

## Guidance on CPO and planning gain

*R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20.

On 12 May 2010, the UK Supreme Court handed down a judgment which raises a number of fundamental issues in the context of planning permission including (1) how far a planning authority may go in finding a solution to a problem caused by the deterioration of listed buildings; (2) to what extent a planning authority may take into account off-site benefits (planning gain) offered by a developer and (3) what offers (if any) made by a developer infringe upon the principle or policy that planning permissions may not be bought or sold. The decision sets out important guidance on the use of compulsory purchase powers and although English in provenance, it is binding on Scottish Courts given that it emanates from the Supreme Court.

### **Background**

Sainsbury owns or controls 86% of a semi-derelict site, known as Raglan Street, just outside the Wolverhampton ring road. Tesco controlled most of the remainder and had obtained outline planning permission for development of the site. The planning authority had also previously indicated that it was minded to grant outline planning permission to Sainsbury. Tesco also has control of a site some 850m away from Raglan Street known as the Royal Hospital site. That site is semi-derelict and contains a number of listed buildings in poor condition. It had been a planning objective of the local authority to secure the regeneration of the Royal Hospital site. In isolation, the Royal Hospital site was not financially viable due to the planning requirements which the local authority wished to impose to secure its redevelopment. However, Tesco offered to link the scheme for Raglan Street with the redevelopment of the Royal Hospital site. In January 2008, the local authority approved a Compulsory Purchase Order in respect of the land owned by Sainsbury at Raglan Street in order to facilitate development of the site by Tesco. In doing so, it took into account the commitment by Tesco to develop the Royal Hospital site and permitted the CPO in order to allow the cross-subsidy of a commercially viable site that would enable the redevelopment of a site that was not, as it would make a greater contribution to the well-being of the area as a whole. Sainsbury objected and contended that it was illegitimate in resolving to grant the CPO sought to have regard

to the separate re-development of the Royal Hospital site. An attempt to judicially review that decision was rejected by the English High Court and the Court of Appeal.

### **Decision**

In a case heard by seven law lords (normally there are five), the appeal was narrowly allowed on a 4:3 split. Their Lordships held (1) that principles applied in planning decisions also applied to compulsory acquisition but a stricter approach was required due to the serious invasion of proprietary rights; (2) off-site benefits which are related to or connected with a development are material, however, the connection between the off-site benefits and the development for which the CPO was promoted has to be a real one, rather than fanciful or remote; (3) in the present case, the only connection was that either the local authority was tempted to facilitate one development because in fact it wanted another to take place or that Tesco was for its part tempted to undertake one uncommercial development in order to undertake the development that it actually wanted; (4) in terms of the applicable section of the Act (of which there is an equivalent in Scotland), only relevant matters could be taken into account and the financial connection between the two sites was not such as to amount to a relevant matter. Accordingly, the opportunity to secure redevelopment of the Royal Hospital site was not a lawful consideration for the purposes of a decision whether to promote the CPO in relation to the Raglan Street site; and (5) whilst the extraneous benefit offered by the Tesco proposal would not normally be a relevant consideration in the CPO decision, it might be in relation to a decision by the local authority to dispose of land under a different section of the Act. However, in the present case that would be putting the cart before the horse since the local authority would have nothing to dispose of in the absence of the proposed development deal put forward by Tesco (consideration of which it held to be unlawful).

### **Discussion**

This is a very important decision which discusses the perennially vexed question as to what extent planning gain may be taken into account in granting planning permission for a proposed development. There is extensive discussion of “fairly and reasonably related to the development” formula arising from the well known case of *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. The case of *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, concerned

with issue of whether an offer to build a link road was fairly and reasonably related to the development in question is also extensively discussed and illuminated. In principle, so long as the necessary link exists between the proposed development and the off-site benefits that will accrue, it is a matter which a decision maker may lawfully take into account, but the weight to be given to that material consideration is entirely a matter for him. In this case, the additional factor regarding the proper use of compulsory acquisition powers (upon which the case ultimately turned) based upon prior case-law and planning principles will also be of assistance to local authorities and developers alike.

**Maurice O'Carroll, Advocate, LARTPI**

[www.mauriceocarroll.co.uk](http://www.mauriceocarroll.co.uk)