

UTILITIES, WAYLEAVES AND COMPENSATION

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1. There are variants on compulsory acquisition available to the utilities. Originally provided for public statutory authorities these variants have survived for certain new private statutory undertakers. These statutory powers enable a company to exercise a power to enter and use land or an interest in land without acquiring the title to that land. Some require compensation to be paid and others do not.
2. These powers will remain topical not only in the emerging solutions to our energy shortages but also because of the conflict between development and 'lost' or unrecorded underground services.
3. Notwithstanding the existence of such powers, outright compulsory purchase of land remains as an alternative option for the utility: more cumbersome to achieve but more certain in the long term. It is not always clear which is the cheaper option or why one is being used in preference to another.
4. What are the purposes for which these variant CPOs exist?

Electricity lines (wires and cables)
Telephone lines
Water and Sewerage
Gas
Pipelines

This paper considers what these powers are and then some recent developments in case law applicable to these variant CPOs for utilities:

- Compulsory purchase or wayleave?
- Implications of *Miller Homes Ltd v Yorkshire Electricity Distribution Limited* (2009) unreported;
- Compensation in the light of *Welford v EDF Energy Networks (LPN) Ltd.* [2007] EWCA Civ 293 (on appeal from LCA/30/2004).

The powers

5. The powers of the utility to use land for their purposes are as follows:
 - 5.1 Electric lines
 - 5.1.1 Electric lines are defined in s.64 of the Electricity Act 1989 as:
“any line which is used for carrying electricity for any purpose and includes, unless the context otherwise requires –
 - (a) any support for any such line, that is to say, any structure, pole or other thing in, on, by or from which any such line is or may be supported, carried or suspended;

- (b) any apparatus connected to any such line for the purpose of carrying electricity; and
- (c) any wire, cable, tube, pipe or other similar thing (including its casing or coating) which surrounds or supports, or is supported by, or is installed in close proximity to, or is supported, carried or suspended in association with, any such line.”

5.1.2 The right to place electric lines **on**, **under** or **over** any land, together with ancillary trenches, poles or pylons¹, may be **voluntary**, **implied** or **statutory**. They may be granted by **licence**; temporary **easement**; permanent easement; **interest in land** or creation of **new rights** under or over land.

5.1.3 To confuse matters, such rights are often referred to as wayleaves. It is entirely unclear what a wayleave is. An early mention, following on from Durham Court rolls of the C15th, of a wayleave is to be found in *Dand v Kingscote* (1840) 6 M&W 174. A C17th deed of land at Amble in Northumberland reserved the right of the grantor of:

“...all mines of coal within fields and territories of Amble together with sufficient wayleave and stayleave to and from the said mines and the liberty of sinking and digging such pit and pits.”

The owner subject to the burden of this reservation argued that:

“The term *stayleave*, according to the custom and the understanding of miners and other persons conversant with coal mines, means a right in the coal-owner of having a station where he may deposit his coals for the purposes of dispensing them to the purchaser.... *Wayleave* is the privilege of crossing land for the supply of coals to the purchaser. This privilege is generally the subject of detailed contracts, specifying the particular direction and extent of the wayleave, and there is no usage of or understanding amongst persons conversant with coal-mines, by which to interpret the extent of the privilege, when conferred in general terms used in the deeds...”

The term “wayleave” is used to describe a right of way *over the surface*, which shall leave the owner the full enjoyment of the soil, subject only to that easement....”

The Court held that this meant:

“a right to such a description of wayleave, and in such a direction as will be reasonably *sufficient* to enable the coal-owner to get, from time to time, all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such direction as is then convenient”. (p.198)

5.1.4 Voluntary wayleaves are contractual and not statutory agreements entered into by the utility and the land-owner or occupier whereby a contractual licence is granted. The terms may be agreed individually or by a standardised agreement and should be in writing.

5.1.5 Implied wayleaves are those deemed to have arisen by implication from the conduct of the utility and the land-owner/occupier. As a wayleave is a licence it does not run with the land and automatically lapses on change of land-owner. The successor

¹ Ancillary items are vital and were accepted in *CEGB v Jennaway* [1959] 1 WLR 937. That decision does not appear to be consistent with later authority: *Sovmots Investments v Sec. of State for the Environment* [1979] AC 144. The problem being that the right given is a right of occupation and not an interest in land *Newcastle-under-Lyme Corp. v Wolstanton Ltd.* [1947] Ch. 427 at 456-7; and that any expropriatory orders should not carry ancillary rights unless expressly mentioned.

will not be bound by any previous written licence but may be taken to have a new contractual licence implied from conduct or course of dealings such as acceptance of payments. Similarly, where a fixed term wayleave expires but the line is not removed a new wayleave may be implied from the continuation of the same course of dealings.

5.1.6 Statutory wayleaves are known as necessary wayleaves and arise under the provisions of Schedule 4 to the Electricity Act 1989. At the end of a voluntary or implied wayleave (i.e. on death of the original land-owner/occupier or transfer of land between companies or trusts) the land-owning successor may give the utility notice to remove its wires and ancillary infrastructure. The electricity licence holder must then apply for a necessary wayleave within three months under paragraph 8:

“8(1) This paragraph applies where at any time [a necessary wayleave]

...

- (a) is determined by the expiration of a period specified in the wayleave;
 - (b) is terminated by the owner or occupier of the land in accordance with a term contained in the wayleave
 - (c) by reason of a change in the ownership or occupation of the land after the granting of the wayleave, ceases to be binding on the owner or occupier of the land.
- (2) The owner or occupier of the land may –
- (a) in a case falling within paragraph (a) of sub-paragraph (1) above, at any time after or within three months before the end of the period specified in the wayleave;
 - (b) in a case falling within paragraph (b) of that sub-paragraph, at any time after the wayleave has been terminated by him; or
 - (c) in a case falling within paragraph (c) of that sub-paragraph, at any time after becoming the owner or occupier of the land by virtue of such a change in the ownership or occupation of the land as is mentioned in that paragraph,

give to the licence holder a notice requiring him to remove the electric line from the land; but the licence holder shall not be obliged to comply with such a notice except in the circumstances and to the extent provided by the following provisions of this paragraph.

- (3) Where within the period of three months beginning with the date of the notice under sub-paragraph (2) above the licence holder makes neither –
 - (a) an application for the grant of the necessary wayleave under paragraph 6 above; nor

- (b) an order authorising the compulsory purchase of the land made by virtue of paragraph 1 of Schedule 3 to this Act,

the licence holder shall comply with the notice at the end of that period.”

5.1.7 If the electricity licence holder wishes to continue to occupy the land it must make an application under paragraph 6 for a necessary wayleave within three months from the date of the notice. If such an application is made, then the licence will continue until the application is determined and thereafter if the decision is to grant the necessary wayleave. If no notice is served, continued presence of the wires after the three months will constitute a trespass and damages may accrue thereafter.

5.1.8 Where a necessary wayleave is granted there is provision for compensation:

“7(1) Where a wayleave is granted to a licence holder under paragraph 6 above –

- (a) the occupier of the land; and

- (b) where the occupier is not also the owner of the land, the owner,

may recover from the licence holder compensation in respect of the grant.”

That compensation may be recovered as a lump sum or periodic payment and is for damage to land or moveables and disturbance of their enjoyment. Any dispute is referable to the Lands Tribunal and ss. 2 and 4 of the Land Compensation Act 1961 will apply. (Sub-paragraphs 7(2) (3) and (4)).

5.1.9 The test for the grant of a necessary wayleave is whether it is necessary or expedient for the electricity licence holder to instal and keep installed an electric line on, under or over any land. Procedural and Legal Guidance for Applicants and Landowners and/or Occupiers was produced in September 2002 by the Secretary of State for Trade and Industry (now Business Enterprise and Regulatory Reform) for what they call (compulsory) wayleaves. This guidance applies, at para. 4.14, a second, non-statutory test of “what the effects are of the electric line on the use and enjoyment of the land in question”.

“Purpose and scope of the necessary wayleave hearing

4.14 The purpose of a necessary wayleave hearing is to hear evidence as to:

- (i) why it is necessary or expedient for the electric line to cross the particular land in question; and
- (ii) what the effects are of the electric line on the use and enjoyment of the land in question.

4.15 In scope, a necessary wayleave hearing is focused more on establishing the effect on private land interests, rather than matters of a more general planning nature that would be canvassed at a public inquiry. Accordingly, there is no right for third parties to appear and evidence may, at the request of the electricity company or owner and/or

occupier, be given in private. Thus, evidence that will be relevant at a necessary wayleave hearing is site specific, for example, the effect of the electric line in question on farming (crops and animals), on the use of machinery, on wild fauna and flora and, in the case of an overhead line, on the outlook from buildings situated on the land in question. Other relevant evidence is likely to be the cost of any suggestions for local diversions of the application route (typically up to a maximum of 500 metres either side of the existing/proposed route) and, in the case of an overhead line, the location of supports on the land in question.

4.16 Matters of a more general nature, such as the overall case for a new electric line and planning considerations that are not site-specific, such as alternative routes (beyond the 500 metres ‘zone’), will not normally be treated as appropriate for detailed discussion at the necessary wayleave hearing by the Inspector. Such matters are more properly considered at the separate **section 37 (of the 1989 Act)** development consent application stage, where local planning authorities and all those affected by a proposed electric line can make representations to the Secretary of State.

Hearings are governed by the Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 SI No. 450. The Guidance emphasises that the hearings are private and that there are no rights of audience for third parties and that there is no power to award costs.

5.1.10 Powers exist which authorise an electricity-licence holder to compulsorily acquire any land which is required for any purpose connected with the carrying on of the activities authorised by its licence (section 10 and Schedule 3 of the Electricity Act 1989). Land includes any right over land and the power to acquire includes the power to create new rights as well as acquiring existing rights. The powers are wide enough to include wayleaves, licences and easements as well as the ground itself.

5.1.11 Part II of Schedule 3 refers questions of compensation to the Lands Tribunal.

5.1.12 There is some evidence that the Department considers that a CPO can only be sought as a last resort after failure to obtain a voluntary or necessary wayleave. There is no basis for such an approach in the statute or in the practice adopted by electricity licence holders, provided that the land is required for the applicant’s authorised activities. It was established in Sharkey v Secretary of State for the Environment (1991) 63 P&CR 332 that when assessing whether land is “*required*”:

“... the local authority do not have to go as far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose: or, to use another similar expression, that it is essential. On the other hand, I do not find the word ‘desirable’ satisfactory, because it could be mistaken for ‘convenient’, which clearly, in my judgment, is not sufficient. I believe the word ‘required’ here means ‘necessary in the circumstances of the case’. [at p.340].

ODPM Circular 06/04 provides at paragraph 17 that:

“A compulsory purchase order should only be made where there is a compelling case in the public interest.

That test would also apply to a CPO under the Electricity Act 1989.

5.2 Telephone lines etc.

5.2.1 The Telecommunications Act 1984 section 10 and Schedule 2 provided a Telecommunications Code. That Schedule is incorporated within the Communications Act 2003 by section 106 as the Electronic Communications Code and with some amendments set out in Sch. 3 to the 2003 Act. The Code contains provisions for obtaining what are in effect ‘compulsory’ agreements or variant CPOs.

5.2.2 The Code provides for:

- i) agreements conferring rights to execute works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or to keep such apparatus installed on, under or over that land; or to enter and inspect any apparatus, to be obtained in writing from the occupier of the land;
- ii) the owner or lessee who is not the occupier is not to be bound generally by an agreement entered into by the occupier unless also a signatory;
- iii) the rights to be exercisable only in accordance with the written agreement;
- iv) the rights obtained are not registerable land charges or interests;
- v) the agreement will contain the terms which will be deemed to be done in the exercise of statutory powers.

5.2.3 The Code restricts the ability of an owner or lessee entitled to call for the removal of the apparatus to do so. Para. 21 requires him to give notice. If the undertaker serves a counter-notice then removal can only be enforced under a court order. The court will examine what steps the undertaker is taking to secure the rights previously enjoyed and the timetable for obtaining such rights. As a result of this restriction on removal, compensation for any depreciation that para. 21 causes to the value of the land is payable to the owner or lessee at the time the right is conferred (para. 4(4)). Disputes as to entitlement or amount of compensation are referable to the Lands Tribunal (para. 4(6)). Detailed provisions are set out for the assessment of compensation in para. 4 (7)-(10).

5.2.4 Where the undertaker requires any person to agree that any right should be conferred on him (para. 5) or retained (para. 6), he may give notice of the right and of the agreement that he requires. When 28 days has elapsed without the recipient entering into the required agreement the undertaker may apply for a court order conferring the proposed right. The Court will need to be satisfied that any prejudice is capable of being compensated for by money and that the benefit secured to the undertaker outweighs that prejudice. The application may be made by the undertaker to a County Court. The Court fixes the compensation payable on such terms as appear to be fair and reasonable if the agreement had been given willingly (para. 7). In *Mercury Communications Ltd v London & India Dock Investments Ltd* [1994] EGLR 229 the County Court held that this involves an element of subjective judgment; that compulsory purchase principles (including *Pointe Gourde*) were not applicable; that a ransom value approach was inappropriate; and that industry agreed formulae for agricultural land were of no assistance to urban land and did not represent the bargaining power of grantors. The Court used evidence from two comparable agreements.

5.2.5 The Code also provides a power to fly lines (para. 10). Where apparatus (including supports and lines) is kept installed on land, the undertaker has the right to install and keep installed lines which:

- i) pass over other land adjacent to or within the vicinity of the land on which the apparatus is kept;
- ii) are connected to that apparatus; and
- iii) are more than 3m above the land and are more than 2 m from any building on the land over which they are to pass.
- iv) do not require any apparatus to support them on the land over which they are to pass;
- v) do not interfere with any business on the land over which they are to pass.

Provision is made for objection to the Court and for obtaining compensation for injurious affection, as if under s.10 of the Compulsory Purchase Act 1965, by paras. 16 and 17.

5.2.6 The Communications Act 2003, section 118 and Sch. 4, para. 3(3) give an undertaker powers of compulsory acquisition of land, or of an easement or other right over land by the creation of a new right. The test is that the interest be required:

- (i) for or in connection with the establishment or running of the operator's network; or
- (ii) as to which it can reasonably be foreseen that it will be so required.

In contrast to the legislation applicable to other utilities and to the provisions of the Code, the Act does not provide any express compensation provisions to be applied upon confirmation of a CPO. Accordingly, section 1 of the Land Compensation Act 1961 refers the determination to the Lands Tribunal for determination on normal compulsory purchase principles.

5.3 Water and Sewerage

5.3.1 Under the Water Resources Act 1991 the Environment Agency may lay resource mains or discharge pipes above and below the surface of any street (WRA s.159) or of any land that is not a street (WRA s.160) and may keep its main or pipe there; carry out works to inspect, maintain, adjust, repair or alter them; and carry out any further works requisite for or incidental to the purposes of any of those pipes or works.

5.3.2 Under the Water Industry Act 1991 a water undertaker may lay:

- i) water mains; resource mains; or discharge pipes; and
- ii) service pipes but only where there already is a service pipe where the new pipe is to be laid or where required to lay a service pipe to make a domestic connection under s.46;

and a sewerage authority may lay:

- i) any sewer or disposal main; or
- ii) various lateral drains

above and below the surface of any street (WIA s.158) or of any land that is not a street (WIA s.159) and may keep its pipes there; carry out works to inspect, maintain, adjust, repair or alter them; and carry out any further works requisite for or incidental to the purposes of any of those pipes or works.

5.3.3 WRC Section 177 and Schedule 21 and WIA Section 180 and Schedule 12 provide for compensation for the exercise by the undertakers of their powers to enter and lay relevant pipes under sections 159 to 167 of the WRC Act 1991 and 158 and 159 of the WIA 1991 Act:

- For pipes in streets the obligation is to do as little damage as possible and to pay for any loss or damage done with disagreements being referred to arbitration (WRC Sch. 21 para. 1 and WIA Sch.12, para.1).
- For pipes under other land compensation is to be paid for the value of any depreciation to the interest in land; for any additional damage and disturbance from the works; and for any injurious affection of any other land (WRC Sch. 21 para. 2 and WIA Sch.12, para. 2). Any question of disputed compensation is referable to the Lands Tribunal (WRC Sch.21, para.3 and WIA Sch. 12, para. 3).

5.3.4 Both the Environment Agency and the Water and Sewerage undertakers also have powers of compulsory purchase of any land or new interests or rights to be created over land (or extinguishment of existing rights or interests) which are required for the purposes of or in connection with the carrying out of their functions (s. 154 Water Resources Act 1991 and s.155 Water Industry Act 1991 respectively). Under both Acts and in each case questions of compensation are referable to the Lands Tribunal.

5.3.5 In addition the EA and each undertaker has powers to obtain compulsory works orders under WRC s.168 and Sch.19 and WIA s.167 and Sch.11.

5.4 Gas

5.4.1 There is no variant CPO power for a Gas utility. The choice is either a voluntary agreement or a full CPO.

5.4.2 The Gas Act 1995 incorporates the Gas Act 1986. Section 9(3) and Schedule 3 of the 1986 Act provide for the compulsory acquisition of any land or of any right over any such land or other land for the purposes of developing and maintaining:

- i) an efficient and economical pipe-line system for the conveyance of gas; and, on request, to connect to that system:
- ii) (a) another pipe-line system operated by an authorised transporter or
 - (b) a system to convey gas to any premises.

5.4.3 There is no specific guidance as to the determination or quantification of compensation. Section 1 of the Lands Compensation Act 1961 applies.

5.5 Pipelines

5.5.1 The Pipe-lines Act 1972 introduces yet another variant CPO known as a “compulsory rights order”. Under Section 12 the Secretary of State may make an order permitting a person to execute works for the placing in land of a pipe-line; for the use of that pipe-line; and for any other necessary works. The order may be conditional and may contain such ancillary rights as are listed in Sch. 4. The order enures for the benefit of the pipe-line owner but may be revoked by the Secretary of State.

5.5.2 Schedule 2, Part I, as modified by Part II, sets out the procedure for confirmation of a compulsory rights order. Compensation is payable for depreciation and damage (s.14) but the determination of disputes is not specified. Despite the distinction between a Compulsory Purchase Order and a Compulsory Rights Order in the Act, it is arguable that both fall within s.1 of the Land Compensation Act 1961.

5.5.3 A significant constraint on a compulsory right order is that it requires confirmation by special parliamentary procedure (s.12(7)).

5.5.4 Section 11 and Schedule 2, Part 1 provide for the compulsory acquisition of land for a pipe-line. It too is subject to special parliamentary procedure. Section 1 of the Land Compensation Act 1961 applies and compensation is determinable by the Lands Tribunal subject to the 1972 Act, Third Schedule.

Compulsory purchase or wayleave?

6. The question might refer to either:

- i) why is there such confused nomenclature over the variant CPOs? or
- ii) which route is preferable?

6.1 The nomenclature is difficult. Only electricity rights seem to be referred to regularly as wayleaves despite the minerals origin of that term. The almost total duplication of a CPO by a CRO (compulsory rights order) in the Pipe-lines Act 1962 probably owes its origin to the fact that it pre-dated the introduction of other powers to acquire new rights.

6.1.1 It might be arguable that there is no need for anything other than a CPO now that new rights can be acquired. No rational explanation has been discovered during reviews of the legislation for the variation between the CPO variants. There can be no reason for not adopting a uniform approach with one body determining compensation on a standard basis.

6.1.2 At the very least, the hypocrisy of the “compulsory agreement” for telecommunications, seems deliberately misleading.

6.2 The first and most obvious case where a CPO is to be preferred is where the necessary wayleave application relates to a new electric line on or over (but not under) land where a dwelling already covers that land or where valid planning permission exists for a dwelling to be constructed. The Secretary of State is precluded by legislation from granting a necessary wayleave in such circumstances unless the new line is to be placed underground (see paragraph 6(4) of Schedule 4 to the Electricity Act 1989). The same constraint does not apply where the application for the grant of a necessary wayleave relates to an existing electric line. This interpretation has been upheld by the High Court (see *R v Secretary of State for Trade and Industry, ex parte Wolf* (2000) 79 P&CR 299).

6.2.1 The most obvious case where rights are sought rather than a CPO concerns sewerage and water undertakers who may CPO land for treatment works but use their parallel powers under the 1991 WIA Act for the pipes linking into those works. There is no incentive for them to engage in the costly and uncertain procedures of the CPO when, unlike electricity wayleaves, the rights obtained under the statute are automatically granted, with only 3 months notice being required to be given for a new pipe or 2 months for an alteration and the rights are not time-limited or determinable.

6.2.2 It is unclear why water, sewerage and communications undertakers have greater powers than electricity undertakers; or why Gas transporters have no alternative to a CPO. Nor is there any obvious reason why pipe-lines undertakings are subject to special parliamentary procedures when, normally, no other undertaking has a similar constraint.

- 6.3 The rights acquired also differ. Easements are perpetual and wayleaves are terminable. However, it is often unclear whether an easement can actually be obtained since the dominant tenement, which must be benefited, is unclear or remote. For example, in *Swindon Waterworks Company Ltd v the Proprietors of the Wiltshire and Berkshire Canal Navigation Company* (1875) LR 7 HL 697 at p.705 it was said that the use of land for the purpose of abstracting water which is to be supplied to consumers elsewhere is not for the sake of the (dominant) tenement where the abstraction occurs but so that the owner of that tenement may make gains by alienating the water to other parties who have no connection whatever with any part of the stream. In *Stockport Water Company v Potter* (1864) 3 H&C 300 it was said that if waterworks could be considered a dominant tenement every house in Stockport to which the water flowed through the pipes might equally be so. These old cases might be past their sell-by date² and could be said not to be relevant to the current world but it has been questioned more recently whether there is a dominant tenement identifiable and benefited by a pipe-line proposal. It would be unsafe to rely upon voluntary deeds of grant of easements in such cases.
- 6.4 Licences have their own weaknesses. Any utility is at the mercy of a company reorganisation by a licensor. Without any obligation for either the old or the new licensor to notify the licensee, the licensee becomes a trespasser on an unknown date. Failure to take prompt action upon (albeit in some cases suspended until receipt of a notice) renders him liable in trespass and, in the case of electricity undertakers, precluded from promoting a CPO to retain his infrastructure.
- 6.5 From the perspective of the acquiring authorities one would expect a degree of confidence in the future and a preference for a perpetual certainty. From the landowner there might be a hope that things might change in the future either to justify ridding the land of its encumbrance or to bring higher financial compensation or, possibly, to trip up the statutory undertaker.
- 6.6 The answer why the electricity industry has not traditionally gone straight to the CPO may well lie in the paternalistic approach of true nationalised statutory undertakers like the CEA and CEGB. In 1988, in the run up to privatisation of the electricity industry, the CEGB still had an unwritten policy that it did not use its CPO powers. Although the new undertakers do not have such historical baggage, old habits die hard.
- 6.7 Why enter into voluntary variants such as wayleaves?
- terms can be crafted to the particular site
 - goodwill might be retained
 - speedier and cheaper resolution is a possibility
 - the length of the period before termination is negotiable
 - compensation can be adjusted to reflect the urgency
- 6.8 Why enter into a CPO?
- the period before termination may be longer

² See *Re Salvin's Indenture* [1938] 2 All ER 498.

- resolution may act as a helpful precedent
- withdrawal of objections more likely
- compensation may be less generous

6.9 By way of example, it is the Secretary of State's policy that, if, after considering an Inspector's report and recommendations he decides to grant an electricity undertaker a necessary wayleave, he will usually grant it subject to a condition that it may only be terminated after 15 years. Unlike voluntary wayleaves, necessary or compulsory wayleaves which have been granted by the Secretary of State are binding on successive owners and/or occupiers for the duration of the specified period during which no notice to terminate can be served (paragraph 6(6)(b) of Schedule 4 to the 1989 Act). It is expressed to be the Department's considered view that a 15 year term represents an equitable period which provides a balance between offering an electricity company a degree of certainty for the installation of apparatus whilst still affording the landowner the opportunity of having the position reviewed in the light of subsequent changes in circumstances and the local environment. Parties who consider that the necessary wayleave in question should be of a shorter or longer term should give their reasons as part of their evidence and should explain why a different period would be more appropriate in the particular circumstances.

6.10 Without a rationalisation of the variant CPOs, it is not possible to say that one course is always better than another. Equally, as between undertaker and land owner or occupier it is not possible to say that one course or another always suits one or the other or both. For the future, it might be that some form of rationalisation could be combined with or incorporate alternative dispute resolution which is, after all, now recognised as an aspirational preliminary stage towards obtaining a CPO (Circular 06/04 para. 26).

Implications of Miller Homes Ltd v Yorkshire Electricity Distribution Limited

7. The circumstances of this case in Leeds highlight:

- i) the precarious nature of wayleaves;
- ii) the need for utilities to keep accurate and up to date records; and
- iii) an immediate requirement, irrespective of any negotiations, to serve notices on the Secretary of State requiring a necessary wayleave under Sch. 4 para. 6 on receipt of any letter suggesting termination following change of ownership or occupation.

7.1 Unbeknown to the Electricity Undertaker, it owned four 33kV cables and other apparatus beneath the surface of Yarn Street, Leeds. These, it transpired, provided strategic supplies to some 26,300 customers, including a Foundry. In addition these Cables provide security of supply (i.e. back-up supply) to a further 95,800 customers in Leeds. Matters proceeded in the following way:

- 21st December 2006 the property developer took a transfer of the development site which was registered on 9th January 2007;

- 19th January 2007 a letter was received from the developer's agent referring to the termination of "any existing wayleaves or any other agreement" under schedule 4 of the 1989 Act³;
- Neither party could locate any wayleave agreements at that time. The Undertaker questioned what land of the developer the wayleaves crossed;
- Correspondence continued during May 2007 with the developer suggesting the agreement of an easement or requesting a wayleave hearing;
- On 10th July 2007 the Undertaker received a letter stating that, as no application had been made to the Secretary of State for a necessary wayleave under Schedule 4 of the Electricity Act 1989, the Defendant intended to commence proceedings for the removal of the apparatus;
- An agreement for a wayleave dated 1960 was subsequently produced by the developer. It had not passed through the various transformations of the Electricity Industry to the present Undertaker. Wayleaves are not registrable as land charges;
- Proceedings for trespass, breach of statutory duty and damages were then commenced;
- The Undertaker undertook to remove the cables by 1st April 2009.

7.2 The Judge held that the Undertaker could not resist liability for damages (period and amount to be assessed).

7.3 The relevance of the case concerns the procedural elements behind the decision rather than the decision itself. These stem from Schedule 4, para. 8 of the Electricity Act 1989:

"8(1) This paragraph applies where at any time [a necessary wayleave granted by agreement ...] ...

(b) is terminated by the owner or occupier of the land in accordance with a term contained in the wayleave

(c) by reason of a change in the ownership or occupation of the land after the granting of the wayleave, ceases to be binding on the owner or occupier of the land.

(2) The owner or occupier of the land may –

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"We act for Miller Homes Limited, the freehold owner of the land shown edged red on the enclosed plan. The land is affected by electricity lines and distribution apparatus owned and operated by your company. We are instructed to serve notice on you to terminate any existing wayleaves or any other agreement. If any wayleaves or any other agreements are not binding on the existing freehold site owners, then please accept this letter as a notice to remove the electricity lines and distribution apparatus from the land. This notice is given under schedule 4 of the Electricity Act 1989. Please acknowledge receipt of this notice.

Yours faithfully ..."

- (b) in a case falling within paragraph (b) of that sub-paragraph, at any time after the wayleave has been terminated by him....
- (c) ...at any time after becoming the owner or occupier of the land by virtue of such a change in the ownership or occupation of the land

give to the licence holder a notice requiring him to remove the electric line from the land; but the licence holder shall not be obliged to comply with such a notice except in the circumstances and to the extent provided by the following provisions of this paragraph.

- (3) Where within the period of three months beginning with the date of the notice under sub-paragraph (2) above the licence holder makes neither –
- (a) an application for the grant of the necessary wayleave under paragraph 6 above; nor
- (b) an order authorising the compulsory purchase of the land made by virtue of paragraph 1 of Schedule 3 to this Act,

the licence holder shall comply with the notice at the end of that period.”

7.4 Under 8 (1)(b), (2)(b) and (3) there is a two-stage process⁴ which applies where there is an express wayleave recorded in an Agreement.

- The first stage ((1)(b)) is to determine the Agreement in accordance with its terms (the terms are likely to be specified in months i.e. 6 months).
- The second stage ((2)(b)) is to serve a further notice requiring removal of the cables at some point after termination of the Agreement and giving the undertaker 3 months from service of that second notice ((3)) within which it has the right to seek a necessary wayleave from the Secretary of State.

This is a re-enactment of the provision of section 11 of the Electricity (Supply) Act 1922.

7.5 Under 8 (1)(c), (2)(c) and (3) there is only a single-stage procedure. Notwithstanding the existence of a deed of grant, upon any change of ownership or occupation of the land the wayleave ceases to be binding on the owner or occupier of the land. In such a case:

- The single-stage ((2)(c)) at any point after change of owner or occupier is to serve a notice requiring removal of the cables and giving the undertaker 3 months from service of that single notice ((3)) within which the undertaker has the right to seek a necessary wayleave from the Secretary of State.

7.6 This appears to contrast with the position before 1989 when any agreement would continue to apply upon the terms of the Agreement, after termination upon change of occupier, until determined in accordance with the Agreement (s.11 Electricity

⁴ See Guidance Note, Secretary of State for Trade and Industry (September 2002), para. 3.6

(Supply) Act 1922). There remains some uncertainty now as to the status of the wayleave after change of ownership and before notice is served. In “Electricity Wayleaves Easements and Consents” 2007 it is stated at p. 68 that:

“8.6 Temporary continuation of wayleaves

Finally, we need to consider the nature of the wayleave **implied** by paragraph 8 of schedule 4 to the Act. As explained above, the mere termination of a wayleave does not automatically require a licence-holder to remove the electric line from the land. There are further processes which have to be completed before an obligation to remove arises. During that period, paragraph 8 of schedule 4 to the Act provides that notwithstanding the termination of the express or implied voluntary wayleave by notice of expiration of the term (or in express cases only change of ownership) a wayleave will be **deemed** to continue on the same terms and conditions as previously unless and until the process as described ...[under schedule 4, paras 6 and 8] has been completed.”
[emphasis added]

The authors would appear to agree that the statute has not re-enacted section 11 of the 1922 Act and therefore they consider it necessary to fill the deficit by an “implied” wayleave which is then described as a “deemed” wayleave. It also says that the paragraph provides that a wayleave will be deemed. However, I am unsure what words in the paragraph say this. If there is a deemed wayleave on the original terms surviving change of ownership, why would a specified period for termination not be deemed to continue to apply and why should application for a necessary wayleave have to be made within (and often well within) that period specified period, assuming the specified period to be more than 3 months?

- 7.7 Interesting though such points may be, the lesson from this case is that it confirms that an undertaker should consider itself at risk from a letter, however phrased, seeking to terminate a wayleave upon change of owner or occupier. The undertaker cannot rely upon the terms of the Agreement because, by the nature of a wayleave, termination is instantaneous on the change. It would appear that a change can be engineered by simple transfer between parties or companies. A prudent undertaker cannot risk negotiating but must seek a necessary wayleave immediately. In effect, the undertaker should always make a ‘holding’ application. Such a bureaucratic approach could be said to arise from an apparent error in the re-enactment of the law during privatisation. In fact it is a result of the uncertain nature of a wayleave and the vulnerability of contractual licence. It is another reason why utilities might prefer permanent arrangements such as CPOs.

Compensation in the light of *Welford v EDF Energy Networks (LPN) Ltd*

8. The basis for compensation will depend upon whether the claim arises under a statutory right or under a voluntary agreement: *Christian Salvesen (Properties) Ltd v CEGB* (1984) 48 P&CR 465; *Mayclose Ltd v CEGB* [1987] 2 EGLR 18. The case of *Welford* is the most recent case to consider compensation payable for wayleaves.
- 8.1 It concerned claims made by two individuals and a Skip Hire Company against a licensed electricity distributor. A number of underground electricity cables crossed a

site which the individual Claimants had purchased with the intention of using it as a waste transfer station. The site was purchased without knowledge of the cables. After their discovery in July 1995, the Claimants gave notice requiring their removal on 12th September 1995. The electricity company applied for and obtained statutory wayleaves allowing for the retention of the cables. Compensation was claimed:

- i) under Sch 4, para 7 of the Electricity Act 1989 in respect of the wayleaves granted in August 1998; and
- ii) under an arbitration agreement referring the assessment of damages, if any, arising between the notice to remove of 12th Sept. 1995 and the grant of the wayleave on 17th August 1998 from the High Court to the Lands Tribunal for determination⁵.

8.2 The issues arose from the inability of the Claimants to build a waste transfer handling building on the site because of the presence of the cables.

8.3 The Lands Tribunal gave an interim decision on 10th March 2006. That decided:

- i) Whilst Sch. 3 to the 1989 Act (grant of a statutory easement) applies the provisions relating to the compulsory purchase of land (such as market value of the interest acquired, injurious affection of the land retained, disturbance or other loss not directly based on the value of the land) Sch. 4 makes no mention of market value or injurious affection. Compensation for a wayleave is simply “compensation in respect of the grant” and makes provision for damage and disturbance in terms owing nothing to the compulsory purchase code (para. 43).
- ii) Compensation for a wayleave covers (para. 44):
 - a) the value of the wayleave;
 - b) any consequential diminution in the value of the claimants’ land (being all of the land held at the valuation date irrespective of the area over which the wayleave was granted) but limited to 15 years since any further wayleave thereafter would be subject to a fresh claim (para.96); and
 - c) disturbance including loss of profit, tested against causation, remoteness and reasonableness.
- iii) Compensation for loss of profits was not reflected in the award for the diminution of the value in land in this case because the diminution in value excluded any premium value for use of the site as a waste transfer station (paras. 90-95). That was included instead under loss of profit (upheld by the Court of Appeal).
- iv) Since the compensation for a disturbance by a wayleave is effectively the same as for disturbance compensation for compulsory purchase, loss of profit could include prospective use for a business not yet commenced if enforcement action was not envisaged in respect of a use for which there was no planning

⁵ In contrast, no such agreement was reached in the *Miller Homes* case.

permission (para. 47). The Court of Appeal upheld this conclusion because it is the coming into existence of the business and the investment in relation to the land that is sufficient, even though the land is not yet being used for the business (para. 31).

- 8.4 The Tribunal proceeded to a further decision [2009] RVR 10 on the question of the amount of compensation payable to the company for loss of profits. Detailed valuation points of importance were considered.
- 8.5 The Welford decisions provide a useful and contemporary insight into the approach that the Lands Tribunal is likely to take to compensation claims in respect of wayleaves:
- i) the precarious nature of the arrangements under which high voltage cables have been laid over the years;
 - ii) the difficulty of finding out where underground cables are since they are not registrable as local land charges or revealed by local searches; and are often not properly recorded;
 - iii) the problem for utilities in estimating or anticipating a disturbance claim.

Conclusion

9. The DETR Report entitled “Fundamental review of the laws and procedures relating to compulsory purchase and compensation” July 2000 concluded:

“While accepting that there may be a case for some differences in the procedures appropriate for obtaining compulsory powers of access for different types or scales of installation, the group was not convinced that there was any real advantage in retaining different procedures for similar types or scales of installation by different suppliers. Nor could we see any logic in retaining the current approach whereby wayleaves and easements seem to be being used interchangeably for the same ends....

“...we consider that the fairest approach to compensation would be to devise a single code which could also provide a useful guide for voluntary agreements. We can see no reason, and heard no argument, against basing the assessment of compensation on the same principles of equivalence as those which we have confirmed in this report as providing the best approach to compensation for the compulsory purchase of land ... “

Nothing has changed or happened since.

10. The continuing absence of uniformity means that no general conclusions can be drawn across the board. However, two points emerge: firstly, that the nature and meaning of a wayleave or other licence is uncertain and the availability of an easement cannot be assumed; secondly, that where compensation comes before the Lands Tribunal rather than the Courts, the Tribunal will strive to find parallels with CPO compensation principle if possible. The significance and effect of these two points may differ as between utility and landowner or occupier.

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18th April 2009

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