds from property sales are not suitable for attachment due to the nature of conveyancing transactions as a debt normally only arises on the closing date of the sale. It is arguable that the same could be said for land acquired by a CPO but this is subject to attachment under the Guidelines.

20.04 In the Commission's 2010 *Report on Personal Debt Management and Debt Enforcement* the Commission argued[693] that the early collection of tax debts through these mechanisms is to be encouraged, so that delayed collection of such debts does not provide a debtor with an unofficial state subsidy, and does not allow a debtor to enter into financial difficulties which may prejudice the position of other creditors without their knowledge. Section 1002 was also cited in the Report to support the idea that statutory power already exists to attach to a joint bank account. The Commission similarly considered that, in relation to garnishee orders, tests of appropriateness and proportionality should be incorporated into each case of debt enforcement.[694] The fact that the tax would be deducted from compensation awarded as a result of a CPO could be considered a stronger factor in considering not to make the order. Nonetheless, this may not hold sufficient weight so as to offset the legitimate aim of tax enforcement. As attachment is usually an action of last resort, it could also be argued that there was no other mechanism that would guarantee payment.

[693] Law Reform Commission, *Report on Personal Debt Management and Debt Enforcement* (LRC 110-2010), at 170.
[694] *Ibid* at 226.

QUESTIONS FOR ISSUE 20

20(a) Do you consider that section 1002 of the *Taxes Consolidation Act 1997*, under which taxes owing may be deducted from a CPO award, should be retained?

20(b) If the answer to (a) is yes, do you consider that the Revenue Commissioners should be required to obtain a court order before using section 1002 of the 1997 Act?

20(c) Do you consider that the fact that the compensation arises from a CPO should be a consideration in any proportionality test applicable to a debt enforcement decision?

Please type your comments (if any)

ISSUE 21
COSTS

The 1845 and 1851 Acts

21.01 Section 24 of the 1845 Act provides that a court (justice), upon the application of either party with respect to any question of disputed compensation, may hear and determine the compensation. The costs of every such inquiry are at the discretion of the court. Section 34 continues that all the costs of arbitration shall be paid for by the acquiring authority, unless the arbitrator's award is the same or a smaller amount than has already been offered by the authority, in which case, each party shall bear its own costs and the costs of the arbitrators shall be borne by the parties in equal proportions. Sections 22-57 of the 1845 Act are no longer relevant, having been overtaken by the 1919 Act. However, Galligan and McGrath note that they are still of limited relevance where the owner cannot be found.[695] Under section 12 of the *Railways Act (Ireland) 1851,* the salary or remuneration, travelling and other expenses of the arbitrator and all other expenses incurred by the Commissioners of Public Works in Ireland (the Office of Public Works) would be paid by the railway company. Section 13 provides that the arbitrator may, where he or she thinks fit, upon the request of any party by whom any claim has been made, determine the amount of costs incurred and shall direct the acquiring authority to pay them within 7 days. If the costs are not paid within 7 days, the amount shall be recoverable by distress. It also provides however, that no such direction shall be made if the amount of compensation awarded to the landowner exceeds the amount offered by the company before arbitration.

The 1919 Act

21.02 Section 5(1) of the 1919 Act provides that where an acquiring authority has made an unconditional offer in writing, and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he or she thinks proper not to do so, order the claimant to bear his or her own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made. Section 5(2) provides that if the landowner does not provide the acquiring authority with particulars of his claim, costs will be awarded as if an unconditional offer has been made and the claimant had been awarded a sum not exceeding the amount of such offer. On the other hand, where a claimant has made an unconditional offer and the sum awarded is equal to, or does not exceed such an offer, the official arbitrator shall, unless for special reasons he or she thinks proper not to do so, order the acquiring authority to bear its own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made. Section 5(6) provides that where an official arbitrator orders the claimant to

[695] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 8.

pay the costs, the acquiring authority may deduct the amount so payable by the claimant from the amount of the compensation payable to him or her. Under section 5, costs include any fees, charges, and expenses of the arbitration or award.

The 2000 Act

21.03 Under the 2000 Act, the costs will only be reimbursed following a decision from An Bord Pleanála, which would direct the acquiring authority to pay the fees incurred from holding the hearing and also any costs incurred by any person appearing at the hearing.[696] These do not include reasonable subsistence and travelling expenses which are payable under section 135. Section 219 provides that An Bord Pleanála, not the inspector, has "absolute discretion" to direct the local authority, or the person who applied for the CPO to make reasonable payment for the costs in holding the oral hearing, the fees of any consultants or advisors engaged in the matter and any expenses paid to the member and employees of the Board. All sums under these 2 sections are recoverable as a simple contract debt in any court of competent jurisdiction.[697] There is no provision under section 219 of the 2000 Act to order an objector to pay costs. This means that it is available to any person to challenge the order without being liable to pay costs for what could potentially be a baseless claim.

21.04 It could be argued that the system is structured in an unbalanced manner. A local authority informs the landowner of its plans to compulsorily purchase the land, and provides him or her with information gathered by the local authority and its chosen experts. This leaves the landowner with only 2 choices, namely agree to forfeit his or her land or seek legal advice and initiate an independent investigation. An independent investigation is a costly service, with no guarantee of reimbursement.[698] There is no mechanism in place to fund such independent services for the landowner in advance. By way of contrast, in Norway, both the confirmation of the CPO and the determination of compensation are conducted at the same hearing. This hearing is held by a board of 2 legal professionals and between 2 and 4 land appraisers with specialist knowledge in the area. Under the Norwegian system, the developer must pay the costs of the landowner in seeking expert assessments and legal advice as well as the first review by the board, regardless of the outcome. However, the developer can request a limit on the number of legal professionals acting on behalf of the landowner. If the landowner seeks a second appraisal, then there is a possibility that he or she will bear the costs but this is at the discretion of the board. If the developer seeks the second appraisal, they will always be responsible for the cost of the hearing and any associated costs.

[696] Section 219 of the 2000 Act

[697] Sections 219(3) and 135(5)(b)(ii) of the 2000 Act.

[698] "Whilst it is true that the actual interference is affected by the confirmation of the compulsory purchase order it is more proper to regard the law which enables the compulsory purchase order to be made as the means by which the rights have been restricted" *Crosbie v Custom House Dock Development Authority* [1996] 2 IR 531 at 544.

QUESTION FOR ISSUE 21

21(a) Do you consider that the landowner should be reimbursed with the costs to obtain an independent evaluation regardless of the amount of the final award (taking into consideration the unconditional offer)?

21(b) Do you consider that the landowner should be provided with these costs in advance of any oral hearing that may arise?

Please type your comments (if any)

ISSUE 22

DISPOSAL OF LAND

The 1845 Act

22.01 There are many individual provisions governing the disposal of land,[699] but this Paper is confined to the method under the main systems. Under section 128 of the 1845 Act, before the promoters of the undertaking dispose of any superfluous land, they must offer to sell the land back to the landowner from whom the land was compulsorily acquired. However, this obligation does not extend to land if the lands are situated within a town, or are lands built upon or used for building purposes. If the original landowner cannot be located or identified, the land must be offered to the adjacent landowners.

The 2000 Act

22.02 Under section 211 of the 2000 Act, a local authority can dispose of any land acquired for the purposes of the Act or otherwise acquired through sale, leasing or exchange where it no longer considers the land necessary in order to carry out its functions. Section 211(4) provides that capital money arising from such disposal of land shall be applied for a capital purpose or may be properly applied or for such purposes as may be approved by the Minister, whether generally or in relation to specified cases or circumstances. "A capital purpose" is not defined under the 2000 Act. Section 206(1) of the *Planning and Development Regulations 2001* provides that the consent of the Minister under Section 211 of the 2000 Act is not required by a local authority where it is of the opinion, for economic or social reasons, that it is reasonable that the disposal of land is carried out in accordance with the terms of section 183 of the *Local Government Act 2001.* Section 183 provides for the disposal of land held by a local authority. However, it does not detail the disposal process aside from provisions relating to the notification of the proposed disposal to members of the local authority and the potential objection to such disposal by the members.

[699] Section 16 of the *Harbours Act 2015* provides for the disposal of land by the directors of the transferred company. Section 16(4)(a) provides that in making any decision to dispose of the land, the directors shall have regard to any policy or guidelines of the Government. Section 4A(2)(b) of the *St James Hospital Board (Establishment) Order, 1971* provides for an agreement between one or more persons in order to dispose of land held by the HSE, for the purposes of constructing buildings and facilities on land vested in the Board and for the management and running of the hospital. Section 53(2) of the *Education and Training Boards Act 2013* provides that the Minister may give a direction to an education and training board to acquire, hold or dispose of land where he or she considers it necessary having regard to the interests of the local community within the functional area of the board and the public interest in ensuring value for money. Section 53(7) provides that all moneys received by the board from such a disposal may be recovered by the Minister and where the money not so recovered, it shall be applied towards such purposes as the Minister determines.

Case Law

22.03 *In re the Health (Amendment) (No.2) Bill 2004*[700] involved a Bill that would have retrospectively legalised charges which had been unlawfully levied from exempted persons for inpatient services that the Oireachtas had previously enacted should have been provided free of charge. The Supreme Court held that such legislation could not be considered to involve "regulating" the exercise of property rights under Article 43, and that "principles of social justice" could not permit the expropriation of property solely be reference to the financial interests of the State.[701] It is therefore strongly arguable that land should not be compulsorily acquired in exchange for profit or provided to another landowner in exchange for something that would have otherwise been unavailable to the State.

22.04 In *In re the Planning and Development Bill 1999,*[702] the question was whether it was constitutionally permissible to require that planning legislation could impose a requirement that up to 20% of a housing developer's land should be set aside for social housing purposes, and as a result be given over to a public housing authority. Under the proposal in the 1999 Bill, enacted as Part IV of the 2000 Act, An Bord Pleanála may, as a condition of a grant of permission, require the developer to pay an amount equivalent in value to the transfer of the land to the authority. This money may only be used for functions related to housing. Any dispute may be settled by a property arbitrator or An Bord Pleanála. If the planning authority determines that it no longer requires the land, it may use it for another purpose connected with its functions or sell it for the best price reasonably obtainable. Only the market value must be then used for housing functions, there are no such restrictions on the use of any profit. If the housing authority sells one of the houses to an eligible person at a discount from the market value, the percentage of that discount (as opposed to the amount) must be paid to the planning authority upon any resale by the eligible person.[703] The housing authority is thus making a profit from compulsorily acquired land. Although the Supreme Court did not mention the validity of these specific provisions, it upheld the entire scheme as constitutional. In relation to disposal, the overlying approach appears to treat compulsorily acquired land as if the land had been acquired through a sale. The previous landowner has no right in relation to the land nor can he or she be treated more favourably.

The Possibility of Resale to the Landowner

22.05 In Belgium, in disposing of the land, the landowner is permitted to purchase the property that was subject to a CPO if he or she is willing to refund the compensation. However, one aspect of this is the unfairness that such an approach might bring about, either to the landowner or acquiring authority. If the market value of the land has risen in the interim, then the compensation refunded will not reflect the price the

[700] [2000] 2 IR 321.
[701] [2005] 1 IR 105.
[702] [2000] 2 IR 321.
[703] This amount is reduced by 10% every year following 10 years of occupation and also takes into account any material improvements.

acquiring authority may obtain on an open market but if the value has decreased, the landowner will be paying more any other individual would have cause to pay.

22.06 There appears to have only ever been one case where a local authority has used the "exceptional circumstances" rule that is available where the authority does not wish to place the land on the open market. In 2002, the Dublin Docklands Development Authority enforced a CPO, granted by An Bord Pleanála, against the Irish band U2, who occupied a property owned by Harry Crosbie, located at 16 Hanover Quay. They also owned 18 Hanover Quay, but the CPO over that property was never completed as, to do so, would have meant that the Authority would have to accommodate U2 in another building. The aim of the CPO was to carry out public amenity works relating to the development of the Grand Canal Harbour. The compensation paid for the individual property was not disclosed; however, No. 16 combined with No. 12 amounted to €5.1 million. In 2013, when the Authority was being wound up and it did not have sufficient funds to carry out the project, it resold the property to U2 for €450,000, without offering it to Harry Crosbie, the previous owner. When questioned by the Public Accounts Committee (PAC), it maintained that it did so using the exceptional circumstances rule, albeit, for the first time, outside of competitive tendering. The Authority maintained that it had engaged with professional valuers and believed that it achieved an amount on par with the open market price in a difficult economic market.[704] However, during the hearing, a member of PAC maintained that the site and development value would have been €5 million. In its report on the Dublin Docklands Development Authority, PAC noted that it could find no justification for such a restricted disposal of this property and that it should have been sold on the open market in order to ascertain its full value.[705] It therefore, recommended that where sales of State assets occur without an open process, the reasons for that private sale should be clearly documented and a report made to a parent Department and should be highlighted by way of a note in the accounts of the State body.[706]

The Issue with the lack of a specified purpose and the disposal of land

22.07 It is unfortunate that the High Court in *Crosbie* did not take the opportunity to address the question of first refusal for the owner, should the purpose fail or should excess land be left over following a development. Without substantial plans in place, there is the possibility that this could be extremely costly at a later date when trying to sell off land that was deemed unnecessary to finish the project. At the time of writing (December 2017), Galway County Council is tasked with selling off excess land from the M6 Motorway between Ballinasloe and Galway City, which is landlocked.[707] The Council is not attempting to sell it back to the landowners who have access, having

[704] Vol. 2, Committee of Public Accounts Debate, 26 March 2015, No.123.
[705] Public Accounts Committee, Report on the Dublin Docklands Development Authority (November 2015) at 18.
[706] *Ibid* at 22.
[707] D. Tierney, Land for Sale – With No Access, Connaught Tribune, 25 February 2017.

stated that "a process must be adhered to".[708] It should also be noted that Transport Infrastructure Ireland (TII) owns the land, and should the land be sold, the money shall be returned to TII. In this case, it seems a profit is unlikely; however, it is possible that an acquiring authority could make a financial gain at the expense of the landowner and his or her displacement.

Governmental Guidelines

22.08 In 2012, the Commissioners of Public Works in Ireland (the Office of Public Works) chaired a steering group on property asset management to identify key reforms in both the acquisition and disposal of land by central government, state bodies or agencies, the HSE and local government. Following on from this work, the government published a policy document, "*Accommodating Change – Measuring Success: Property Asset Management Delivery Plan*". This document is to be used in conjunction with the state property register viewer and with Circular 11/15 which details the protocols on asset transfer and sharing. Under these documents, "surplus property" is defined as property surplus to the State's requirements and available for occupation or disposal. However, it does not include property that must be disposed of in a certain manner, as prescribed by legislation. In terms of acquisition, it states that the relevant stakeholder should ensure that the necessary funding is in place. For any disposals, it provides that in order to obtain value for money, a business case should be created which should be subject to standard appraisal steps:

(1) The objection should be defined. This should be stated in "language that allows a wide range of options to be considered". This provides that it should be a broad definition which only seeks to further the power of the stakeholder.
(2) Explore the potential options for the land, i.e. "would better value be obtained by obtaining planning consent for a change of use".
(3) Quantify the cost reductions or income from the variable options, at which point it may be necessary to seek the advice of valuers/surveyors.
(4) Analyse the main options which would include considering withholding the property from the open market if market conditions would not provide value for money.
(5) Identity the risks associated with each viable option. There is no further instruction on this point.
(6) Decide on a preferred option. It is stated that maximising the amount realised should not be the sole criterion and the impact of the decision on the public service and the local community must also be considered.
(7) Make a recommendation to the Decision-Making authority.

22.09 This policy document also includes a hierarchy in terms of the method of disposal. First, property may be disposed by transferring it to another public body. Secondly, it may be disposed on the open market and finally, the property may be held or

[708] *Ibid.*

considered for other uses. Open market would include disposal by means of public auctions, private treaties, informal tender, sale of long leasehold interest properties, surrender, assignment of leasehold interest, disposal and leaseback, break clauses, and subletting to a third party. It also mentions that cognisance should be taken of "special interest purchasers" which is not otherwise defined in the document. There is no provision for approaching the previous landowner; however, the policy document does not mention compulsory acquisition. It also recommends that opportunities for collaborative procurement of professional services should be actively pursued.

22.10 The Commission seeks views as to whether a right of first refusal should be included in CPO legislation and whether the same compensation should be paid so as to uphold the principle of equivalence. This would leave the landowner in no worse or no better situation that he or she would have been before the CPO.

QUESTION FOR ISSUE 22

22. Do you consider that CPO legislation should provide for a "first refusal" to the landowner for any unused or excess land? If so, what form would that take?

Please type your comments (if any)

ISSUE 23

CONSOLIDATION OF COMPULSORY ACQUISITION LEGISLATION

23.01 The exercise of compulsorily acquiring land in exchange for compensation can be traced back to Cormac's house, Ódran and the King at Tara.[709] The need to modernise agricultural production and the subsequent industrial revolution developed the practice into a statutorily protected power vested in local authorities and statutory bodies. The legislation enacted in the early 19th Century, however, comprised essentially standalone Acts that had to include the specific land being acquired, the specified purpose for which it was to be used and the compensation to be paid. Each of these Acts had to be passed by Parliament. It was, first and foremost, the introduction of the Railway Acts that drove the cumbersome, expensive and lengthy process into a more streamlined process, bypassing the need for an Act of Parliament. The *Lands Clauses Consolidation Act 1845,* which remains in force, introduced a standard procedure for the compulsory acquisition of land. It has been described as "very loosely drawn" with "very little attention paid in it as to accuracy of language".[710] The *Statute Law Revision Act 2007* explicitly retained in force the main pre-1922 Acts on compulsory acquisition, the *Land Clauses Consolidation Act 1845,* the *Railways Act (Ireland) 1851,* the *Railways Act (Ireland) 1860,* the *Railways Act (Ireland) 1864,* the *Local Government (Ireland) Act 1871,* the *Local Government (Ireland) Act 1898,* the *Housing of the Working Classes Act 1890* and the *Acquisition of Land (Assessment of Compensation) Act 1919*.

23.02 The *Interpretation Act 1937* defined "land clauses acts" as the *Lands Clauses Consolidation Act 1845*, the *Lands Clauses Consolidation Acts Amendment Act 1860*, the *Railways Act (Ireland) 1851*, the *Railways Act (Ireland) 1860*, the *Railways Act (Ireland) 1864*, the *Railways Traverse Act 1868*, the *Acquisition of Land (Assessment of Compensation) Act 1919*, and every statute for the time being in force amending those Acts or any of them.[711] The *Interpretation Act 2005*, which replaced the 1937 Act, does not contain a definition of the Land Clauses Acts.

23.03 The 1845 Act process involved the identification of land and landowners, notification (which included the publication of maps), the holding of an enquiry open to the public when necessary and the principles of compensation. This process and its clauses

[709] This old Irish story involves the acquisition by the King of Tara, Cormac Mac Airt, of Odran's land. When Ódran denied entry to the King, the King promised to compensate him by paying him his own weight in silver, daily rations for a household of nine persons for so long as the king should live and land of equivalent value elsewhere.

[710] *Horn v Sunderland* [1941] 2 KB 26, at 43 (Scott LJ).

[711] *Interpretation Act 1937*, Schedule, Part. 15.

were potentially available to be incorporated where necessary into an enabling act.[712] It is important to note that the 1845 Act does not grant the power to compulsorily acquire, but rather grants power to the legislature to enact legislation that can enable an authority to compulsorily acquire the land.[713] Section 1 provides that the 1845 Act would apply to every future Act that grants the authority to compulsorily purchase land. The enabling Act, coupled with the 1845 Act, is often referred throughout the 1845 act as a "special Act".[714] The 1845 Act did not provide, however, for instances in which land was acquired otherwise than by agreement but this was later rectified by the *Acquisition of Land (Assessment of Compensation) Act 1919.* Under section 265(3) of the *Planning and Development Act 2000* as originally enacted, it was provided that section 2 of the 1919 Act should apply to every case, other than a case under the 2000 Act. This resulted in arbitrators being unable to rely on the rules laid out in the 1919 Act with regard to every CPO made under the 2000 Act. Since section 213 of the 2000 Act is one of the most relied upon provisions from which the power to compulsorily acquire land arises, this had the effect of reverting the assessment of compensation back to pre-1919 legislation. This has now been amended by section 46 of the *Planning and Development (Strategic Infrastructure) Act 2006* to reflect that section 2 should refer to every case aside from those covered under Part XII[715] of the 2000 Act, which sets out the rules for general compensation. These rules do not apply to compensation in relation to the compulsory acquisition of land aside from those exercised in respect of public rights of way.

23.04 The 1845 Act did not eliminate the necessity for a special Act of Parliament but this was rectified the same year with the *Inclosure Act 1845*. This Act set up a single statutory body of Inclosure Commissioners who then dealt with compulsory acquisition petitions. This body had the power to send an inspector to hear objections and valuers to assess the compensation. This process is now done separately. The power to confirm a CPO was subsequently relinquished by the Oireachtas and given

[712] Section 5 of the 1845 Act provides that "it shall be sufficient in any such Act (any subsequent Act) to enact that the desired clauses of the 1845 Act shall be incorporated with the subsequent Act save so far as they shall be expressly varied or excepted by such Act". Galligan and McGrath believe that this leads to confusion and to the adoption of the practice in subsequent Acts and as is evident from CPOS and their incorporation of the 1845 Act or the Land Clauses Acts generally, Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at 14.

[713] Section 18 provides that "when the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act, or any incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the land so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works".

[714] Section 2 of the 1845 Act provides that "[t]he expression "the special Act" used in this Act shall be construed to mean any Act which shall be hereafter passed which shall authorise the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid". However, despite the use of the word "Act" this was interpreted by the Supreme Court in *Chadwick & Goff v Fingal County Council* [2007] IESC 49 to include a statutory scheme.

[715] This Part relates to compensation generally and compensation under Part III deals with regional spatial and economic strategy and sections 46, 85, 88, 182, 2017 and 252 deal with the removal or alteration of a structure or discontinuance of use, special planning control scheme, the servicing of notice relating to structures or other land in an area of special planning control, cables wires and pipelines, compulsory powers for creation of public rights of way and the power of authorised persons to enter the land respectively.

to the local authority or county court, which subsequently passed the power to the Minister and later to An Bord Pleanála.

23.05 In 1882, 38 years after the enactment of the 1845 Act, William Suffern sought to annotate and clarify the 1845 Act and 3 subsequent amending Acts, the Railway Acts of 1851, 1860 and 1864. He identified the key defect as the "tinkering" that occurs when a number of statutes are only repealed in parts and replaced by new Acts[716]. The effect of this, over 170 years later is that the legislation is littered with duplication with the end result being a highly convoluted and inaccessible system. This inaccessibility might be argued to be overly burdensome to the general public especially where landowners may wish to conduct their own personal investigations and the associated costs involved. There also appears to be a lack of precision in that provisions on compulsory acquisition are dispersed across legislation that includes local government, housing and numerous other Acts concerning individual statutory bodies with customised powers to compulsorily purchase land. When the legislation is not clear, it could be considered to place a landowner in a difficult position, trying to navigate through the substantive content. The legislation governing this area has been described, both by writers on the subject[717] and the judiciary,[718] as being overly complex, leading to a suggestion that it would be nigh on impossible to navigate the area without a legal education. The importance of not misinterpreting the legislation was highlighted in *Movie News Ltd v Galway County Council,*[719] when the defendant relied on the *Local Government (Planning and Development) Act 1963* for its empowering provision. This was rejected by the Court, which stated no such right was created by the Act. The Court held that the power to compulsorily acquire land must be expressly stated. The correct provision was section 10 of the *Local Government (No.2) Act 1960* in conjunction with section 213 of what is now the *Planning and Development Act 2000* (which replaced the 1963 Act).

23.06 Aside from the confusion caused by the overlapping nature of the legislation, it also include terminology that is long outdated. Section 7 of the 1845 Act, when referring to people with disabilities, does so by using the terms "lunatics and idiots" and refers to a married woman as a "feme covert" which was a term used to describe a woman who, upon marriage, had all her legal rights and obligations subsumed by her husband. A "feme covert" does not have the right to own property or enter into legal relations. The term has been excluded from common usage since the mid to late 19th Century. There is also an issue with other terms used in the 1845 legislation, which

[716] Suffern, The Law Relating to the Compulsory Purchase and Sale of Lands in Ireland 1st ed (Ponsonby 1882) at xxii.

[717] "The legislator has singularly failed to keep pace by introducing a simplified and intelligible procedure governing such acquisitions, a failure which has been judicially characterised in recent times as lamentable", Butler, Keane on Local Government 2nd revised ed (First Law 2003) at 268.

[718] The Supreme Court in *Portland Estates (Limerick) Limited v Limerick Corporation* [1986] ILRM 77 states that "[t]he various Local Government Acts, the Housing Acts and the Planning Acts form a code of inter-related statutes in the drafting of which clarity of language is remarkably absent. The seeker for true meaning of particular statutory provisions is often sent from one statute to another and is frequently misled and confused by the use of different terms having the same meaning according to a particular adaption used in one statute which may be absent in another. These statutes are drafted for an elite cognoscenti – those who in wither central or local government are accustomed to the exercise of the powers prescribed and the language used. For others the ascertainment of what is laid down involves and arduous journey into the obscure" at 80.

[719] High Court 30 March 1973.

are also outdated and confusing without further context. The phrases "company" and "promoters of the undertaking" are used instead of acquiring authority although this is understandable given that the main promoters of undertakings in the 19th century were private railway undertakings or companies. A reference to an "arbitrator" is also confusing in conjunction with later legislation, given that the arbitrator's powers under the 1845 Act and amending Acts are now split between the inspector who conducts the oral hearing and the arbitrator who determines compensation.

23.07 The *Railway Act (Ireland) 1851* provides, under section 5, that the Commissioner of Public Works shall appoint an arbitrator following a request from the Railway Company. Under section 6 of the Act, the arbitrator shall have the power to call for the production of any documents in the possession or power of the company, or of any party making any claim under the 1951 Act. He or she may also examine witnesses under oath. Under section 7, the arbitrator shall make a declaration essentially stating that he or she will act in good faith and if he or she does not, he or she shall be guilty of a misdemeanour. The arbitrator is subsequently provided with the maps, plans, schedules and estimates of compensation by the Commissioners. Under section 8, once an arbitrator is appointed, notice of the undertaking is published which states the requirement for all landowners with a potential claim to submit a short statement of the nature of the claim in writing. Section 9 provides that the arbitrator shall frame a draft award following a review of the maps, plans, schedules and estimates, as well as any claims of anyone with an interest in the land being acquired. This draft award will then be circulated to all persons entitled to compensation or who shall have been heard before the arbitrator as a claimant for compensation. Included in the award shall be a notice of a time and place at which a hearing may take place to hear objections against such draft award. When the arbitrator has heard all the objections and made inquiries as he or she shall see fit, he shall make his award under his seal. He or she shall then distribute a notice which names a date by which the landowner must send their short statement of the nature of their claim to the company, to include a short abstract of the title on which the same is founded. This system is still in force but is never used.

23.08 In his annotated version of the 1845, Suffern commented that where a special Act purports to incorporate the 1845 Act "except the part with respect to the purchase and taking of land otherwise than by agreement" then the entire Act will be said to be incorporated aside from sections 16-68, despite the fact that other sections deal with the subject of compensation in cases without agreement.[720] Where however, the words of the special Act are "except so much as *relates exclusively* to the purchase and taking of lands by compulsion", it was held that section 68 was not excluded.[721] Section 3 of the *Railway Act (Ireland) 1851* provides that the clauses of the 1845 Act, regarding the purchase and taking of lands otherwise than by agreement, except sections 16 and 17, shall not be applicable or in force with respect to any railway or portion of a railway in Ireland to which the 1845 Act applies. Suffern noted that this

[720] This assertion is based on *R v Lord Mayor of London* LR 2 QB 292.
[721] *Broadbent v Imperial Gas Co* 7 DM & G 447; 26 LJ Ch 276.

section might appear to have the effect of rendering sections 18-68 inapplicable to lands in Ireland were it not for section 29 which provides that all the provisions of the 1845 Act shall extend and be taken as part of the 1851 Act unless they are inconsistent with provisions of the 1851 Act.[722] Therefore, sections 19 and 20 will be deemed to be necessarily incorporated even though these provisions relate to the purchase of lands otherwise than by agreement. Section 4 of the 1851 Act provides that, in preparing the schedule of valuation of the lands required, the acquiring authority must have regard to damage by severance and other matters by the 1845 Act, thus, bringing the reader's eye back to section 63 of the 1845 Act. Section 3 also defines "railway" as "the railway and works by the Special Act authorised to be constructed". Suffern construes this as to make the Railway Acts applicable to every undertaking by the authority and that the Railway Acts were not intended to focus solely on railways but were effectively just amending the 1845 Act.[723] This back and forth reflects the inconsistent and highly convoluted nature of the legislation.

23.09 Another reason consolidation may be required is the need for a codification of the process. There are many Acts that give various statutory bodies the power to compulsory acquire land with modifications to the standard process as prescribed in the 1960 Act, the 1966 Act and the 2000 Act. For example, section 13 of the *Transport (Dublin Light Rail) Act 1996* confers on a light railway order the status of a compulsory purchase order, as made under the *Local Government (No.2) Act 1960,* with the most notable modification being that any references to the local authority shall be construed as references to the Board. The Board under this Act means Córas Iompair Éireann as established by the *Transport Act 1944*, not An Bord Pleanála. Section 13(2) provides that where Córas Iompair Éireann believes that it is more efficient and economical to acquire additional adjoining land, the Board may do so with the consent of the Minister and any person having an interest in or right in, under or over the adjoining land notwithstanding the fact that the adjoining land is not specified in a light railway order. It does not provide for instances in which the person with an interest or right in the land does not wish to sell the land. It is envisioned that such land would simply be subject to a light railway order. Section 214 of the 2000 Act transferred the function conferred on the Minister in relation to the compulsory acquisition of land by a local authority under the following enactments are hereby transferred to, and vested in, the Board (An Bord Pleanála) and "any reference in any relevant provision to those Acts to the Minister, or construed to be a reference to the Minister, shall be deemed to be a reference to the Board" except any powers to make regulations or to prescribe any matter. During the debates on the Bill at the time, the Minister previously empowered to make such decisions made the point that such decisions should be made independently in order to remove the possible appearance of objective bias and the sway of policy demands.[724]

[722] *Ibid* at 107.
[723] *Ibid* at 108.
[724] Then Minister for the Environment and Local Government, Noel Dempsey, Select Committee on Environment and Local Government Debate, 18 May 2000, Planning and Development Bill, 1999 [Seanad]: Committee Stage. "it can be strongly argued that the

23.10 Despite the convoluted and antiquated nature of the 1845 Act, it is still being incorporated into new legislation. Certain Acts, such as the *National Asset Management Agency Act 2009* explicitly incorporate sections 63 and 69-79 into its assessment of compensation in default of agreement.[725] *The Minerals Development Act 2017* makes reference to the 1845 Act, noting that sections 69 to 83 apply where the Minister makes regulations he considers necessary for compulsory acquisition under a mining facilities acquisition order.[726] Sections 69-83 deal with the application of compensation payable to persons under a disability or who refuse or who are otherwise unable to pay and conveyances in default of agreement. It is also significant to note that there is a timeline imposed on the Minister within which he must pay compensation owed under the Act.[727] A claim for compensation shall be extinguished under the 2017 Act if not exercised within 12 months.[728] However, this must be extended with the Minister's consent if he is satisfied that good reasons exist for the failure of the claimant to submit a claim for compensation.[729] Section 107 provides that once the Mining Board receive a claim for compensation (that has not extinguished); it shall determine the entitlement to, and amount of, compensation. Section 107 does not provide for a time line within which this must be done. Section 133 provides for a right of entry by the Minister on a mine site and adjacent lands for the purposes of determining if they should be designated as a rehabilitation area and sets out the notice provisions required in respect of the proposed entry. Section 140 grants the same power of entry by the rehabilitation authority for the purposes of preparing, adopting, revising or implementing a rehabilitation plan. Section 142 provides for the payment of compensation by the rehabilitation authority for damage or nuisance caused. Section 142(2) provides that the fact that the damage or nuisance was caused by an act or omission that was authorised under this Act is not a defence to a claim for compensation.

23.11 One option in the consolidation process would be to create a similar Clauses Act based on the 1845 Act which can be incorporated into an enactment conferring a compulsory purchase power, as this would prevent the need to include complex procedures in the special Act. However, in opposition to this, it could be argued that such a system is unnecessary and has led to the current difficulty whereby an outdated procedure is repeatedly incorporated with modifications and in doing so, discourages keeping the legislation up to date. This creates a system whereby the law on CPOs is inconsistent and unclear. Each Act should arguably confer its own power as it is not the norm that an Act relies on another in order to be effective or lawful. The 1845 Act is still effective, despite being outdated, because it grounds the

Minister…having decided on the roads policy, has a vested interest in ensuring that every CPO that comes before him in relation to a roads project is passed, irrespective of the objections made".

[725] Section 166 of the *National Asset Management Agency Act 2009.*

[726] Section 127(1) of the *Minerals Development Act 2017.*

[727] Section 108 of the *Minerals Development Act 2017* provides that the Minister shall pay an amount of compensation within 60 days after the day the Minister was informed of the Mining Board's decision, where the ancillary underground right has already been exercised at the time of the Board's decision. If the ancillary underground right has not been exercised at the time of the Board's decision, the compensation must be paid within 60 days of the end of the year in which the right is exercised.

[728] Section 106(1) of the *Mineral Development Act 2017.*

[729] Section 106(2) of the *Mineral Development Act 2017.*

power to empower other Acts concerning the compulsory purchase of land. Another approach would be to enact one piece of legislation which would confer on each body the power to compulsorily acquire land as opposed to having a section that deals with compulsory purchase in each Act relevant to such bodies.

QUESTIONS FOR ISSUE 23

23(a) Do you consider that the existing legislation on compulsory acquisition of land and compensation should be repealed and replaced by a single consolidating Act, which would include any reforms arising from this project?

23(b) Do you consider that compulsory acquisition legislation should involve one system in which all statutory bodies and authorities operate the same system?

23(c) If the answer to (b) is No, what modifications do you consider should apply between systems?

23(d) Do you consider that there is need for reforms of the law on compulsory acquisition of land that have not identified in this Issues Paper? If so, please specify them.

Please type your comments (if any)

Appendix A: Table of compulsory acquisition legislation[730]			
Name of the Act	**Section of the Act**	**Power to compulsorily acquire**	**Minister/Body with Power**
Air Navigation and Transport Act 1936	*Section 41*(1)	Any land, right of impounding, diverting or abstracting water	Minister for Transport, Tourism and Sport with the consent of the Minister for Public Expenditure and Reform.
	Section 43(1)	Land	Local Authorities, with the consent of the Minister for Housing, Planning, Community and Local Government
Air Navigation and Transport Act 1950	*Section 13*(1)	Cause any apparatus to be erected, placed and attached upon, in or to any land or building in the vicinity of an aerodrome, for the purpose of navigating an aircraft in the vicinity of an aircraft. May also use and maintain the apparatus.	Minister for Business, Enterprise and Innovation and a company under section 11 of the *Irish Aviation Authority Act 1993.*
Air Navigation and Transport (Amendment) Act 1998	*Section 17*(1)	Any land, easement, interest in or other right over land, or any water right, for section 18 purposes.	Aer Rianta (Dublin Airport Authority, Shannon Airport Authority or Cork Airport Authority) with the approval of Bord Pleanála

[730] The links for individual acts and sections are of those as enacted, unless the section has been substituted in its entirety, in which case, the amending provision is linked. It would be necessary to review the legislative directory or any revised acts that may be available to view any amendments. The available revised acts may be accessed at http://revisedacts.lawreform.ie/revacts/alpha. The information in the 3rd and 4th columns has been updated to 16 November 2017. Disclaimer: while every care has been taken in the preparation of this table, the Law Reform Commission can assume no responsibility for and give no guarantees, undertakings or warranties concerning the accuracy, completeness or up to date nature of the information provided and does not accept any liability whatsoever arising from any errors or omissions. Please notify any errors, omissions and comments by email to p4p8@lawreform.ie.

Air Raid Precautions Act 1939	*Section 17*(1)	Land, any easement, or other right whatsoever existing over or in respect of any land or water, wherever situated	Local Authority, with the consent of the Minister for Defence after consultation with the Minister for Housing, Planning and Local Government
Arterial Drainage Act 1945	*Section 14*(1)	The several lands, easements, fisheries, water-rights, navigation rights and other rights proposed in the drainage scheme.	Following an order by the Minister for Agriculture, Food and the Marine, Food and the Marine confirming a drainage scheme- the Commissioners of Public Works, or, such function may be transferred to the Minister for Environment, Heritage and Local Government, with his or her consent, for operation under the Planning Acts.
	Section 49(5)	Provides for a compulsory drainage order so that an existing watercourse may be restored, opened up, or generally put into proper repair and effective condition or, so that a new watercourse could be constructed.	Any Minister of State or County Council who has made a representation to the Commissioners of Public Works regarding the need for such an order and has had such an order confirmed by the Commissioners of Public Works.
Barrow Drainage Acts 1927	*Section 7*(c)	The several lands and premises, easements, water-rights and other rights proposed in the scheme	Following an order by the Minister for Finance confirming a scheme of arterial drainage- the Commissioners of Public Works
British-Irish Agreement Act 1999	*Section 12*(1)	Any land, (including an inland waterway or part of an inland waterway) or any right, easement,	Waterways Ireland with the consent of the North/South Ministerial Council

		title or interest in, over or in respect of any land.	
Casual Trading Act 1995	*Section 7*(1)	Any market right in respect of a market or fair in its functional area	A local authority, with the consent of the Minister for the Environment
Coast Protection Act 1963	*Section 11*(1)(c)	The several lands, easements, fisheries, water-rights, navigation rights and other rights proposed in the scheme	Following an order by the Minister for Public Expenditure and Reform confirming a coast protection scheme, and having consulted the Minister Communications, Climate Action and Environment and any such other Minister or Ministers as he may consider necessary, – the Commissioners of Public Works
Defence Act 1954	*Section 33*(1)	Any land or right over land for the purposes of the Act	The Minister for Defence, with the consent of the Minister for Public Expenditure and Reform
Derelict Sites Act 1990	*Section 14*	Any derelict site situated within their functional area	A local authority, having been confirmed by An Bord Pleanála (subject to *section 17*(1))
Dublin Docklands Development Authority Act 1997	*Section 27*(1)	Land situated in the Dublin Docklands Area (other than land already owned by another statutory body) for the purposes of the Act	Dublin City Council, having been confirmed by An Bord Pleanála
Dublin Reconstruction (Emergency Provisions) Act, 1924	*Section 1*(1)	Land for the purpose of widening, opening, enlarging, extending or otherwise improving streets in the	Lord Mayor, aldermen, and burgesses of Dublin, following the approval of the Minister for Housing, Planning,

		City of Dublin in connection with the reconstruction of areas, streets, houses or buildings destroyed or damaged in the course of recent disturbances	Community and Local Government
Dublin Transport Authority Act 2008	*Section 44*(1)(c)	To acquire and facilitate the development of land adjacent to any public transport infrastructure, in the Greater Dublin Area, where such would contribute to the economic viability of the said infrastructure	The National Roads Authority (referred to as Transport Infrastructure Ireland for operational purposes)
Electricity (Supply) Act 1927	*Section 45*(1)	Any land or any easement or other right over land or any right of impounding, diverting or abstracting water for the purposes of the Act.	Commission for Regulation of Utilities, having consulted the Minister for Communications Climate Action and Environment and the Minister for Jobs, Enterprise and Innovation
	Section 47(1)	Any land or any easement, or any other right over any land, or any right of impounding, diverting or abstracting water, which may be necessary or convenient for the establishment or extension of a generating station, the development of water-power for the generation of electricity, the transformation transmission, or	Any authorised undertaker empowered by the Distributions System Operator

		distribution of electricity, or the construction of any works authorised by the Commission for Regulation of Utilities	
	Section 83(1)	Any land permanently for the purpose of erecting thereon or of using the same as barracks for the accommodation of members of the Defence Forces or of the Gárda Síochána engaged in the defence or protection of the Shannon works.	Minister for Business, Enterprise and Innovation
Electricity (Supply) (Amendment) (No 2) Act 1934	*Section 5*(1)	Either permanently or temporarily: Compulsorily acquire any lands or premises; compulsorily acquire, terminate, restrict or otherwise interfere with any easement, way-leave, water right, fishing right, or other right over or in respect of any lands, premises or water; compulsorily terminate, restrict or otherwise interfere with any easement, way-leave, water right, fishing right, or other right existing over or in respect of any lands, premises or water; compulsorily divert, close, remove, or otherwise	Electricity Supply Board

		interfere with any public or private road, way, or bridge, or any canal or other artificial water-way or any artificial watercourse; compulsorily interfere with any lands or premises.	
Electricity (Supply) (Amendment) Act 1945	*Section 7*	Temporarily or permanently: acquire any land, easement, way-leave, fishery, fishing right, water-right, or other right whatsoever over or in respect of any land on water; terminate restrict, or otherwise interfere with any easement, way-leave, fishery, fishing right, water-right, or other right whatsoever over or in respect of any land on water; divert, close, remove, submerge, or otherwise interfere with any private road, way, or bridge or canal or other artificial water-way or any artificial watercourse, or, interfere with any land.	Electricity Supply Board, following the approval of a hydro-electric scheme by the Minister for Jobs, Enterprise and Innovation
	Section 15	When application for compensation due to the termination, restriction, injury to, or other interference with a fishery or fishing right is made,	Following consultation with the Minister for Agriculture, Food and the Marine, Food and the Marine, the Electricity Supply Board

		and it is considered more expedient to compulsorily acquire the fishery, fishing right, wayleave or other ancillary rights for the enjoyment of such a fishery or fishing right	
	Section 30(2)	For the purpose of the exercise of the powers conferred on the Board by a transport works order, either temporarily or permanently, compulsorily any land, easement, way-leave, or other right over or in respect of any land; terminate, restrict, or otherwise interfere with any easement, way-leave, or other right over or in respect of any land; divert, close, remove, or otherwise interfere with any private road, way or bridge; subject to the provisions of the Act, close, divert, remove or otherwise interfere with any public road or bridge.	The Electricity Supply Board, following the making of a transport works order by the Minister for Jobs, Enterprise and Innovation
Fishery Harbour Centres Act 1968	*Section 3*(1)	Any land situated in a fishery harbour centre or right over or in respect of land or water so situated	The Minister for Communications, Climate Action and Environment with the consent of the Minister for Public Expenditure and Reform
Garda Síochána (Acquisition of Sites and Retention of Premises)	*Section 2*(1)	Any land as a site for a Garda Síochána station or for a house for	The Commissioners of Public Works with the consent of the Minister for Justice

Act 1948		a member of the Garda Síochána	and Equality and the Minister for Public Expenditure and Reform
Gas Act 1976	*Section 32*(1)	Any land or right over land which is required by ITO for or in connection with the performance of any function of ITO or is required for the provision of a pipeline.	ITO (Independent Transmission Operator) with the approval of An Bord Pleanála
	Section 39(1)	May extinguish a public right of way, other than a public right of way acquired compulsorily by ITO.	ITO, with the approval of the Minister for Communications, Climate Action and Environment and consultation with the Commission for Energy Regulation
Harbours Act 1996	*Section 16*(1), *4th Sch*.	Any land (whether situated within or outside its harbour) or any interest in or any right over any such land, for the purposes of ensuring the implementation of any scheme of development of its harbour or any part thereof which, in the opinion of the company, would prove impracticable without the land, interest or right concerned being included in the scheme.	A private company formed and registered under the Companies Acts by An Bord Pleanála, with the consent of the Minister for Finance and the approval of An Bord Pleanála, in respect of each of the following harbours: Cork Harbour, Drogheda Harbour, Dundalk Harbour, Dún Laoghaire Harbour, Foynes Harbour, Galway Harbour, New Ross Harbour, Shannon Harbour, Waterford Harbour, Wicklow Harbour.
Health Act 1947	*Section 78*(1)	Land, to include water and any estate or interest in land or water and any easement or right in, to, or over land or water, for the	The Health Service Executive, subject to any general directions given by the Minister for Health with the consent of the Minister for Finance

		purposes of the authority's powers and duties under the Act.	
Hospitals Act 1939	*Section 5*(i), sch. art 19(e)	Land and rights over land	A body corporate of a voluntary hospital, with the consent of the Minister for Health
Housing Act 1966	*Section 76*	Land, to include water and any interest or right in or over land or water	A housing authority, confirmed by An Bord Pleanála
Industrial Development Act 1986	*Section 16*(1)	For the purpose of providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking, the Authority may acquire land, easement, way-leave, water-right or other right whatsoever over or in respect of any land or water; terminate restrict or otherwise interfere with any easement, way-leave, water-right or other right whatsoever over or in respect of any land or water – if the Authority considers that industrial development will or is likely to occur as a result.	Enterprise Ireland and Industrial development agency

Inland Fisheries Act 2010	*Section 60*(2), (5), (8).	For the purpose of enabling a corporate plan prepared by IFI to be carried out and it is necessary that a particular fishery be acquired or it is, for the purposes of managing, operating, protecting, conserving or developing any fishery in accordance with such a plan, expedient that the fishery should be acquired. This would include the bed and soil of waters which form part of a fishery and any estate or interest in land, or any way-leave, right of access or other easement or other right over, in or other land which, in the opinion of IFI, is required for or in connection with the preservation, conservation, operation, development or improvement of the fishery being acquired under the order. This shall not include any land vested in the State or any dwelling or the curtilage thereof, or any enclosed premises, yard, garden or land appurtenant to a dwelling or any right over, in,	Inland Fisheries Ireland, by means of an order made by the Minister for Communications, Climate Action and Environment having consulted the Minister for Public Expenditure and Reform and any other Minister of the Government, as appears to him or her to be concerned.

		under, or in respect of such. Also, a fishery may be acquired where the Minister is satisfied that to do so, would be in the public interest.	
	Section 61(1)	The Minister may transfer bed and soil that is contiguous to a fishery acquired by section 60 to IFI, if the Minister deems it necessary or expedient for the maintenance, operation, improvement or development of such a fishery. The bed and soil shall not exceed 50 yards either above or below the fishery.	Minister for Communications, Climate Action and Environment
	Section 62(1)	Right of way by a particular route over any land	IFI with the consent of the Minister for Communications, Climate Action and Environment
Land Act 1939	*Section 57*(1)(a)	Where it appears to the Land Commission that injury is being or	Land Commission

		is likely to be caused to any land by the blowing or drifting of sand on to such land and the Land Commission determines to undertake and carry out work to prevent such injury, it shall be lawful for the Land Commission to acquire any land or any easement or other right over or in respect of any land.	
Lands Clauses Consolidation Act 1845	Section 16	Land for the purposes of the undertaking	Promoters of the undertaking
Local Authorities (Works) Act 1949	*Section 2*(4)	Where a local authority is of the opinion that any land or permanent construction in its functional area has sustained or is likely to sustain damage from flooding, landslide, subsidence or other similar occurrence and it in the public interest to afford such relief or protection from the damage, it may execute the making of drains, the removal of substances or things causing obstructions in watercourses, the widening or deepening of watercourses, the making or repairing of walls or	A local authority, with the consent of the Minister for Housing, Planning and Local Government

		embankments, the diversion of water into watercourses.	
Local Government (Sanitary Services) Acts 1964	*Section 6*	Any land situated in their sanitary district that is a dangerous place or that has ceased, by reason of the carrying out of works under this Act by the authority, to be a dangerous place.	Irish Water, confirmed by An Bord Pleanála
Local Government Act 1925	*Section 68*(1)	Land or other property rights	Local authority, confirmed by An Bord Pleanála
Local Government Act 1946	*Section 84*(1)	Any land which has or will become severed by operations of the road authority and which, because of its shape and size, could not be used economically or has become or is likely to become derelict	A road authority or the National Roads Authority (referred to as Transport Infrastructure Ireland for operational purposes), with the consent of the Minister for Housing, Planning, Community and Local Government
Local Government (Sanitary Services) (Joint Burial Boards) Act 1952	*Section 2*	Land for the purpose of providing a new burial ground or making additions to a burial ground	Joint burial board, approved by An Bord Pleanála
Local Government (No 2) Act 1960	*Section 10*(1), (4)	Any land, including any substratum of land, whether situated within or outside their functional area; or a public right of way	Local authority, confirmed by An Bord Pleanála
Minerals Development Act 2017	*Section 112*(1)[731]	Mining Facilities Acquisition Order	Minister for Communications, Climate

[731] Not yet commenced. Also, The *Minerals Development Act 1940* is repealed by the 2017 Act (by *section 238*(1)(a)) but until it comes into force, *section 19* provides that the Minister for Jobs, Enterprise and Innovation may, with the consent of the Minister for Finance compulsorily acquire any land or any ancillary right if it is necessary for the efficient or convenient exploitation of any State minerals.

		– acquire an ancillary right, for the purposes of a licensee under a mining licence, or acquire and vest an estate or interest in private land in a licensee under a mining licence	Action and Environment
Minerals Development Act 1979	*Section 12*	The exclusive right of working minerals except as provided for in Part II of the Act.	Minister for Business, Enterprise and Innovation
Minister for Community Rural and Gaeltacht Affairs (Powers and Functions) Act 2003	*Section 3*(1)(a)	Any existing aerodromes or any land required for the construction, improvement, extension or development of aerodromes and ancillary facilities on the islands, or as the case may be, the mainland.	The Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs with the consent of the Minister for Public Expenditure and Reform and the Minister for Transport, Tourism and Sport. This may be extended to a statutory body under section 3(2)(a) if authorised by an order made by the Minister for Community, Rural and Gaeltacht Affairs with the consent of the Minister for Public Expenditure and Reform and the Minister for Transport, Tourism and Sport, and laid before the House of the Oireachtas. Such an order may not be made in respect of any land covered by water, or which is foreshore, without previous consultation with the Minister for Communications, Climate Action and Environment

National Asset Management Agency Act 2009	*Section 158* (1), (2)	Land in order to enable NAMA to perform its functions, to enable a building constructed on charged land to be used or enjoyed for the purpose for which it was developed, or to enable NAMA or a NAMA group entity to vest in a prudent and experienced purchaser good and marketable title to charged land but only if the land sought to be acquired is only of material benefit to the owner in so far as it affects the use or development of charged land; land where the land is owned by a person who is a debtor, associated debtor, guarantor or surety in relation to an acquired bank asset, and that person is in material default of his or her obligations to NAMA or a NAMA group entity and the default has caused, or is likely to cause NAMA or the NAMA group entity substantial loss, land that was intended to form part of a security in relation to a credit facility provided by a participating	NAMA or a NAMA group entity nominated by NAMA, with the confirmation of the High Court

		institution but was not included in the security through an error or omission, or land where a debtor, associated debtor, guarantor or surety in relation to an acquired bank asset is using or intends to use his or her ownership of the land to materially impede the disposition, at a fair and reasonable price, of land by NAMA or a NAMA group entity.	
National Cultural Institutions Act 1997	*Section 53*(1)	When such is requested to be returned by the owner; a cultural object that was entered into the register and was for 5years, uninterrupted, in the care of an institution specified in the *Second Schedule* or in any other institution owned or funded wholly or substantially by the State or by any public or local authority.	The Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs with the consent of the Minister for Public Expenditure and Reform
National Monuments Act 1930	*Section 8*(1)	A preservation order: A Monument which in their opinion is a national monument which is in danger of being or is actually being destroyed, injured or removed, or is falling into decay through neglect.	The Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs on the basis of a report made by the Advisory Council or otherwise.

National Monuments (Amendment) Act 1954	*Section 4*(1)	A temporary preservation order: A monument which in their opinion is a national monument is in immediate danger of injury or destruction	The Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs
National Monuments (Amendment) Act 1994	*Section 11*(1)	Any monument that is, in their opinion, a national monument; part of such a monument; any land that is in the vicinity of such a monument and is intended to be used by them for the provision of facilities deemed appropriate by the Minister for persons having access to the monument under the *National Monuments Acts 1930 to 1994*; any right, easement, title or interest of any kind in, over or in respect of such a monument or land, any easement over land to provide access to or service for such a monument, or part of monument or any land being acquired under this section. This acquisition may be done regardless of whether the Commissioners or a local authority are or are not the guardians of the monument and	The Minister for Arts, Heritage, Regional, Rural and Gaeltacht Affairs with the consent the Minister for Public Expenditure and Reform

		whether a preservation order is or is not in force	
Petroleum and Other Minerals Development Act 1960	*Section 23*(1)	Whenever the Minister is of opinion that it is necessary for the efficient or convenient exploitation of petroleum: land or any ancillary right	The Minister for Business, Enterprise and Innovation with the consent of the Minister for Public Expenditure and Reform
Planning and Development Act 2000	*Section 213*(2)(a), (b)	For the purposes of performing any of its functions, may, permanently or temporarily, acquire land, easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land or restrict or otherwise interfere with any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land. This shall include purchase, lease, exchange or otherwise.	A local authority, confirmed by An Bord Pleanála.
Postal and Telecommunication Services Act 1983	*Section 44*(1)	Any land or any easement or other right over land for the purpose of providing a site, or approaches to, any building or structure intended to be used for the purpose of its exclusive privilege.	An Post

Public Health (Ireland) Act 1878	Section 203(1)	Lands and premises which include messuages, buildings, lands, easements and hereditaments of any tenure.	Sanitary Authority, as approved by An Bord Pleanála
River Owenmore Drainage Act 1926	*Section 5*	In order to reduce flooding on the River Owenmore and its tributaries and for the carrying out of works necessary – construct, execute and complete the works specified in the scheme (drain or improve rivers, streams or waters; acquire, restrict, terminate, or otherwise interfere with land and premises to include the easements, water-rights, and other rights) with such reasonable additions, omissions, variations and deviations as is necessary	Following the confirmation of an arterial drainage scheme by the Minister Public Expenditure and Reform– Commissioners for Public Works
Road Traffic Act 1961	*Section 95*(6)	May enter and provide a traffic sign on land that is not public, where it is reasonably necessary and having given 21 days' notice to the occupier	The road authority (as defined in the *Local Government Act 2001*), with the consent of the Commissioner of An Garda Síochána
Roads Act 1993	*Sections 19*(7)(b)	Acquire land, provide a traffic sign or do any other thing which arises out of or is consequential on or is necessary or expedient for the	The National Roads Authority (referred to as Transport Infrastructure Ireland for operational purposes), confirmed by An Bord Pleanála

		purposes of or would facilitate the construction or maintenance of a national road.	
	Section 52	Any land or substratum of land or any rights in relation to land specified in the scheme	The road authority (as defined in the *Local Government Act 2001*), following the approval of a motorway scheme, a service area scheme, a busway scheme, a protected road scheme or its amendment; confirmed by An Bord Pleanála.
Saint Laurence's Hospital Act 1943	*Section 21*	For the purpose of providing a site for a new hospital, or facilitating the extension, enlarging or improving the amenities of such a hospital, acquire land in or near the city of Dublin	Minister for Health
Shannon Electricity Act 1925	*Section 4*(1)	For the purposes in *section 3*, either permanently or temporarily: acquire any land or premises, easement, way-leave, water-right, fishing rights, or other right over or in respect of any lands, premises or water; terminate, restrict, or otherwise interfere with any easement, way-leave, water-right, fishing right, or other right existing over or in respect of any lands,	Minister for Business, Enterprise and Innovation

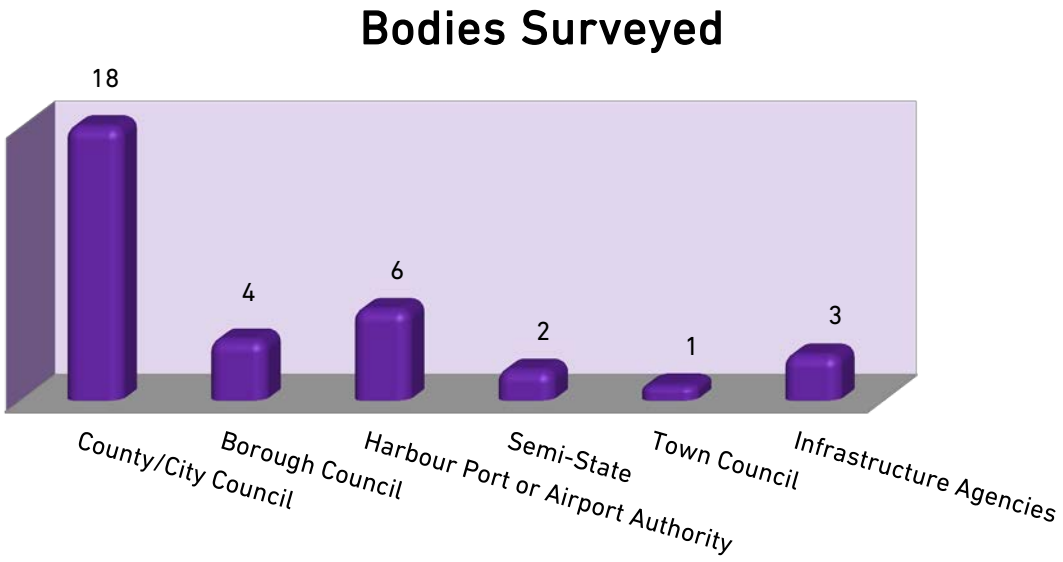
		premises, or water; divert, close, remove, or otherwise interfere with any public or private road, way, or bridge, or any canal or other artificial-way or any artificial water course.	
Sport Ireland Act 2015	*Section 26*(1)	Any land adjoining the site or any interest in or right over such land for the purpose of providing a means of access to and egress from the site and to the public road.	Sport Ireland, with the consent of the Minister for Transport, Tourism and Sport
Tourist Traffic Act 1939	*Section 19*(2)	Any land, including land covered with water, easements, way-leaves, water rights, fishing rights, sporting rights, and other rights over or in respect of any land or water, for the purpose of any of the duties or functions conferred on the Board by the Act	The National Tourism Development Authority, with the consent of the Minister for Jobs, Enterprise and Innovation
Tourist Traffic Act 1952	*Section 7*(1)	Acquire such land (apart from any building which is being used for the time being for ecclesiastical purposes) as the Board thinks proper to enable work to be carried out in order to erect a fence or notice, or to provide or improve means of access to, any historic	National Tourism Development Authority

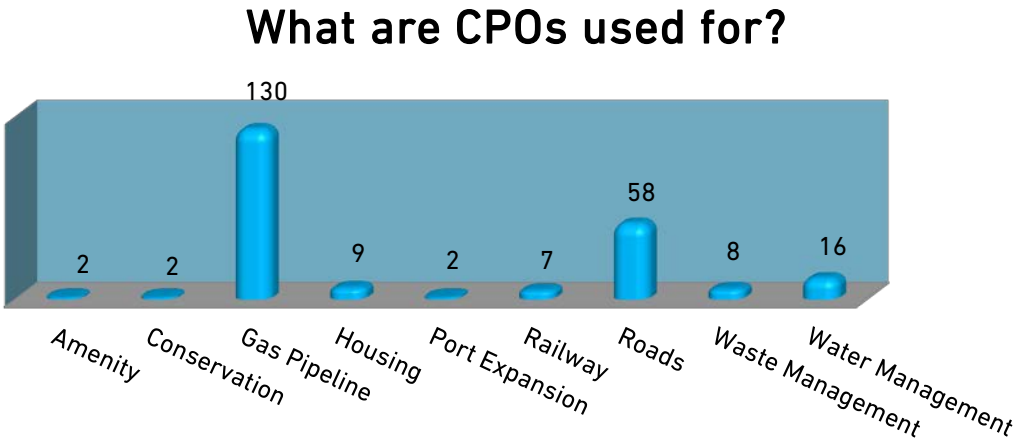
		building, site or shrine, or any other place which, in the opinion of the Board, is likely to be of particular interest to the public.	
Transport Act 1950	*Section 17*(1)	Acquire land or close, stop up, remove, alter, divert or restrict an existing means of crossing a railway	Córas Iompair Éireann with the consent of the Minister for Jobs, Enterprise and Innovation
Transport (Dublin Light Rail) Act 1996	*Section 13*(1)	Any land, substratum of land or rights in, under or over land specified in the light railway order	Córas Iompair Éireann, approved by An Bord Pleanála
Transport (Railway Infrastructure) Act 2001	*Section 45*(1)	Any land or rights in, under or over land or any substratum of land specified in the order	Upon the commencement of a railway order, the National Roads Authority or Córas Iompair Éireann, with the approval of An Bord Pleanála
	Section 45(2)	Acquire additional adjoining land if it is more efficient and economical to do so, in the opinion of the Agency or Córas Iompair Éireann and even, if such land is not specified in the order	National Roads Authority (referred to as Transport Infrastructure Ireland for operational purposes) or Córas Iompair Éireann with the consent of An Bord Pleanála.
Tuberculosis (Establishment of Sanitoria) Act 1945	*Section 8*	For the purposes of establishing a sanatorium	The Minister for Health
Turf Development Act 1946	*Section 29*(1)	Either permanently or temporarily: acquire any land, easement, wayleave, water right or other right	Bord na Móna

		whatsoever over or in respect of any land or water; terminate, restrict, or otherwise interfere with any easement, way-leave, water right, or other right whatsoever existing over or in respect of any land or water; divert, close, remove or otherwise interfere with any private road, way or bridge or any canal or other artificial waterway or any artificial watercourse; interfere with any land.	
Water Supplies Act 2007	*Section 91*(5)(b)(iii)	If, in the opinion of the water services authority, the relevant water services provider is not capable of resuming the operation or management of the waterworks or waste water works: acquire the waterworks or waste water works in accordance with its powers under this Act	Water services authority, with the approval of An Bord Pleanála
Water Supplies Act 1942	*Section 13*(1)	For the purpose of increasing, extending or providing a supply of water, take a supply of water and to execute, on any land required by the authority, any works which are necessary for ancillary operations	Sanitary Authority, as confirmed by An Bord Pleanála

APPENDIX B: Survey conducted in 2008 regarding the frequency of use of CPOs.

This Appendix sets out the results of a survey of more than 60 bodies by Mr Leo Varadker TD, now Taoiseach, and the detailed responses received from 38 bodies including local authorities at county, town and borough level, semi-state companies, harbour, port and airport authorities. The responses by body are set out in the graph below.



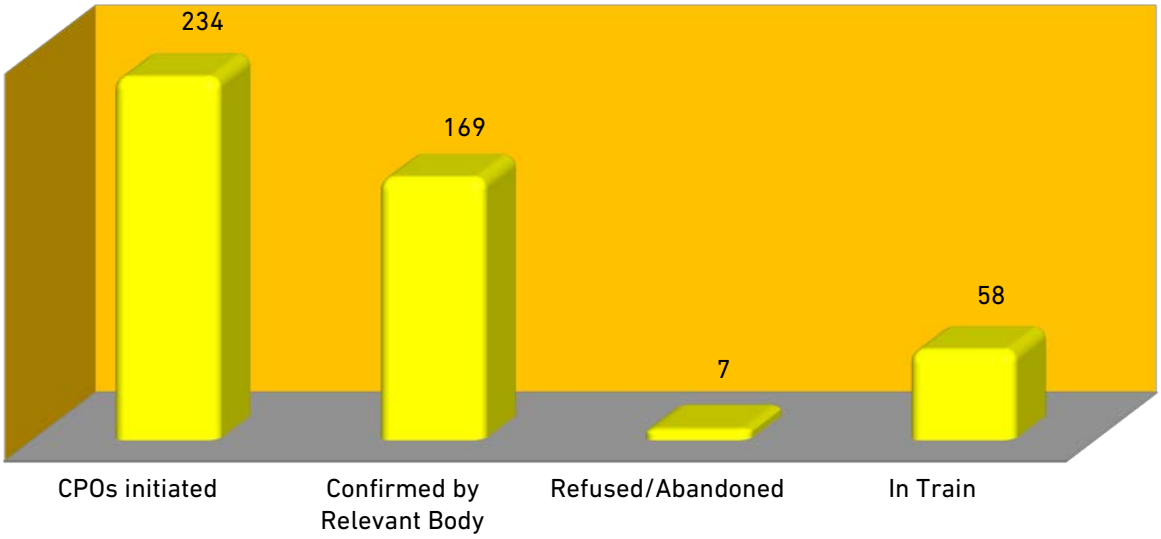


The survey established, by means of parliamentary question to the then Minister for Finance, that the Office of Public Works had not utilised their CPO powers between 2007 and 2010.

Furthermore, the then Minister for Education confirmed that she was unaware of any Vocational Education Committee (since 2013, Educatioon and Training Boards) had used their powers, on any occasion, to carry out compulsory purchase.

Based on the responses of these bodies, the following CPO activity between 2005 and mid-2008 were identified and are set out in graph below.

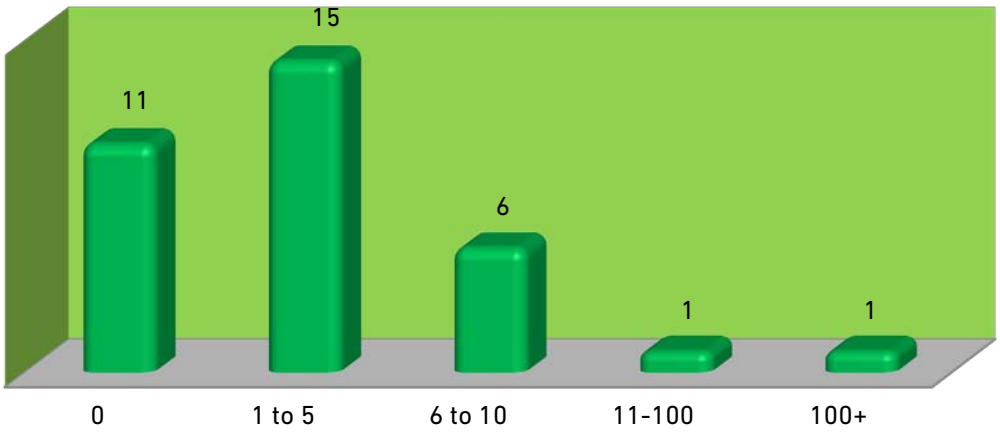
CPO Activity



In total, 234 compulsory purchases orders were identified, of which 72% were confirmed by the relevant body, 25% were still in train, and only 3% had been withdrawn or refused.

However, these raw figures gives an inaccurate impression of the CPO process. As shown in the 2 graphs below, one body Bord Gais was responsible for a substantial proportion of activity in the period under review (2005-mid 2008).

CPOs Initiated by Body



Please fill in your name and contact details below. Click submit button to email your submission. If submitting by webmail please check your drafts folder and sent items to ensure that your email has been submitted.

First name *	
Surname *	
Telephone/mobile number	
Email address*	
Confirm email address *	
Organisation	

* Denotes required field

Click to submit