'PRIVATE TAKINGS FROM ACROSS THE POND'

by

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> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions* ***except in the public interest*** *and subject to the conditions provided for by law and by the general principles of international law.*
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*[1]
>
> [Emphasis added]

1. Introduction

To English eyes, the most remarkable element of the American Supreme Court's decision in *Kelo v City of New London*[2] was not the decision itself, but rather the furore which followed. Traditionally, our domestic law relating to compulsory purchase has centred on procedural and compensatory matters; threshold questions about the constitutionality and desirability of taking land have rarely been a matter of wide public debate. This paper describes the traditional and current approaches taken by English law to 'private takings', or those situations where property rights are compulsorily transferred from one private party to another.

It is argued that despite the traditional laissez-faire attitude towards these transactions and the low 'public interest' threshold required, they should be viewed with greater caution by both the legislature and courts. Modern compulsory purchase powers are broad and subjective in scope and their supervision and review present significant challenges in an era of growing privatisation and contractualisation of many State functions. The concerns of the minority in *Kelo* that a weak public use

[1] Article 1 of the First Protocol to the European Convention on Human Rights (1952) ('ECHR') incorporated into domestic law via the Human Rights Act 1998 ('HRA 1998').
[2] 545 US 469 (2005).

requirement might lead to the 'specter of condemnation' hanging over all property are therefore just as serious, if not more so, on our side of the Pond.[3]

2. The Legislative Background – Private Acts of Parliament

Despite popular belief, private takings have a long pedigree on both sides of the Atlantic. Whilst the *terms* of the Mill Acts were particular to America, analogous legislation exercised an even greater sway in England, albeit against a very different constitutional backdrop. For centuries, the English Parliament has actively facilitated the exercise of private acquisition powers by enacting Private Acts in the name of economic advancement. This type of legislation, which probably developed out of a practice which existed by the reign of Henry IV,[4] involved individuals petitioning Parliament for extraordinary powers over and above those granted by the common law.[5] Early private legislation was often highly personal in nature given that it usually related to matters of familial importance such as requests for divorce, and the alteration of settlements and entails.

This historic constitutional framework continues to affect judicial review and control of statutory powers in this area. Particular supervisory challenges arise which are without parallel in the United States. Not only did explicit property protection exist at both State and Federal levels from early on, but there has been a greater judicial willingness to scrutinise, and strike-down, legislative actions which threatened to undermine constitutional protections, as exemplified by the seminal case of *Marbury v Madison*.[6] By way of contrast, the long-standing attraction of Private Acts lay in their ability not only to discriminate between the conflicting property interests of opposing parties (as would happen in a court hearing), but to do so in a manner which prevented *any* further discussion or appeal. Once enacted, a Private Act allowed for an unassailable shifting of property rights. Until recently no one, and no body, had the power to gainsay the terms of a validly enacted statute.[7] Parliament traditionally possessed 'absolute despotic power' as the 'sovereign and uncontrollable authority'[8] in making or repealing legislation, and as such was immune to legal challenge even on the grounds that the terms of a statute had been

[3] *ibid*., 503 *per* O'Connor.
[4] Henry IV reigned from 1399 – 1413.
[5] OC Williams, *The Historical Development of Private Bill Procedure - Volume 1* (HMSO, 1948), 24.
[6] *Marbury v Madison*, 5 US 137 (1803) (US Supreme Court).
[7] See now s. 4 of the HRA 1998 which empowers the courts to make a declaration of incompatibility in the event that they are unable under s. 3 of that Act to interpret legislation in a Convention-compliant manner.
[8] Blackstone, *Book II, Commentaries on the Laws of England*, 2-9.

obtained by fraud.[9] Some of the clearest historical examples of English legislation explicitly promoting private takings are to be found in the many Private Acts authorising the building of canals and railways.[10]

3. The Canal Boom and Railway Mania

From the mid 18th century, the use of private powers of compulsory acquisition to build toll roads, canals and railways in England began to grow. As in America, the importance of infrastructure to the economic wellbeing of the country cannot be underestimated. The development of canals across England allowed for previously landlocked and isolated areas to benefit from the ability to transport materials and goods by water. Canals were therefore essential to economic and urban development for almost 100 years in facilitating the carriage of coal to ironworks, mills and factories along with other heavy commodities such as copper, tin, salt and china clay, and ensuring regular deliveries of grain and groceries.[11] Whilst the gains from canals were high, so were the initial costs particularly in relation to land. It was understandably rare for an economically useful canal to be built solely across one landowner's property,[12] with most projects requiring long strips of land crossing various counties and thereby affecting larger numbers of individuals.

Private Acts allowing for private takings thus proved to be vital in avoiding holdout problems from landowners, and did not require particular extra effort on the part of a canal's promoters. Most canals were funded by joint-stock companies which, following the Bubble Act of 1720, necessarily required Parliamentary approval for their incorporation.[13] Accordingly, it was not an arduous task to include an additional request for compulsory purchase powers in the petition for a Private Bill relating to incorporation as a joint-stock company. However, it was with the growth of the railways that the use of private compulsory purchase powers in England began to explode.

Whilst railways were viewed at first as a novelty their economic potential soon began to be appreciated. The 'railway age' in England is most often associated with the opening of the Stockton to Darlington

[9] *Pickin v British Railways Board* [1974] AC 765 (HL).
[10] The Inclosure Acts are outside the ambit of this paper.
[11] J Simmons and G Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s* (OUP, Oxford, 1997), 67.
[12] The most famous exception is, of course, the third Duke of Bridgwater who from 1759 - 1761 constructed a canal to transport coal from his estate at Worsley to Manchester and Liverpool.
[13] The Bubble Act of 1720 (6 Geo. 1, c. 18)..

railway in 1825.[14] By the 1840s the expansion of the railways had led to the 'most dramatic infringement of private property rights in England since the Civil War.''[15] From 1837 to 1842 around 20 to 25 private railway Bills were enacted annually. In 1844 this rose to 66, and in 1845 this rose again to 110 such Bills, before leaping in 1846 to some 550 railway Bills.[16]

4. Parliamentary Reactions to Railway Takings

Unlike in America where 'two strands of pro-entrepreneurial discourse'[17] emerged and debate raged at the State legislative level about the desirability of private powers of compulsory acquisition, Parliament appeared relatively untroubled. It reacted to the railway mania with an efficiency drive and sought merely to streamline the procedure required to pass Private Acts. As a result of this, a series of Consolidation Acts were enacted in the mid-1840s to ensure a greater degree of uniformity between similar Bills.[18] It is hard to gauge the level of scrutiny afforded to Private Acts during the canal and railway boom. Whilst a vast amount of such legislation appears to have been promoted and passed, the Parliamentary procedures and the deep (often vested) interest of those reviewing the proposed legislation militates against this being a cursory examination. Whatever the political or legal merits of allowing so many private takings to occur during the eighteenth and nineteenth centuries, it seems that this compulsory readjustment of property rights succeeded in encouraging entrepreneurship. Within a relatively short period of time England achieved a dense infrastructural network with all the benefits that this brought for commerce and social mobility.

Today's society faces challenges that are just as consuming and financially risky as those faced by earlier eras. Bureaucratic and centralised administrations are not generally best placed to react speedily and efficiently in designing and managing redevelopment programs. Over the last few decades there has been a steady shift in England towards privatisation and the contracting-out of public services to private operators.

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[14] Daunton notes that the construction of the railway network was 'rapid' increasing from c. 500 miles in 1838 to 7,500 miles in 1852. M J Daunton *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (OUP, 1995), 310-311.

[15] R W Kostal *Law and English Railway Capitalism 1825-1875*, (Clarendon Press, 1997), 144.

[16] Williams, 'The Historical Development of Private Bill Procedure - Volume 1', 59.

[17] G S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970* ((University of Chicago Press, 1997), 186.

[18] Particularly the Lands Clauses Consolidation Act 1845, 8 Vict c 18.

5. Modern Compulsory Acquisition Procedure

English compulsory purchase procedures are statutory and in a nutshell generally involve the making of a compulsory purchase order ('CPO') by a specified body under the Acquisition of Land Act 1981.[19] Local authorities are given the power to acquire land if they think that development, redevelopment or improvement of that land is likely to promote the economic, social or environmental well-being of their area.[20] The terms of the CPO, which will specify the land required, are scrutinised by a government Minister. If individuals object to the terms of the CPO an inquiry will be held where evidence from both sides can be heard. The Planning Inspector leading the inquiry will then report to the Minister and make recommendations.

The Minister may then confirm, modify or reject the recommendations made to them.[21] The validity of a CPO may only be challenged in the High Court by a 'person aggrieved'[22] within six weeks of the date on which notice of the confirmation of the CPO is published. The grounds on which a CPO may be challenged are: (1) that there is no power in the 1981 Act or the enabling Act to authorise the order; or (2) that the requirements of the appropriate Acts and regulations have not been complied with such that the interests of the party applying to the High Court have been substantially prejudiced. Additionally, whilst the CPO itself may be challenged under s. 23 of the 1981 Act, s. 54 of the Civil Procedure Rules also allows a decision to make an order, or a confirming Minister's decision not to confirm an order, to be subject to judicial review.

6. Section 226 of the Town and Country Planning Act 1990

One of the clearest English examples of the broad scope of modern statutory compulsory purchase powers is s. 226 of the Town and Country Planning Act 1990 (as amended). Under this provision a local authority,[23] joint planning board or a national park authority has the power to acquire land compulsorily

[19] The Planning Act 2008 (received royal assent on 26 November 2008) will introduce significant changes with its more efficient and centralised procedure to deal with the development of nationally significant infrastructure projects covering energy, transport, water, and waste.
[20] Section 226(1), (1A) of the Town and Country Planning Act 1990, as amended by s. 99 of the Planning and Compulsory Purchase Act 2004.
[21] The assessment of compensation is generally determined under the terms of the Compulsory Purchase Act 1965.
[22] A 'person aggrieved' includes any person with an interest in the land covered by the CPO.
[23] Defined in s. 226(8) of the TCPA 1990 as a county, district or London borough council.

for 'planning purposes' as defined by s. 246(1). According to a government Circular,[24] powers under s. 226 are intended to provide a 'positive tool' in facilitating the assembly of land by acquiring authorities in order to implement proposals in their community strategies. Under s. 226(1) the authority may compulsorily purchase land where the authority (subjectively) thinks that the acquisition will 'facilitate the carrying out of development, re-development or improvement on or in relation to the land.' Acquisition under this provision must not be exercised unless the local authority, again subjectively, thinks that the development, re-development or improvement is 'likely to contribute to the achievement' of any one or more of the following objects: the promotion or improvement of the economic well-being of their area; the promotion or improvement of the social well-being of their area; and/or the promotion or improvement of the environmental well-being of their area.[25]

Not only are the powers under the Town and Country Planning Act 1990 highly subjective and broad, but they also make express provision for the involvement of private parties in these development plans. Notably, s. 226(4) states that:

> *It is immaterial by whom the local authority propose that any activity or purpose mentioned [in s. 226(1)]should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).*

The inclusion of this statutory provision demonstrates a positive desire on the part of the legislature to encourage private takings where this will encourage development and financial investment by private parties.

7. Human Rights – A Compelling Case in the Public Interest?

Even before the enactment of the HRA 1998 and its incorporation of the written property protection afforded by (particularly) Article 1 of the First Protocol, the English courts acknowledged that compulsory purchase powers should only be exercised where 'necessary in the public interest'. As Lord Denning said in the *Prest* case, where 'the scales are evenly balanced ... the decision ... should come down against compulsory acquisition.' He noted that it was a 'principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly

[24] Circular 06/04: Compulsory Purchase and the Crichel Down Rules. The current Circular can be accessed at http://www.communities.gov.uk/publications/planningandbuilding/circularcompulsorypurchase2.
[25] TCPA 1990, s. 226(1A).

authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid.'[26]

The HRA 1998 and Article 1 of the First Protocol have ostensibly provided greater protection for property rights since these cannot be compulsorily acquired except where this is in the public interest. However, both at the European Court of Human Rights in Strasbourg and in England, this fetter appears to be interpreted as weakly as the equivalent public use requirement under the Takings Clause in America. Promoters, Inspectors and confirming Ministers appear well aware of the need to balance competing human rights when considering compulsory purchase schemes, but in practice this may not always happen with an appropriate degree of rigour.

The courts have generally used the following starting point in reviewing exercises of statutory discretion:

> *To the famous question asked by the owner of the vineyard ("Is it not lawful for me to do what I will with mine own?" St. Matthew, chapter 20, verse 15) the modern answer would be clear: "Yes, subject to such regulatory and other constraints as the law imposes." But if the same question were posed by a local authority the answer would be different. It would be: "No, it is not lawful for you to do anything save what the law expressly or impliedly authorises. You enjoy no unfettered discretions. There are legal limits to every power you have.*[27]

However, the difficulty facing an aggrieved individual who believes that statutory powers have been exceeded is that the English courts are loath to grant challenges to CPOs, even where they involve a private taking. This approach is understandable given the combination of factors influencing the courts' decisions in this area: (i) parliamentary sovereignty; (ii) express statutory authorisation for private takings under s. 226(4) (iii) broad and subjectively worded statutes; and (iv) concerns about relative institutional competence. Not only are the courts therefore deferential towards the *grant* of compulsory purchase powers in the first place, but they also often face significant difficulties in judicially reviewing and enforcing the *exercise* of powers under the terms of the relevant CPO due to the private nature of the entities carrying out the work.

[26] *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 *per* Lord Denning MR.
[27] *R v Somerset County Council, Ex parte Fewings* [1995] 1 WLR 1037 (CA), 1042 (Sir Thomas Bingham MR).

8. Deferential Judicial Review in Action

An example of this deferential approach may be seen in the *Alliance Spring Co Ltd v First Secretary of State* case.[28] The facts revolved around planning decisions prompted by the building of Arsenal Football Club's 'Emirates' Stadium in north London. As part of the regeneration scheme, Islington Borough Council made a CPO under s. 226 TCPA 1990 to acquire and demolish various privately owned properties on 134 plots of land. Following detailed hearings of the remaining objections the Inspector recommended that the CPO should not be confirmed. The Secretary of State disagreed with the recommendations and confirmed CPO. It was this decision which was challenged in *Alliance Spring* on the basis that the planning decision to acquire and demolish the properties was being driven by Arsenal Football Club's desire for a larger stadium, rather than the planning needs of the area as a whole. In dismissing the challenge, the Court of Appeal stated that the Secretary of State had correctly decided that the main purpose of the scheme was regeneration, albeit the 'trigger for the scheme was the desire of AFC for a new stadium with a substantially increased capacity.' As such the court held that the Secretary of State was entitled to reach his decision to confirm the CPO and commented that '[d]evelopments which result in regeneration of an area are often led by private enterprise.'[29]

A similar approach may be seen in the case of *R (Hall) v First Secretary of State*.[30] The case centred on the attempts made by British Airways ('BA') to gain planning permission for a new headquarters complex. The proposed development was contrary to normal Green Belt policy which protects green spaces surrounding urban areas, so BA needed to offer associated planning benefits for their proposal to succeed. They argued that they would create a substantial public park, and planning permission was granted following a public inquiry. This was subject to the condition that BA should use reasonable endeavours to acquire ownership of various plots of land including the scrapyard owned and operated by the Hall family, and known as the Rose Cottages site. In the event that BA failed to gain the land required by negotiation, it was to rely on the local Council exercising its compulsory purchase powers on behalf of BA.

The Halls resisted the offers made by BA and objected to the compulsory acquisition of the Rose Cottages site. The scrapyard had been in operation for 40 years, and was bounded by industrial

[28] [2005] EWHC 18 (Admin).
[29] *ibid*., [19] *per* Collins J.
[30] [2007] EWCA Civ 612.

workshops left derelict by British Airways itself. Most significantly for the Hall family, their land was not actually required for the park scheme itself and nor were there wider environmental concerns. Mrs Hall objected noting that the CPO would force the business to close and would leave three people unemployed. She argued that the confirmation of the CPO would make the Secretary of State 'guilty of land grabbing, for the sake of a private corporation's greed'. The Halls argued that the Secretary of State had not adequately considered whether less intrusive means could have been used given that the acquisition was simply to enable British Airways to improve the appearance of land neighbouring their headquarters and the park. The Court of Appeal held that the Secretary of State's decision was a matter of planning judgment not open to legal challenge, and the CPO offered a clear and practical way forward.

9. Conclusion

The combination of broad discretionary statutory powers, unlimited in time and aim, coupled with the likelihood of a deferential approach towards the exercise of that power by the courts, has a potentially significant impact on property rights rendering them uncertain and fragile. It becomes far harder to know when, and by whom, property rights may be subject to challenge with all of the security and investment concerns that this brings. Private takings may be beneficial to wider society, but it behoves the English courts to be more demanding inquisitors than they have generally proved to be when hearing legal challenges .[31] As Justice O'Connor noted in the American context in *Kelo,* the fallout from this type of decision 'will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'[32] None of this is satisfactory, particularly when assessing the impact of this type of draconian and far-reaching power on individuals and the stability of property rights.

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[31] This is particularly so in relation to uneconomical schemes. *Chesterfield Properties plc v Secretary of State for the Environment* 76 P & CR 117 (1997) (QBD involved a scheme involving the re-development of a town centre at an estimated cost of £40 million, of which £13 million was to come from public funds and the remainder from private sector investment. The Inspector found that the financial viability of the scheme was 'marginal', the Secretary of State confirmed the CPOs on the basis that the proposed scheme might be the last chance to revive the economy of the town centre. The court held that a CPO could be confirmed under s. 226(1)(a) of the 1990 Act (un-amended) without requiring a condition precedent that the confirming authority had to be satisfied that the development would be carried out.

[32] *Kelo v City of New London* 545 US 469 (2005), 505.