

The Compulsory Purchase of Farmland: Identifying Severance and Injurious Affection claims

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Abstract

In situations of compulsory purchase of farmland, claims for the injurious affection of retained land can form a substantial part of the overall claim for compensation. This paper seeks to identify the problems of identifying injurious affection and severance items, and examines how statutory provision and subsequent case law have dealt with them.

Introduction

The general rules and principles underlying the acquisition of land also apply to acquisitions of agricultural land. The nature of agricultural land however gives rise to special circumstances which require additional rules, and the application of the general rules in a particular fashion. Because agricultural land usually comprises 'large' parcels, invariably the acquisition is of part only, resulting in a severance of retained land, and an impact on the retained land both of the construction and after use of the acquisition scheme. These two items can give rise to substantial claims, often exceeding the compensation for land taken, which, due to the low value of agricultural land, can be relatively modest.

The claim for severance and injurious affection arises under section 7 of the Compulsory Purchase Act 1965, which reads:

'In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.'

Under strict construction, severance forms part of the claim for injurious affection and in most instances, they will be considered together as a single head of claim (see *Duke of Buccleuch v Metropolitan Board of Works*). However, for agricultural land, a clear distinction between the two arises in practice (Hamilton, 1977). Consider the example of a farm being split either by a new road, or by a canal of the same width. In essence, the severance claim would be the same in both instances; the depreciation in the value of the retained land. The injurious affection claim would be quite different; the construction of the road would be likely to result in greater loss than would the canal, whilst the after use of the road would most definitely impact more severely on the retained land.

Severance

A severance claim only arises where part of a claimant's land is taken, and where the value of the retained land is depreciated as a result. Baum and Sams (1997) identify two instances where this can occur;

- a) Where a holding is divided into two parts, one being taken for the scheme, and the other being retained. The value of the retained land is consequently less than before the acquisition, by reason only of it being smaller than previously,
- b) Where a holding is divided into three parts, with two being retained and being physically separated by the third which is the part taken. Each retained part may suffer the loss as described in (a) above, but

additionally the two parts together may suffer through now being physically separated by a barrier of some sort i.e. the scheme.

In both instances, the effect of taking part is to destroy any marriage value that existed in the claimant's total ownership (Denyer-Green, 1994). The identification and quantification of marriage value is something that is particularly relevant in the agricultural land market. (Prag, 1999) With farmland, it is more commonly the second of these instances which concerns valuers, farms being traversed historically by canals, railways, and more recently, new roads, all leaving retained lands with difficult, if not insurmountable access problems.

The question of marriage value raises some pertinent theoretical valuation issues. Consider the example of two 500-acre arable farms adjacent to each other. The value of each is £2000 per acre. Suppose that a 100-acre parcel comes on the market adjacent to both of them. Both of the farmers might be prepared to bid up to £2500 per acre to secure the additional land and benefit from the increased economies of scale that the marriage produces. The resultant 600-acre farm may now be worth a premium per acre, reflecting marriage value.

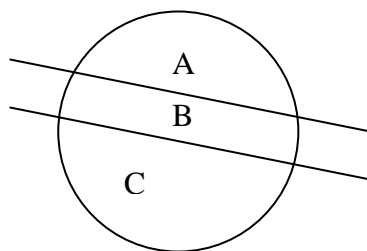
An important observation, not considered by most writers on the subject, is that invariably, smaller parcels of farmland attract greater per hectare values. For this reason most farms are lotted up into smaller parcels when being sold, each parcel being attractive to a near neighbour as a means of sensibly expanding his unit. Strictly applied this may obviate the relevance of a severance claim. It may be difficult to substantiate a claim that the effect of the severance is to destroy the marriage value that existed in the claimant's total ownership. Certainly, it would be difficult for most agricultural owners to substantiate a claim under (a) above, although claims under (b) are usually well-founded. It is however, open to a district valuer to argue that a parcel of severed, retained land is actually worth more than it was before the acquisition, by virtue of it being a smaller size and hence attractive to neighbours.

The presence of a road or some other scheme bisecting land invariably results in increased costs of working the holding, due to greater travelling time, and often more irregular shaped, and smaller, fields. A severance claim however requires the consideration of the diminution in land values: it is not suffice to capitalise the increased costs of working (*Cuthbert v Secretary of State for the Environment*, and *Frederick Powell & Son Ltd v Devon County Council*). Essentially what is required is a 'before and after' valuation of the retained land, although it is recognised (Denyer-Green) that this may well give a lower value, and not fully reflect the full cost of the severance to the claimant. The shortfall may well substantiate a claim for disturbance (see *Cooke v Secretary of State for the Environment*, and *Valentine v Skelmersdale Development Corpn*).

Baum and Sams argue that in order for the claimant to be properly compensated his severance and injurious affection compensation should be calculable by the following equation:

Injurious affection compensation = value of whole holding before- Value of retained land after plus compensation for land taken.

Thus in the diagram below, injurious affection compensation (including severance) should equal (A+B+C before) – (A+C after + compensation for B)



The question of 'before and after' valuations was considered by the Court of Appeal in *Hoveringham Gravels v Chiltern District Council*, and later by the Lands Tribunal in *Abbey Homesteads v Secretary of State for Transport* and *Trocette Property v Greater London Council*. All of these have raised a question mark against the use in this way of before and after valuations, and indeed suggest that the strip of land taken should be valued not as part of the whole farm, but as a distinct strip of land, thereby ignoring any element of value that might attach to it through being part of a larger parcel. As a consequence, it is probably only safe (Baum & Sams 1997) to apply the before and after valuation to the retained land in order to calculate injurious affection, that is (A+C) before – (A+C) after.

This raises the somewhat awkward valuation principle of ascribing a before value for land that is going to be retained after a strip of land dividing them has been developed. In other words, land to be taken, and land to be retained should be distinguished throughout the valuation process. This was the preferred method in *ADP & E Farmers v Department of Transport*. It must be pointed out that in practice, strips of agricultural land taken for road schemes and the like are invariably valued as part of the farm and at existing use value for farmland in the neighbourhood. There is no question of them being valued as virtually sterile strips.

However, where the principle becomes more important is where development values are involved, and compensation claims are consequently much higher. Here the acquiring authority might seek to have the strip valued at existing use value, as was the case in the *Abbey Homesteads* and *ADP & E Farmers* cases, thereby depriving the landowner of the development value which subsequent to the authority's scheme attached to the retained land. Hamilton (1977) makes reference to *Jelson v Blaby District Council* where the Court of Appeal applied the *Pointe Gourde* principle and section 9 of the Land Compensation Act 1961 to regard any severance depreciation of the land taken as being attributable to the scheme and therefore valued the land taken

disregarding any depreciation due to the scheme. Quite clearly at odds with Baum and Sams' reliance on the Hoveringham principle is the decision in *Budgen v Secretary of State for Wales* where the Lands Tribunal endorsed the principle of a before valuation extending to the whole farm. Clearly the rules on the effect of severance are deficient (Denyer-Green, 1994), although the continued reliance on 'before and after' valuations in most instances probably best reflects the claimant's true loss.

It would appear that the only claim for severance that landlords of holdings let under the Agricultural Holdings Acts can substantiate is one that reflects a loss in rental value of the retained land, that gives rise to a lower 'after' valuation. Theoretically at least, this should give rise to a lower investment value per hectare than if the retained lands formed part of a contiguous unit. In theory, comparable valuations should be sought to substantiate such claims, but in practise arguments based on the capitalisation of reduced rentals at appropriate discount rates may be more practicable, the former being almost impossible to obtain. Landlords will, of course, have a separate head of claim for the value of the land lost, at investment value.

Agricultural tenants dispossessed by notice of entry are also entitled to severance and injurious affection compensation, under section 20(2) of the 1965 Act. Under this provision, a tenant could only claim for damage done to him 'in his tenancy', and hence could not claim for any severance suffered as a result of tenanted land being severed from other land which the tenant himself owned (see *Worlock v Sodbury RDC*). This anomaly was rectified by paragraph 4 of the Planning and Compensation Act 1991 which effectively put tenants on the same footing as owner-occupiers for whom similar losses were already covered. Tenants under the Agricultural Holdings Acts will be able to claim reduction in their rents under the normal procedure invoking arbitration. Such action was considered in *Minister of Transport v Pettit* where the Tribunal commented that 'in a world regulated perfectly by logic an injury to the tenant in his holding should at the next possible date for rent revision produce a reduction in rent which exactly balanced the injury'.

Success in such a procedure would naturally pass the loss onto the shoulders of the landlord, who may or may not have considered it in his heads of claims. As Hamilton (1977) points out, 'there is much to be said for some co-ordination of the landlord's and the tenant's claims, where practicable, to ensure that each receives his due compensation'. The acquiring authority will have to meet the tenant's severance claim at least up to the time that he can next invoke the review procedure, which may be up to three years hence. The tenant may during this period, also be liable to pay rent on land which has been already taken from him, as such dispossession does not automatically give rise to a rent review. Such apportionment may similarly have to wait until the next rent review for the whole farm.

The presence of a road or some other scheme bisecting land invariably results in increased costs of working the holding, due to greater travelling time, and often more irregular shaped, and smaller, fields. A severance claim however requires only the consideration of the diminution in land values: it is

not suffice to capitalise the increased costs of working (*Cuthbert v Secretary of State for the Environment*, and *Frederick Powell & son Ltd v Devon County Council*). Essentially what is required is a 'before and after' valuation of the retained land, although it is recognised (Denyer-Green) that this may well give a lower value, and not fully reflect the full cost of the severance to the claimant. The shortfall may well substantiate a claim for disturbance, see *Cooke v Secretary of State for the Environment*, and *Valentine v Skelmersdale Development Corpn*.

Hamilton argues that any permanent disturbance should properly be reflected in the land value and hence the severance claim, and that the strict 'disturbance' claim should be limited to temporary disruptive items. Clearly this is not the view adopted by the court in *Cooke v Secretary of State for the Environment*. It may well be, following *Cooke*, that farmer landowners would be best advised to abandon severance claims in favour of full disturbance claims, so that there can be no question of duplication of items which may lead to a depreciation in land value.

Injurious Affection

Injurious affection items are similar to damages in the tort of nuisance, which would be actionable but for the fact that the use for which the land has been compulsorily acquired was carried out with statutory authority. Unlike severance, injurious affection claims are uniquely available to owners who do not have any land taken, but who are nonetheless disadvantaged by the scheme.

Essentially injurious affection claims are quantified in the same way as severance claims, that is, by assessing the depreciation in the value of the retained land.

Compensation may be claimed for damage to retained land by both the construction of, and the subsequent use of, the works for which the land is taken. A strict interpretation of s.7 of the Compulsory Purchase Act 1965 gave rise (see *Edwards v Ministry of State for Transport*) to the iniquitous situation whereby only the injurious affection arising on the actual piece of land taken was compensatable, there was no reference to the whole works. The effect of the decision in *Edwards* was reversed by the Land Compensation Act 1973 section 44, enabling claimants to have their compensation assessed by reference to the whole of the works.

There is no definitive list of the nuisances which might substantiate a loss in land value and hence give rise to a claim for injurious affection. Such items have variously been held to be smell (invariably from sewerage farms), noise, interference with drainage, loss of privacy etc. Such items are likely to be permanent in nature, and give rise to a loss in value of neighbouring retained land. Nuisances arising from the construction work itself, such as dust and dirt, noise and other inconvenience, are of a temporary nature, and therefore more suitable for a claim for disturbance (see *Budgen v Secretary of State for Wales*)

Land owners may also be able to substantiate an injurious affection claim even where no land is taken. These are strictly limited by statute- section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973. Thus for instance homeowners may have a claim for loss in value when their properties are 'blighted' by the construction (and subsequent use of) a new road nearby.

By their nature, injurious affection items are likely to impact most greatly on residential property. Farmland is unlikely to suffer a loss in value due to noise or smell. As has already been noted, injurious affection items arising during the construction of the works may be more properly claimable under the disturbance head of claim, and here farmers may be able to substantiate monetary loss. In any event, an owner's right to claim for injurious affection is likely to be more extensive if land was taken, no matter how little an amount. Consequently the owners of agricultural estates, where legal ownership may in reality be separated between a number of family individuals or trusts, should endeavour to arrange their affairs so that injurious affection claims can accompany claims for loss of land.

Mitigation

An extreme form of mitigation is for the claimant who is dispossessed of part of his land to force the acquiring authority to purchase the remainder of his land under section 8 of the Compulsory Purchase Act 1965. For farmers, a more satisfactory option is available under Section 53 of the Land Compensation Act 1973. Here owners can force the purchase of other land not reasonably capable of being farmed. Other land must be in the same agricultural unit, so off-lying fields cannot be off-loaded in this way, but parts of fields left on the 'wrong side' of motorways may be. Such purchase notices should not be confused with notices served under Section 137 of the Planning and Compensation Act 1990 following refusal of planning permission for development. Section 53 notices can additionally be served by farm tenants, and landlords. This can give rise to the unusual situation of an acquiring authority being forced to take on the tenancy of an agricultural holding.

How this sits squarely with the tenant being prevented from parting with possession under the terms of his tenancy is not immediately obvious. In any event, the authority must offer to surrender the lease to the landlord, which in most instances today, he will willingly accept. In a similar fashion, the acquiring authority may be forced to purchase the landlord's interest, and to take on a sitting tenant, although no express powers exist to offer the interest to the tenant.

Section 53 notices are rarely used by farmers to require the purchase of the total of the remainder of their land, rather for small unworkable severed pieces.

Although there is virtually no statutory provision for it, the one notable exception being in the case of railways, acquiring authorities may be willing to

carry out various works of accommodation in order to mitigate the effect of their scheme on the landowner. Such accommodation works may reduce the impact of severance, for example fencing, bridges and underpasses, re-arrangement of private access roads and tracks, or may be aimed at reducing injurious affection, for example noise barriers, visual screens, and the double-glazing of residential premises (Hawkins). An acquiring authority will generally only provide such works if it is cost-effective to do so; where the cost of the work is less than the compensation to be set-off. So, for instance, the provision of a motorway underpass costing £100,000 will not be undertaken if this only reduces the severance claim by some £50,000. Compensation for severance and injurious affection will then be assessed on the reduction in land value on the basis that the works are carried out. The district valuer, acting on behalf of the acquiring authority will need to assess not only the reduction in the value of retained land, but also the affect on such values of possible accommodation works.

For farmland, an early and considered agreement on accommodation works is essential, in order to mitigate as far as possible the impact of the scheme. The farming business will in most cases have to continue with the development in place, and in many instances the provision of appropriate accommodation works to enable this is more important than the monetary compensation that the owner might be able to negotiate from the authority (Slatter, 2001).

Betterment

An further valuation problem is created by statutory provisions enabling authorities to reduce compensation payable for land taken, severance or injurious affection where other land in the same ownership increases in value as a result of the scheme. The general provision is to be found in sections 7 and 8 of the Land Compensation Act 1971. In situations where the increase in value as a result of a scheme exceeds compensation payable under the heads of claim, the acquiring authority is not entitled to claim back the excess (Hamilton, Baum & Sams). Probably the most common example of this involving farmland is in the construction of new public roads. Section 261 of the Highways Act 1980 provides that in assessing compensation for land taken in the construction of a highway, regard shall be had to the extent to which the remaining contiguous lands belonging to the same person may be benefited by the purpose for which the land is acquired (Denyer-Green).

One of the common consequences of the construction of new bypasses around towns and villages is that the owner of retained land within the route of the road obtains planning permission for development on land which, but for the new road, would have been unlikely to gain such permission. Such a situation was considered in *Portsmouth Roman Catholic Diocesan Trustees v Hampshire County Council* where the land Tribunal held that the benefit was too remote to be taken into account as betterment. Surprisingly few cases have arisen on this matter, and the validity of the decision in the *Portsmouth* case is questionable (Baum & Sams).

Just as landowners were advised to arrange their affairs in order to maximise their entitlement to severance and injurious affection claims, so too can they arrange their affairs to avoid betterment. Section 7 only allows claims against the owners of land taken, who must also own retained land that is adjacent or contiguous to the land taken. Careful planning of title before notices to treat are issued may serve to minimise any set-off.

Acquiring authorities are also entitled to deduct enhancement from compensation paid out to claimants under Part 1 of the Land Compensation Act 1973-in cases of injurious affection where no land is taken, and where the injurious affection is a result of physical factors.

Conclusion

The valuations for severance and injurious affection are by their very nature complicated, and are not assisted by some unclear statutory provisions as well as conflicting some conflicting case law. What is certain however, is that farmers and landowners are likely to be able to substantiate significant claims for depreciation of retained land. Careful consideration to ownership details, given at an early stage, may enhance the basis of such claims. Careful consideration to accommodation works can assist in the mitigation of the harmful effects of public works, and may prove more beneficial to landowners than monetary compensation.

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