Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Pwyllgor yr Economi, Seilwaith a Sgiliau/ Economy, Infrastructure and Skills Committee

Prynu Gorfodol / Compulsory Purchase

Ymateb gan Philip Meade / Evidence from Philip Meade

Evidence for Energy, Infrastructure and Skills committee 11th October 2018

Issues with compulsory purchase.

It is important for me to say from the outset that whilst I do not intend to be intentionally partisan, it is fair to say that I only really have experience from the claimants' side of the fence.

I have acted for claimants affected by compulsory purchase for over twenty years. Claims have usually been for farming clients, with some residential and commercial properties involved as well.

I dealt with the majority of agricultural claims on the A55 when it was built from Llanfair PG to Holyhead and as a firm we are currently heavily involved in acting for clients affected by the Newtown bypass.

I have also acted for numerous clients on bypass schemes including the Heads of the Valleys road, gas and water pipelines, minor and major electricity schemes and other infrastructure schemes such as the extension to the West Wales airport.

All in all, I have probably acted for in excess of 1000 claimants over a twenty five year career as well as acting as expert witness and appearing in front of the Upper Tribunal on compulsory purchase matters for utility companies including Dwr Cymru and South West Water.

This evidence is not meant as a criticism of any individuals or companies involved in any of the schemes I have been involved in.

I say this because I appreciate that working on the contractors'/acquiring authorities' side of the fence no doubt has its own challenges, many of which I would have little or no experience of.

In order to break the evidence down a bit, I intend to separate it into two categories, namely conflict avoidance and dispute resolution.

Conflict avoidance is something which I believe we as a profession are perhaps almost uniquely placed to do something about.

Dispute resolution is of course a huge subject and in a strict sense can include everything from negotiation and mediation to High Court and Tribunal.

In many ways, focusing on conflict avoidance is more important than dispute resolution, because if steps can be taken to avoid a dispute, money, time and stress can be avoided for all concerned.

I will try to cover both equally.

Conflict avoidance

From my experience, one of the key things that appear to be forgotten (from the claimants' point of view) is that it is the contractors and subcontractors who build the infrastructure (roads, pipelines, cables etc.) that are the public facing people in any scheme.

Whilst they are of course ultimately employed by the acquiring authority and thus only really answerable to them, their actions and behaviour (good or bad) have a direct impact on those affected by the scheme and they are nearly always the first point of contact.

It is fair to say that almost without exception, in every case both parties (contractors and claimants) start out with good intentions.

It is very rare for a claimant to set out with the intention of being disruptive from the outset (although this does happen occasionally) and it is fair to say that I have never come across a contractor who intentionally sets out to be uncompromising.

The problem is that as a scheme progresses, different pressures come to bear (time constraints, costs, errors and mistakes) and very often the relationship can come under pressure.

Of these, time constraints and budget seem to usually be the root cause of any conflict.

As a scheme progresses and unforeseen events (bad weather etc.) cause problems, the need to get on and complete the scheme by a certain time takes over and goodwill starts to evaporate as corners are cut to save money and time.

This in turn leads to friction and misunderstandings and the parties tend to become less amenable, thus causing more problems and probably more delays and further expense. It becomes something of a vicious circle.

Whilst I appreciate the need for budget constraints, I have never really understood why contractors are put under so much pressure to complete a build by a certain date. It may be that the need to complete by a deadline is

somewhat self-imposed (because they have other projects to move onto etc.) or it may be that the acquiring authority have to get it built for their own macro-economic reasons, grants, political reasons etc.

I am not in a position to be able to know what the reasons for these deadlines are, and it may be that they are a necessary evil, but if they can be addressed and the time limits relaxed, I suspect that would make a significant difference.

Public Inquiry

Another source of friction is the Public Inquiry and more importantly, the outcome of the Inquiry.

One of the most common complaints I hear and have to deal with is when promises and undertakings have been made at the Public Inquiry and then broken.

This usually involves matters such as promises only to work on certain days and within certain working hours, or undertakings not to close roads.

It is accepted that large contracts such as building a road are far from predictable and any number of unseen events can occur.

There should, however, be some element of accountability and ideally more of an incentive for these promises and undertakings to be kept.

Whilst the contractors and the acquiring authority should have the flexibility to be able to adapt a build program to unforeseen events, it would help if there was an underlying accountability such that they should have to prove that breaking such promises is due to *force majeuer* and not just due to less excusable factors such as not carrying out proper due diligence when bidding for the contract or not properly monitoring or managing their employees or subcontractors.

Possible solutions

It would be far too presumptuous of me to suggest that I have a perfect solution to the above issues, but simply making the contractors more accountable for their actions and less inclined to just seek the quickest, cheapest and easiest solution would help.

One way to achieve this would be to have an independent ombudsman who could deal with complaints and suggest possible remedies and if necessary (in extreme cases) issue sanctions against the contractor and possibly the

acquiring authority. I appreciate that this sounds somewhat draconian (especially in terms of sanctioning the acquiring authority), but I would suggest that the threat of sanctions would be a significant deterrent and in reality the more extreme sanctions may hardly ever have to be used.

The sanction that would be most effective against a contractor would be removal from the list of contractors used by the acquiring authority either permanently or for a period of time. The criteria for when such a sanction would be used is not for me to propose, but I would suggest that simply knowing that repeated transgressions (that are proven) could lead to suspension from the list will I would suggest have a significant effect.

Sanctions against the acquiring authority could go as far as limiting or removing their compulsory powers to the extent that future applications have to be authorised in some way by a higher authority for a period of say 12 months.

Again the criteria (and indeed legality) of such a sanction are not for me to comment on, but the threat of such a sanction could in my view prove very effective.

Dispute Resolution

The other side to when CPO goes wrong is when it comes to sorting out the compensation due to a claimant.

Claimants come in many shapes and sizes from the individual property owner whose house is affected by the road but loses no land to a large business or farm that is completely decimated.

Whilst there are many issues that arise under the compensation heading, the over riding problem (for both parties) is that there is no simple, cost effective way of resolving a dispute.

The only statutory remedy is essentially a reference to the Upper Tribunal.

One leading QC who is the author of a leading text on the subject has suggested that unless the difference between the parties is £250,000 or more, the Upper Tribunal is probably not a suitable forum.

The vast majority of claims I have dealt with will be under £100,000 in total, the difference between the parties is rarely (if ever) £250,000 on rural properties.

There is also simply no forum at all for some disputes, such as a disagreement over the advance payment claimed for.

In short, a statutory claimant can ask for an advance payment as soon as the Notice to Treat and Notice of Entry are served. The advance payment is then calculated by the agent acting for the acquiring authority and a payment of 90% of that figure is then paid.

Crucially, there is no forum for challenging this.

The claimant, disaffected by an offer that he feels is below what it should be simply has to wait until the scheme is finished (sometimes years later) before he can submit his final claim. If the final claim cannot be agreed, then the matter can be referred to the Upper Tribunal.

If the advance payment falls short of the final claim (which is always the case in my experience), then the claimant is naturally entitled to the difference, but the only recompense for having to wait for the extra money is to receive interest on the difference. The statutory interest rate is currently so low that it makes such interest payments virtually non existent and provides no incentive to the acquiring authority to try and get the advance payment right.

Possible solutions

I have been heavily involved with the RICS in working with the Water Industry and more latterly HS2 to provide a simplified dispute resolution mechanism using various forms of Alternative Dispute Resolution (ADR) to resolve lower value disputes.

These range from Early Neutral Evaluation (ENE) where an independent surveyor assesses the likely compensation under given circumstances and provides a report that can be binding or non binding (but used as evidence in any subsequent tribunal hearing) to Independent Expert Determination which is similar to ENE, but usually is binding.

A simplified arbitration scheme is also being considered where the third party would act as arbitrator, a role which is more judicial in nature and based on evidence put before him/her as opposed to using their own evidence and expertise.

A lot of work on these options has been done already and it would be fairly easy to set up meetings between the appropriate Assembly staff and the various RICS working parties to see if the ADR proposals are of interest to the Assembly.

The issue with advance payments could be resolved by introducing a fairer level of interest and/or having the right to refer the disagreement to a third party such as discussed above.

Summary

In my view, the introduction of some sort of ombudsman type role to oversee the behaviour of a schemes contractors in particular would be a significant step in the right direction. Such an ombudsman would need to have “teeth” to be an effective deterrent against unreasonable behaviour, but also to be able to filter complaints that have no grounds.

The same ombudsman could refer appropriate compensation disputes to a third party (or at least recommend that as a course of action if the parties have not already agreed to do so).

A proper analysis of why time limits are set for some schemes would also assist and in appropriate circumstances, such time limits could be discouraged (or not actively encouraged).

The introduction of a simplified compensation dispute resolution procedure would also be immensely helpful as well as a fairer level of interest for under paid claims.