Whose land was it anyway? The Crichel Down Rules and the sale of public land

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INTRODUCTION

The guiding principle of compulsory purchase of interests in land in England and Wales is that of fairness, best stated in the words of Lord Justice Scott in *Horn v Sunderland Corporation*[1] when he said that the owner has "the right to be put, so far as money can do it, in the same position as if his land had not been taken from him". In many instances, land acquired by compulsion subsequently becomes surplus to the requirements of the acquiring authority. This may be because the intended development scheme was scrapped, or substantially modified, or that after the passage of time the use of the land for which the purchase took place is no longer required. More controversially it may be that for 'operational reasons' the acquiring authority knowingly purchased more land than was required for the scheme.[2] Under these circumstances, the Crichel Down Rules[3] ('the Rules') require government departments and other statutory bodies to offer back to the former owners or their successors, any land previously so acquired by, or under the threat of, compulsory

[1] [1957] 1 QB 485,

[2] As, for instance, was the situation with the Channel Tunnel Rail Link land purchase.

[3] Department of the Environment- *Disposal of surplus government land: Obligation to offer land back to former owners or their successors- The Crichel Down Rules* (October 1992) HMSO

purchase. Such an offer is to be at current market value, as assessed by the District Valuation Office.

The Rules are non-statutory guidance given to government bodies and others on the disposal of surplus land. The term 'rules' is itself something of a misnomer, as the guidance is in the form of advice rather than as a set of statutory regulations, and is not universally applicable. This paper seeks to explore the extent to which the procedure allowing former owners of such land to buy it back operates in an explicit and fair nature. Drawing on recent research, and on existing literature, the paper will firstly examine the development of the Rules, itself a controversial process, and will proceed to examine the operation of the current rules from the perspective of justice.

Research was conducted on behalf of the former Department of the Environment, Transport and the Regions (DETR)[4], as part of the review of compulsory purchase and compensation[5]. Many of the recommendations of the report have been included in the Government's Planning Green Paper[6] published at the end of 2001 and will be referred to in this paper.

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[4] Department of the Environment, Transport and the Regions: *The operation of the Crichel Down rules* [2000]

[5] Published as: *Department for Transport, Local Government and the Regions [2001] Compulsory Purchase and Compensation- the Government's proposals for Change, Chapter 5*. This forms part of the Government's Green Paper on Planning *infra* n 6

[6] Department of Local Government, Transport and the Regions *Planning: Delivering a fundamental change* [2001]

THE CRICHEL DOWN RULES: ORIGIN AND DEVELOPMENT

In the history of modern parliament, the Crichel Down affair takes on momentous significance, and has been described as a 'political bombshell'[7]. The public inquiry into the Crichel Down events revealed a catalogue of ineptitude and maladministration and resulted directly in the resignation of the Secretary of State for Agriculture (Sir Thomas Dugdale), then a senior cabinet position, and was the first case of Ministerial resignation since 1917. Whilst the underlying case was, in the scale of things, trivial, involving the transfer of some seven hundred acres of mediocre agricultural land in Dorset, the ramifications for subsequent government procedure have been enormous, and it is regarded as one of the key events leading to the creation of the post of Ombudsman[8]. Crichel Down was probably the first instance of close and very public scrutiny being directed at a Minister of the Crown in the execution of his duties.

The significance today of the events of fifty years ago is two-fold. Firstly, and the main topic for this paper, are the Rules themselves, and how they impact on the management of public sector estates. Secondly, the profound effect that the events had on the principle of ministerial responsibility[9] and on the relationship between

[7] J Rimington, "Episodes in civil Service history VIII: Crichel Down" [2001] The Source Public Service Journal http:/www.sourceuk/net/articles

[8] Leeds Metropolitan University, "Introduction to law and constitution" [2002] http:/www.lmu.ac.uk

[9] The Times, Editorial 6 June 1980;

Government and the Civil Service[10] is not to be underestimated. This assumes relevance today in the light of this Government's penchant for 'joined up' government, and is behind much of the ethos surrounding the application of the Rules today, and of the wider functioning of Government departments.

In terms of land disposals, the Rules are of ever-increasing importance. Most notable are the disposals of Ministry of Defence (MoD) lands under the MoD Strategic Defence Review[11], under which the Defence Estate are targeting disposals of £700m by March 2002. It has been estimated that approximately five hundred sites are sold each year in the South East alone[12] and listed on the Defence Estates website as current disposals include for example land at Chelsea, Millbank, Woolwich, Didcot, Thatcham and Farnborough. Some take on national importance, such as the disposals of former RAF sites at Bentwaters and Upper Heyford. At the time of the research, there were over two hundred and forty MoD sites on the market, all of which were being considered under the Rules. Similar examples can be drawn from the National Health Service (NHS), challenged with making disposals of £1.2bn over the next five years. Other significant disposing authorities include the Highways Agency,

[10] C Jeffery, "50 years of the Political Studies Association" [1999] htpp:/www.psa.ac.uk/awards/brochure

[11] Ministry of Defence, *The Strategic Defence Review White Paper: Modern forces for a modern World.* Cmnd 3999. (London. NSO, 1998)

[12] J Doak, "Planning for the reuse of redundant Defence estate: disposal Processes, policy Frameworks and development impacts" [1999] Planning Practice and Research Vol 14 (2) pp211-224

the former British Rail[13], and the privatised water authorities, all of whom have developed their own disposal strategies.

The Crichel Down Rules relate to the disposal of land formerly acquired by, or under the threat of, compulsory purchase. They set out the procedures for offering former owners the opportunity to repurchase land that was acquired from them and which has since become surplus to the purpose for which it was acquired. The Rules themselves are complex, having been developed piecemeal over a number of years[14], their applicability is uncertain (for some bodies they are mandatory, for others, merely discretionary), and their precise authority far from clear. Moreover, they exist only as non-statutory guidance.

The principle of offering to former owners surplus land acquired under compulsory powers dates back to the Lands Clauses Consolidation Act 1845[15]. The Rules themselves however were first published as a Treasury Circular in 1954[16] in response to the recommendations of the Clark Report of the public inquiry held into the Crichel Down events.

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[13] Through the property division, Rail Property Ltd.

[14] I Smith, "Managing Defence Estates" [2001] htpp:/www.publicservice.co.uk/pdf/central-gov

[15] Sections 127-132. These actually went further than the current rules in many respects, including the right of neighbours to be considered in the offer-back procedure where former owners declined to purchase.

[16] No.6/54

The Crichel Down 'case'[17] concerned land acquired by the Air Ministry from the Crichel Estate and others, and used during the Second World War as a bombing range. After the war, the land became surplus to requirements, and the former owners, particularly one Commander Marten, sought to repurchase. Despite early representations made by Marten and others, the Air Ministry decided to transfer the land to the Commissioners of Crown Lands (one of whom was the Minister of Agriculture), on the grounds of maximising production, and subsequently to let to one pre-selected tenant. Further representations, and the ensuing and protracted public disquiet, with accusations of civil service cover-up, ministerial corruption and departmental maladministration[18], led to the establishment of a public inquiry[19] in April 1954. In reporting on the inquiry findings to the House of Commons, full ministerial responsibility for the affair was accepted by Dugdale, who promptly resigned from the Government[20], effectively ending his political career and those of a number of civil servants. In his resignation speech, the Minister set out the main principles on which future disposals of surplus land would be based, adding that the procedure would be applied retrospectively to Crichel Down. The Clark Inquiry itself has been subject to considerable criticism[21], Clark himself being accused of

[17] Not a 'case' in strict legal terms, as no judicial proceedings were involved.

[18] W Woodhouse, "The reconstruction of constitutional accountancy" [2000] Newcastle Law School. Working Paper 2000/10

[19] The Clark Inquiry[19]

[20] HC Deb, vol 530, 1178-1297. (June 1954)

[21] IF Nicolson, *The Mystery of Crichel Down* (Oxford, Clarendon, 1986)

incompetence and arrogance.[22] The detail of the events is beyond the scope of this paper, and is well-documented elsewhere[23].

In the ensuing years, the Rules developed in a piecemeal fashion, in response to changing economic and political imperatives, and as a result of several key decisions of the courts.

The 1954 Rules placed a duty on some government bodies to consider whether the offer-back procedure should apply, and if so, laid down the procedure that should be followed. Significantly there was no *statutory* right granted to former owners. The offer-back procedure only applied to land which was agricultural at the time of the acquisition. There were a number of exceptions[24], where the offer back procedure would not apply; the most important being where the land had been so substantially altered in character that it could not be returned satisfactorily to agricultural use, and a pre-emptive right to transfer land to another government department who would themselves have been able to justify the use of compulsory purchase. Where the Rules did apply, the repurchase was to be at the *current market price* as assessed by the District Valuer, not at the historic price at which the original compulsory purchase took place.

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[22] Rimington, *supra* n 7

[23] See RD Brown, *The Battle of Crichel Down* (London, Bodley Head, 1955); and Nicolson, *supra* n 21

[24] Now contained in Rule 14

Replacement Rules were published in 1957[25], substantially modifying the 1954 set. Certain 'special procedures' were introduced which more formally recognised that the land, if still predominantly agricultural, could be transferred without offer-back to other departments or public bodies as long as they had compulsory purchase powers. If the land had acquired development value, it could be transferred to other department or public bodies irrespective of their compulsory purchase powers. In both instances however, consultation with former owners was to take place, though it is hard to see what it was hoped to achieve by this process. Local authorities were given pre-emptive rights to take over surplus land, although such transfers were subject to the right of former owners to have their interests heard at public inquiry.

The test requiring suitability for satisfactory agricultural use was replaced by a new supplementary test which excluded land unless "..it was still predominantly agricultural in character or could still be used at least partly for agriculture, even though it had become more valuable for other purposes."

In 1967 a further review was carried out in an attempt to clarify the Rules, principally by adopting a clearer format[26]. A number of further exceptions and amendments to the offer back procedure were also introduced. These included land with planning permission or approval, land within a designated New Town or Town Development Area, land which had been offered for sale immediately before the

[25] Treasury Circular No.5/57 and No.5/57(Addendum)

[26] Treasury Circular No.1/67

original acquisition, very small areas of land with no satisfactory agricultural use, and 'public interest' cases.

Further lengthy discussions on the Rules, and a review by the Land Transactions Committee, was prompted by the Compton Bassett 'case' (1969), particularly on the controversial exemption from the Rules of surplus land which had acquired planning permission. Despite widespread concern over the applicability and complexity of the Rules, TC No.1/67 was left unaltered.

In 1981, a further consultation and review took place, largely as a result of the controversial Allen & Unwin 'case' of 1980, concerning the disposal of land formerly acquired for the proposed extension to the British Library and subsequently deemed surplus. Significantly, the Rules were extended to apply to non-agricultural land. However, despite this major development, they were apparently deemed no longer important enough to warrant an explicit document. The 1981 Rules were set out in Part III of the Memorandum accompanying Department of the Environment (DoE) Circular 18/84 "Crown Land and Crown Development" and were published in full in the Journal of Planning and Environment Law [27]. The application to non-agricultural land was however subject to a time limit: the offer-back would only be made if the disposal was no more than 25 years from the date of the original acquisition.

Finally, and partly as a reaction to the case of *R v Commissioner for New Towns ex parte Tomkins*[28], a further review in 1992 led to the publication of the

[27] *JPEL* February 1982,pp 66-71.

[28] [1998] ECGS 141

current rules.[29]

THE CURRENT RULES

The current Rules were published by the DoE and the Welsh Office on 30 October 1992. Strictly they apply to government departments including executive agencies and non-departmental public bodies but additionally are commended to, but are not binding on, Local Authorities and bodies in the private sector to which public sector land holdings have been transferred e.g. the privatised utilities. This, and the fact that statutory development bodies are exempt, is a source of much confusion and conflict[30] Where a government body falls under the Rules, freehold disposals of the following will be covered; land acquired by or under the threat of compulsion or by voluntary sale, if the power to acquire the land compulsorily had existed at the time of acquisition, and land acquired under the blight conditions in the Town and Country Planning Act 1990.

The presumption in the Rules is that former owners or their successors will be given a first opportunity of purchasing the land previously in their ownership, providing it has not been materially changed in character. The Rules identify examples of such changes as being: where houses have been erected on agricultural land; where mainly open land has been afforested; where offices have been built on urban sites; and where substantial works to an existing building have effectively altered its character. Where only part of the land has been materially changed, the

[29] DoE, s*upra* n 3

[30] Civic Trust (2000) commentary on the Defence Estates consultation March 2000

general obligation to offer back will apply only to the parts that have not been changed. The 1992 Rules also extended the twenty-five-year cut-off rule to agricultural land, although this does not operate retrospectively.

The exceptions, contained in Rule 14, are largely unchanged from previous versions of the Rules and include:

- where the land is needed by another Department (on specific ministerial authority),
- where there are strong and urgent reasons of public interest for the land to be disposed of to a local authority as a body with compulsory powers,
- small areas of agricultural land which would have no satisfactory agricultural use even if used with other adjoining land;
- where it is advantageous to the Department and the adjoining owners to adjust boundaries through a land exchange;
- where the land was originally acquired for development purposes;
- where the disposal accords with Government policies of transfer of functions to the private sector providing particular services;
- where a disposal is in respect of either: a site for development or redevelopment which comprises two or more previous landholdings; or a site which consists partly of land which has been materially changed in character and part which has not and there is a risk of fragmented sale of the site realising substantially less than the market value of the whole site.

- Where the market value of the land is so uncertain that clawback provisions would be insufficient to safeguard the public purse and where competitive sale is advised by the department's valuer and agreed by the responsible minister.

In the case of sites for development or redevelopment comprising two or more previous land holdings special consideration will be given to a consortium of former owners.

The Rules are not the only formal guidance that government and other bodies have to take account of when considering disposing of surplus land. Primary legislation including Local government legislation on the disposal of property, governmental policy statements and regulations on disposal are deemed to override the Rules. Complexity to the offer-back procedure compounded by the separate obligation placed on departments to follow the Treasury Guidance (National Audit Office) on the disposal of assets.[31]. Whilst this makes rather obtuse reference to the Crichel Down Rules, it conflicts with them in several respects, particularly in the definition of 'value', adding confusion to the pricing of repurchases.

Reference to the Rules is also to be found in internal guidance of the Civil Service[32] and the Valuation and Lands Agency[33]. Often strict adherence to these

[31] Contained in the Government Accounting Guidelines 3/1998 Annex 32.1 *Disposal of land and buildings and other land transactions.* [1998] NAO

[32] Civil Service IN 26/96 –*Disposal of land to former owners- the Crichel Down Rules* [1996] Civil Service Central Administrative Unit

supplementary rules and guidance notes takes precedence over the Crichel Down Rules and creates pressures which conceivably lead to conflict with them. The National Audit Office scrutiny for instance, imposes 'best value' consideration on disposals, posing a dilemma, particularly on those bodies to which the Rules are 'commended' rather than binding.

Where the Rules are deemed to apply, the department concerned has to consult with former owners or their successors to establish whether they wish to repurchase. Retracing former owners can be a lengthy, difficult, and often fruitless process, adding significantly to the costs of disposal and delaying the sales of surplus land. There has developed a real and strong tension between meeting the requirements of the Rules and achieving disposal targets, and conflict between Treasury and other guidance material and the Rules themselves, which may lead to the rights of former owners being overlooked, particularly in situations where doubt as to the applicability of the Rules already exists.[34]

THE QUESTION OF FAIRNESS

Essentially then, the Crichel Down Rules are about the public right of private individuals to be given the opportunity to buy back property which was taken from them under compulsory powers. As such, they should not only be operated fairly, but

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[33] Valuation and Lands Agency. *Disposal of surplus land and buildings by public sector bodies* [2000] www.vla.nics.gov.uk/au/disposalguide4).

[34] DETR, *supra* n 4

be seen to be operated fairly. Failure to apply them consistently or indeed properly, may leave the disposing department open to a claim that it has contravened Article 1 of Protocol 1 of the European Convention on Human Rights[35].

The question of equity or fairness of the Rules can be examined from three perspectives: firstly, is the principle underlying the Rules intrinsically one of fairness? Secondly, are the Rules, as they are written, 'fair'? And thirdly, are the Rules being applied in an equitable manner?

Ultimately a consideration of these will lead to a fourth question needing to be addressed, namely whether there are any changes which need to be implemented in order to make the Rules more equitable?

THE EQUITABLE PRINCIPLE

The DETR (2000) research examined whether the original philosophy behind having an offer-back procedure was one of equity, and if so, whether this has changed over time, and whether it still valid. Most of those organisations dealing with the Rules claimed not to know on what moral, ethical, financial or legal principles the Rules are based. The interpretation of, and any changes to, the Rules will depend to a significant degree on whether their overriding raison d' tre is to give a right of pre-

[35] C Sturge, "Surplus to requirement" [1999] *EG* 9929.pp 109-111. See also M Redman, "Compulsory purchase and compensation and Human Rights"[1999] *JPEL*. April pp 315-326. and G Parker, "Planning and rights. Some repercussions of the Human Rights Act 1998" [2001] Planning Practice and Research 16(1) pp 5-8.

emption to a landowner dispossessed of his property, or to appease former owners whilst principally having regard to the public purse by enabling surplus land to be disposed of as quickly as possible and at the best possible price. The adherence to the Rules undoubtedly has a negative effect on cost control and on the time taken to dispose, neither of which are beneficial to government or the taxpayer. Indeed earlier research conducted for the DETR in 1998 concluded that '…the rules are a significant complication to the disposal process for the Ministry of Defence'.[36]

The presence of the Rules seems to imply that the taxpayer in some way 'owes' the claimant something. Landowners might argue that the Rules are a recognition that former owners have suffered an injustice or that a right to be offered land back exists. Conversely it could be argued that owners are fully compensated at the point of sale.

Could it be that the Rules represent a tacit acceptance of the existence of an 'emotional tie' between the owner and his land? If this tie gives rise to an element of value which is not compensated at the point of compulsory purchase then it would seem reasonable to contend that the former owner should have some right of redress should the land cease to be held in the public interest. The most appropriate right would appear to be a 'first refusal' to buy the land back. This would appear to be the underlying moral principle on which the Rules are based. However, it has been

[36] Department of the Environment Transport and the Regions *Review of the Redundant defence Estate* [1998] HMSO London

argued[37] that the lack of an explicit philosophy undermines the understanding and application of the Rules.

The closest to an explicit philosophy was put by Maxwell Fyfe, the Home Secretary, in the 1954 House of Commons debate on the Rules:

…"When that purpose is exhausted, when that need is past, what is wrong, on any consideration of morality or justice, in allowing the person from whom the land was taken the chance of getting it back."[38]

The precise nature of that redress is more complex to assess, and will ultimately depend on how the owner was originally compensated. The question of the repurchase price will be investigated below.

One example of the underlying philosophy is given by the exception to the Rules where the land has seen a material change in character. The rationale for this provision needs examination. Firstly, the arbiter of what constitutes a material change is the disposing authority themselves. If they deem that the character of the land is significantly altered, then the Rules do not come into operation, and former owners will not be notified. Ignorance of the impending disposal will consequently eliminate the opportunity for any legal challenge on the part of former owners. Why should material change in the character of property preclude the right to buy it back? The valuation principle (whether *best price* or *current market value*) will dictate that the purchase price reflects such change in character, so is it fair to deprive a former owner

[37].Ibid.

[38] HC Deb, vol 530, 1292 (June 1954)

of the right to make a pre-emptive bid purely on the grounds that he is getting back something materially different from what was taken from him? Clearly if there have additionally been substantive boundary changes, then it might not be feasible or reasonably practicable for former owners to repurchase, unless some form of consortium is created- a scenario which the Rules accommodate.

The question of whether there is an underlying philosophy of fairness can also be examined by closer scrutiny of the issue of development values. Whether owners should be entitled to buy back land that has since gained planning permission, and if so at what price, is an issue that has troubled government since the Compton Bassett case (see page **). When land is compulsorily purchased, any increase in value due to the scheme underlying the purchase is ignored, and owners can only claim (since 1992) for any planning permission which would have accrued during the ensuing ten year period. Briefly, on acquisition, a disposed owner's claim for land taken will consist of current use value + existing development value + hope value (e.g. developer's landbank value'). To this will be added any value due to development not foreseen at the time of the purchase nor attributable to the scheme which arises in the following ten year period.

There is a compelling argument that such increases in value owe their existence to decisions made by society rather than by actions of the landowner concerned, and that hence any such value should belong to society and rightly devolve to the public purse. With this principle in mind, landowners may find themselves either paying a price which reflects the existence of planning permission or development value, or buying back their original land subject to clawback clauses, or

minus certain 'ransom strips', thereby enabling the department concerned to safeguard any future development values. There are two compelling counter-arguments which suggest that landowners and not the public purse should benefit from existing or future planning permissions. Firstly, that the UK does not operate a distinct development land tax, implying an acceptance of the principle that private gains on the realisation of hope value do not reflect any public entitlement. Secondly, since the wholesale privatisation of the public utilities in the 1980s, where land is being sold off by former state-owned utilities the subsequent gains are passed to private shareholders rather than to the public purse.

The main criterion would appear to be that former owners should not benefit unduly at the expense of the taxpayer or the public interest generally[39]. The specific exceptions to the Rules are designed to protect the taxpayer, and in allowing land to be passed between departments the Rules provide for the public interest to be put before that of the individual's right to property.

On balance, and in the absence of any express intent being recorded, it seems reasonable that the underlying rationale behind the Rules is one of fairness and justice. A secondary reason may well be one of political expedience- failing to be seen to be acting fairly is increasingly subject to media exposure and intense public criticism. The lack of a clear procedure led to the downfall of the Minister concerned in 1954, and it is evident that political sensitivity about the Rules still remains. Indeed most Hansard references to the Rules concern the principle of ministerial

[39] Ministry of Agriculture Fisheries and Food (1992) Land and Property Unit. HMSO.

responsibility rather than land disposal issues[40]. Equally of the three hundred and sixty or so web references to 'Crichel Down', at least as many refer to the political consequences of the affair as do to the operation and interpretation of the Rules themselves.

ARE THE RULES, AS THEY ARE WRITTEN, FAIR?

The Rules have been poorly drafted and lack clarity. The original draft and subsequent changes were often knee-jerk policy reactions to the rulings in hard cases, with the consequence that they have developed in a haphazard way without reference to the original Crichel Down ruling or the reasoning behind their introduction. Consequently the guidance is often poor, and the wording is vague and open to wide interpretation. This may be perceived as a failing by former owners but conversely it may be seen by disposing organisations as conferring a degree of flexibility on the process. The DETR research confirmed earlier findings[41] that '…there was a clear lack of understanding amongst property practitioners, local planning authorities and even within government departments as to the precise status of the Rules and which set currently apply'.

It is not clear from the Rules themselves which organisations they cover. Certainly they apply to all government departments but they are only discretionary on local authorities. It is less clear whether they apply to disposals made by successor

[40] HC Deb, vol 238,1061(Nov 1996)

[41] DETR *supra* n 36

organisations, by privatised utilities and by other privatised bodies. The new forms of public – private partnership arrangements arising over the past twenty years have added to the confusion. It would seem to be inequitable, and to run counter to the spirit in which the Rules were intended, for the Government to have transferred land to which the Rules applied, and from departments on which they are binding, to private utilities and the like for which the Rules are only discretionary. Further, the transfer of land to bodies that would not necessarily have had the powers to purchase the land themselves gives rise to disquiet, particularly as subsequent disposals may not be subject to the application of the Rules. The perception arises of a climate of 'backdoor' avoidance of the Rules. For privatised utilities there remains the unanswered question as to whether the courts will hold them to be 'exercising public functions' and therefore under the remit of the Human Rights Act 1998.[42]

If the underlying principle of former owners being offered-back surplus property is accepted as being desirable, then there is a compelling argument for such a right to be enshrined in legislation, rather than to be contained in departmental circulars and guidance notes. As currently set out, the Rules do not constitute a legal right: they have no statutory force nor are they principles of law. They are policy guidance to be taken into account, where relevant, by the bodies to which the Rules are addressed, and any decision on whether or not to apply them will be made by the body in question. This must raise questions of natural justice- with the disposing organisation acting as both judge and jury. Dispossessed owners are not given the opportunity of making representations that Crichel Down should apply- they need not

[42] D Hart, "The impact of the European Convention on Human Rights on Planning and Environmental Law" [2000] *JPEL* Feb. 2000. pp 117 –134.

even be aware that the organisation has considered (or not) their relevance. Aggrieved private owners, without any right of appeal, may subsequently find that they do have recourse to the Human Rights legislation for satisfaction.

There is no clear definition of what constitutes a 'disposal'. Freehold transactions are expressly included, but it is less clear whether or not the Rules also apply to other disposals such as the granting of long leases or disposals to the Private Finance Initiative and Public/ Private Partnership schemes. Some departments do issue guidance (Department of Health 2000), but often this is hidden away in circulars and memoranda. 'Fairness' would imply that the Rules should apply no matter what the status of the disposing (or acquiring) body.

Similarly there is no guidance as to when a property is truly 'surplus'. The procedures for declaring land surplus are at variance with the original intentions of the Rules, formers owners now not being contacted until wider negotiations have been conducted and even after planning permissions have been obtained. This is perceived as being inequitable and contrary to the original intention of the Rules. No longer is land offered back when it is first declared surplus and at the same time that it is offered for transfer to other departments and agencies. There are indeed no explicit procedures for considering the Rules at the time when surplus land is offered between departments.

Neither is there any guidance on what constitutes a 'material change' to land which remains one of the key exceptions. The illustrative examples contained within the Rules would seem to imply that there must be a *physical* change in character.

Less importance is attributed to *'change of use'*, perhaps because formerly the Rules applied only to agricultural land, where material changes were easier to define and, by the very nature of the land, required physical changes. Determining whether or not there has been a material change of character has thus proved problematic, particularly where urban property is concerned. Here the Rules would appear to be at variance with planning legislation where changes of use take on an importance equal to physical changes to a property.

The loose drafting of the exceptions to the Rules means that different authorities can take differing views as to whether situations should be dealt with under them or not. There is concomitant lack of consistency both between and within government departments, who are interpreting them in a variety of ways in order to better meet organisational imperatives such as land disposal targets. The combination of poor drafting and loose interpretation allows similar cases to have different outcomes, an inconsistency which cannot be compatible with 'fairness'. The Planning Minister, Lord Falconer, speaking at the 2001 conference of the Confederation of British Industry outlined his vision of a "good planning system" as one which is "predictable"[43]. As part of the wider planning system, the operation of the Rules would appear to fall well short of this erstwhile requirement.

Much confusion arises over the principles of valuation contained within the Rules. Former owners are required to pay 'current market value', although this is not defined nor is it covered by the Appraisals and Valuation Manual of the Royal Institution of Chartered Surveyors (RICS), 'the Red Book'. This terminology is at

[43] Reported in *Plans, Plots and Talking shops*. Daily Telegraph 17th November 2001.

variance with the Treasury Guidance on Disposals, which requires departments to obtain 'best price'. The Valuation Office advice is that 'best price' equates with the RICS definition of 'open market value'. From the Treasury and National Audit Office standpoint, the best evidence of open market value is an open market sale. Sales off the market to former owners, even where they may be backed up by a professional valuation, do not provide the same reassurance of value for money.

Most compulsory purchase compensation is determined by statute[44] as interpreted by subsequent case law. Two overriding principles are that there is no allowance for the acquisition being compulsory and furthermore that compensation for the land taken is assessed at current market value. It is contended that were the original purchase to have occurred at a premium reflecting the compulsory nature of the purchase, the argument in favour of re-purchase rights would be weaker. That the option to repurchase should be at market value in current use seems reasonable, and the counter-argument that repurchase should proceed at a price equating to the original compensation price would appear to convey too great an element of gain back to the owner, potentially giving rise to 'windfalls of vast proportion'[45]. It is the position of the former owner as a 'special purchaser' which potentially exposes the weaknesses of the definitions. Where former owners still retain adjacent land, there is a compelling argument for regarding them as special purchasers. Where no such retention is present, special status is open to question.

[44] Most notably the Compulsory Purchase Act 1965, the Land Compensation Acts 1961 and 1973 and the Planning and Compensation Act 1991.

[45] *Freedman v British Railways Board* [1992] ECGS 55

However, in the case of agricultural land, landowners do often retain adjacent land, and in addition to receiving compensation for land taken, they can claim considerable sums for severance, injurious affection and disturbance in respect of damage to land retained[46]. The Crichel Down Rules make no explicit allowance for these sums and the question need to be asked whether former owners should be required to repay or make some allowance for these items when they get land back. In reality, the re-amalgamation of parcels of land is likely to result in the creation of marriage value of benefit to the former owner. Such additional severance payments were really intended to compensate the owner for the loss in perpetuity of value in his retained land and the business he operates on it. Clearly only if the resale to him occurs significantly soon after the original appropriation will the owner stand to make any substantial gain, and it is argued that only in those circumstances should they be regarded as 'special purchasers'.

The rules do not clarify the mechanism of the offer back procedure in respect to how price is agreed. Is it sufficient to have the property externally valued and then offer it at that price on a 'take it or leave it basis', or does the disposing authority have to go further and negotiate around the valuation as a starting point? Additionally there is no mechanism for the resolution of disputes over the question of price.

The offer-back procedure is governed by strict limits set out in the Rules. Former owners are given two months to indicate an intention to purchase, a further

[46] R Gibbard, "The compulsory purchase of farmland: identifying severance and injurious Affection claims" [2001]. Working Papers in Land Management O3/01. Department of Land Management and Development, The University of Reading.

two months to agree terms, and a final six weeks to negotiate and agree the price. In practice these arbitrary limits are too short, given the need to undertake legal searches and surveys. Certainly time limits need to be imposed, to prevent open-ended negotiations, and to apply a sensible cut-off in order to protect the public interest. It would appear that very tight timetables are being imposed in order to surmount delays in disposals caused by the difficulties of tracing former owners in the first place.

The introduction, in 1992, of a twenty-five year cut-off period, after which time disposals will cease to be covered by the Rules, would appear to be arbitrary, and a source of unfairness. The argument for a cut-off period would appear reasonable on the face of it, that it limits the cost to the disposing body of having to undertake long and difficult searches to ascertain former owners. For agricultural property however, the length of ownership is usually greater than for other types of property, and a longer time limit, or even the abandonment of any time limit might be more appropriate. It is more likely that former agricultural owners might still be occupying the adjoining property, and would justifiably be aggrieved not to be offered back surplus land.

Of particular effect on agricultural property is the limitation of the offer-back to successors in title, thereby excluding subsequent purchasers. With rural estates, intra-family sales are not uncommon, particularly as a means of handing down ownership to the next generation. Where such sales have occurred, the Rules do not apply, and offerback rights are lost.

ARE THE RULES BEING IMPLEMENTED FAIRLY?

Perhaps not surprisingly, in view of the lack of clarity of the Rules, the research (DETR, 2000) suggests that the total number of cases covered by the Rules and which have resulted in a return to the original ownership since 1992 may be small; almost certainly less than one hundred, and in all probability less than fifty.

The research confirmed the existence of significant misunderstanding as to the applicability of the Rules. Forty percent of government departments and agencies believed that they were discretionary, and forty-four percent of local authorities thought them mandatory. Twelve percent of agencies contacted claimed never to have heard of the Rules. See Table 1.

Table 1. The applicability of the Rules to organisation type

Organisation Type:	% of responses	Rules mandatory	Rules discretionary	Rules not applicable	Not heard of Rules
Government agency	17	49	40	6	6
Government Dept.	4	56	44	0	0
Local authority	34	44	38	10	8
NHS	14	45	45	0	10

authority					
NHS Trust	20	56	32	2	10
Transport	1	100	0	0	0
Utilities	5	91	9	0	0
Valuation Office	5	70	30	0	0

. Source: Department of the Environment, Transport and the Regions: the Operation of the Crichel Down Rules (2000)

Of the post-1992 disposals where the Rules were known to apply, at least fifty-four of sites were not offered back. Of those that were, fifteen percent were purchased by their former owner. Of these, sixty-eight percent were single houses, ten percent were development sites, and eight percent were agricultural land.

The research discovered a number of public sector schemes being prepared which include land, which, under more normal circumstances, would have been offered back to the former owner suggesting that the applicability of the Rules to the privatised utilities needs clarification. These bodies claim that they possess little evidence on the details of land acquisitions, which occurred prior to privatisation, leading to the almost universal presumption that such land had been acquired without threat of compulsion, or that a material change had taken place, rendering the Rules inappropriate to most disposals from this sector. A number of representations to the DETR research were made concerning whether it is equitable that the offer back procedures cease to apply once land is transferred from an organisation for whom the consideration of the Rules is mandatory to one where they are discretionary. This can

lead to the inconsistent application of the Rules by the same type of organisation. In defence, it is not clear from the Rules themselves which private utility and other companies they apply to. It would be more equitable if they were mandatory on all bodies with compulsory powers or which have been assigned land to which the Rules would otherwise have applied.

Indeed, the problem of accessing former records was cited as the main practical difficulty, preventing offer back in forty-three percent of cases. This is perhaps evidence of a lack of rigour in the process of privatisation rather than deliberate maladministration, but nonetheless raises serious questions of morality and justice. Lack of adequate records is a particular concern for successor organisations, which casts doubt on their ability to operate fairly under the Rules. This is particularly so where transfers between departments have already taken place, and is exacerbated where transfers to non-governmental department bodies and others have occurred with the result that few organisations are proactive in seeking to identify former owners. Given the low proportion of sites actually sold back, this may be a rational strategy, although it stands outside the spirit of the Rules if not their actual provisions.

The fact that decisions on the applicability Crichel Down is made in the absence of public scrutiny by the body seeking to dispose of property, and that they can approach third parties in an attempt to pre-empt the rights of former owners is unfair. A decision that the Rules do not apply or that the particular circumstances justify a departure from them can only be challenged on public law grounds by way of a judicial review, on the basis that they have been misinterpreted or irrationally applied. It follows that the Rules give former owners no rights, as such, which can be asserted

and protected by law. The most that a former owner has is a right to challenge by way of judicial review any decision by a disposing organisation in relation to the applicability of the Rules. Even a successful judicial review will not inevitably result in the land being offered back to the former owner, but only in the disposing organisation being required to remake the decision in accordance with the Rules. In all such instances the former owner needs to be aware that a transfer has occurred, and this will probably only be immediately apparent where the sale is conducted on the open market, and only then if it comes to the owner's attention. A disposing body which deems the Rules to be inapplicable is under no obligation to inform former owners that any such consideration has been made. Even where authorities do adopt the Crichel Down procedures, the nature of the searches (often needing to establish title over long periods and through poor quality records) involved means that often the presumption to ignore is strongly evident. As a last resort, where searches prove fruitless, some agencies do resort[47] to placing public notices in for instance, The Farmers' Weekly, the Estates Gazette and the London or Edinburgh Gazette, with a two-month period for owners to come forward. The public have no way of knowing whether this process has been conducted fairly or arbitrarily if at all.

There is an understandable if regrettable lack of understanding amongst practitioners in both the public and private sector and in government departments as to the precise status of the Rules and which set (if any) currently applies. It may be that this is somewhat overstated in the public sector in order to preserve flexibility in whether to apply the Rules or not- better to assume that they do not apply, than to assume that they do. There is a legitimate expectation from members of the public

[47] As is obligatory under Rule 20

that the Rules will be considered and followed where they apply, but the public have no way of knowing whether a department has made this consideration, unless they do decide to apply the Rules and offer back is deemed appropriate.

The Crichel Down Rules are not the only formal guidance that government and other bodies have to take account of when considering disposing of surplus land. Eighty-six percent of organisations responding to the DETR research had some form of written guidance on disposals, (see Table 2) sixty percent of which made some reference to the Rules. However, organisations' awareness of their own procedures was not always thorough- for instance over half of the health-related organisations incorrectly said that their particular guidance made no reference to Crichel Down procedures.

Complexity to the offer-back procedure is further added by the separate obligation placed on departments to follow the "Treasury Guidance on the disposal of assets"[48]. Whilst this makes rather obtuse reference to the Crichel Down Rules, it conflicts with them in several respects, particularly in the definition of 'value', adding confusion to the pricing of repurchases.

Table 2. Diposals Guidance

Organisation	Guidance
Ministry of Defence	Circular 38/1992: The disposal of surplus government land for the Defence Estates; Ministry of Defence - identifying and selling surplus property 1997/8;

[48] NAO, *supra* n 31

	Defence Estates Guide for MoD- Stages and procedures in disposal.
Environment Agency-	Estates Manual Volume 15
National Health service	Estate Management in the National Health Service 1988; Estate code 1995
Department of Transport	Acquisition, management and disposal of land and property purchased for road construction NAO 1994;
Commission for New Towns	Guidance note on disposal of land and built assets, disposal of land and assets NAO 1994-5;
Forest enterprise	Disposal of property- rules and procedures for offer-back to former owners and lessors
Highways Agency	Procedures manuals on land disposal
Local Authorities	Local Government Ombudsman (Disposal of land- guidance on good practise 5).

Often strict adherence to these supplementary rules and guidance notes takes precedence over the Crichel Down Rules and creates pressures which conceivably lead to conflict with them. From the perspective of the public purse, application of the Rules adds delay to the disposal process, increasing the time between declaration of a site as surplus and its final disposal by an average of seventeen months[49], with obvious public policy implications. Consequently there has developed a real and strong tension between meeting the requirements of the Rules, Treasury Guidance on

[49]DETR, *supra* n 4

disposal and the disposal targets of individual departments. This prompted previous research to conclude that the Rules are 'outmoded and counter-productive'[50].

In the light of previous comments, it is perhaps not surprising that an analysis of information on disposals revealed are a significant number of disposals where the land should have been offered back to former owners but was not. Of the three thousand two hundred disposals since 1954 where the Rules were known to apply, over half proceeded without any offer back.

The practise of selling land back subject to the department retaining a ransom strip or the inclusion of clawback clauses is liable to question on the grounds of ethics and equity. The original land purchase at market value would have included hope value not attributable to the scheme, but not any development value arising at a later date[51] It would seem inequitable therefore that clawback should be included at the time of repurchase by the former owner. Rather the purchase price should reflect any latent development value, as would a true open market transaction[52] It could be argued that these schemes reflect a lack of confidence in the external valuation.

The Rules do consider the effect on valuation of site fragmentation, that is the breaking up of a site into its original separate ownership entities. The obligation to offer land back does not apply where disposal is in respect of a site for development

[50] DETR, *supra* n 36

[51] Unless due under the Planning and Compensation Act 1991 section 66.

[52] G Sams, "Compensation in compulsory purchase: Revisions to procedures and miscellaneous matters" [1987] Journal of Valuation 5(4) pp 420 –426.

which comprises two or more previous land holdings and where there is a risk that the fragmented sale would realise substantially less than the best price that could be obtained for the site as a whole. However, there is no guidance on how the risk of achieving a lower aggregate sale price is to be assessed nor what degree of risk leads to exemption under the Rules. The preparation of fragmentation valuations is difficult, complex and open to question. Former owners can form consortia, to legitimately thwart such a fragmentation argument under the Rules, and many departments have argued that this is being abused by developers, with consequent delays and frustrations and with the result that best price has not always been obtained.

Many of the organisations questioned found the Rules to be an irritation rather than a central concern. Some organisations do have them firmly embedded in their disposal procedures (e.g. highways departments), others clearly do not actively consider their application unless and until contacted by a claimant, which from the public perspective is surely unacceptable.

IMPROVEMENTS

The DETR (2000) research recognised and explored a number of possible solutions to the identified problems surrounding the applicability and implementation, and overall fairness, of the current Rules. These varied from abandoning the rules altogether, through maintaining the status quo, to primary legislation.

Abandoning them altogether would run counter to the principle of fairness which currently underlies the Rules. There is a recognition that compulsory purchase is somehow 'unfair' – that unwillingly dispossessed owners do not get compensated for the compulsory nature of the acquisition, and that correspondingly they should be entitled to repurchase if the land ever becomes surplus. Any changes to the underlying ethos of no extra compensation being paid due to the purchase being compulsory would it is argued compromise the Crichel Down philosophy.

A number of organisations and individuals consulted in the research suggested a major shift in the operation of the Rules, whereby the emphasis is placed onto former owners, who would be required to register a wish to purchase at a future date. Such a move would require nationwide publicity in order to ensure fair implementation, and this would bring with it additional cost implications. However, non-awareness of the Rules is a huge issue even under the current regime. Both the National Farmers' Union and the Country Land and Business Association (CLA) recognise the need to make landowners aware of the existence of the offerback rules, whether or not they are changed.

If the Rules are therefore going to be retained in some form, there is an outstanding desire for them to be encapsulated in a single document, for example – 'Treasury Regulations on the disposal of surplus property- the Crichel Down Rules'. This would expressly supersede all previous guidance, so that there could be no confusion over which set of rules was currently in force. Primary legislation may be required to alert bodies to the applicability of the Rules. This would confirm clearly which bodies the Rules were to be applicable to. It is argued that the only equitable

solution is for the Rules to apply to all organisations for all land acquired by or under threat of compulsion. In essence they should apply to the land rather than the disposing body, and would be mandatory for all land acquired by bodies with compulsory purchase powers. Government should consider accompanying the legislation with a Practice Manual to guide departments on procedural matters.

The Rules (or Regulations, as they would be likely to become) should more carefully define the offerback procedure, and the exceptions to it. Terminology currently causing confusion, such as 'material change', 'surplus' and 'disposal' should be defined clearly and unambiguously. The debate over 'value' should be settled. A definition should be adopted with wider professional currency and in accordance with accepted convention. The practise of the retention of ransom strips or claw back clauses to protect future development values should be abandoned, except where it can clearly be shown that the former owner has already received consideration for subsequent development value.

A simplification of the Rules could be based on the principle that all land sales should be conducted by public auction (or by tender). It would be adequate under the new Rules for the disposing authority to take steps to trace former owners and notify them of the impending sale, and to advertise locally and nationally. Former owners would then be required to bid in order to secure the property, and the marketplace would in theory, find its own level. This procedure would not be without valuation problems however; where the former owner was a special purchaser, and no other third parties were interested, they could conceivably repurchase at a very low price at auction.

This would necessitate setting a reserve market valuation price, determined in advance by the District Valuer or by an appointed external valuer.

There is compelling argument for the application of a disputes procedure, by way of the Lands Tribunal with an attendant right to appeal. This may lead to yet more delay in the disposals process, and cost implications, but may be necessary to ensure that 'safe' decisions are made. The Lands Tribunal already deal with land price disputes, and it would seem logical to extend their jurisdiction to offer-back disputes.

In the recently published Green Paper, the DLTR make a number of recommendations for the procedures for the disposal of compulsorily acquired land[53]. Most importantly, in recognition that the Rules should be retained, but as a universally mandatory form, that there should be primary legislation defining the main principles, and secondary legislation incorporating the detailed rules.

The Green Paper proposes new legislation to introduce an appeals/arbitration mechanism, to be used additionally to settle disputes as to whether the Rules should apply to a particular disposal. Additionally the DLTR recognises that property negotiations are often lengthy, and propose increasing the time limits to eight months.

DLTR propose to retain the concept of applying the rules only where there has been no material change in character, retain the time horizon of 25 years along with the list of exceptions, and the continuance of clawback as a legitimate tool in the protection of the public purse.

[53] DETR, *supra* n. 5)

CONCLUSIONS

The Crichel Down Rules were introduced hastily by a resigning Minister, as the result of a parliamentary scandal, and were based on the findings of a public inquiry which has itself been the target of criticism. The rules have never been widely publicised, and have been the subject of numerous reviews and revisions, confusing their underlying philosophy and making their application increasingly uncertain. Running parallel to the Rules, and often overriding them or directly conflicting with them are guidance materials published by the Treasury and others. Additionally, many of the organisations to which the Rules apply have their own guidance on disposals which may or may not deal explicitly with how they are to interact with the Crichel Down Rules.

Consequently, there is much misunderstanding surrounding the issue of the offer-back procedures in practice, leading to inconsistent and often inappropriate application of the Rules. The transfer of powers and rights from public to private organisations has highlighted the shortcomings of the procedures, and has increased the opportunities for, at worst, outright abuse of the Rules, and at best, their application in a piecemeal and unaccounted manner. Examples of best practice do exist, as evidenced by Highways Authority disposals, but even here it is acknowledged that the procedure imposes costs and delays with the implication that the use of resources is sub-optimal.

The underlying philosophy remains relatively unchallenged, that there is a moral obligation, consequent on the compulsory nature of the original acquisition, to give former owners the pre-emptive right to re-acquire what was taken from them. The precise mechanics under which this principle operates, and the determination of the price at which the sale occurs are details which require a consistency of application and regulatory guidance in order to function fairly and predictably.

The current review of town and country planning and associated issues proposes a number of changes, in effect to the applicability and presentation of the Crichel Down Rules, rather than to their substance. The green paper implicitly acknowledges that the rules are not operating fairly or justly, and that they should be made mandatory and subject to primary legislation.