



A legal guide to easements

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A legal guide to easements



Introduction to easements

- ▶ A right benefiting one piece of land (the "Dominant Land") which is enjoyed over another piece of land owned by somebody else (the "Servient Land").
- ▶ Most common example is a right of way.
- ▶ Relevant examples: right to oversail with cables; right to lay a pipe.
- ▶ A "proprietary right" which remains binding even if subject land is sold.
- ▶ A utility company does not have to have Dominant Land in the traditional sense to benefit from an easement. The Dominant Land can be "the undertaking" of the utility company.
- ▶ An easement can be permanent or for a specified term of years.

A legal guide to easements



Introduction to wayleaves

- ▶ An agreement under which a landowner grants permission to a utility company to use land for specified activities.
- ▶ Relevant example: right to install, access and maintain a pylon.
- ▶ A form of contractual licence, but not a proprietary right.
- ▶ Not binding on successors in title.
- ▶ Usual wayleave provisions include a specified term, the parties' respective rights, termination provisions and an agreed annual licence fee.

Introduction to utility companies



- ▶ Key utilities for this talk are electricity, water and gas (telecoms could be the subject of an entirely separate talk!).
- ▶ All of the industries were privatised in the 80's.
- ▶ Comprised of private companies with regional monopolies, apart from NGET which has a national network for electricity and gas transmission.
- ▶ The utility companies are the statutory successors of the nationalised entities – for the purposes of their rights in land, they are the "same" entity.
- ▶ They are all regulated businesses, regulated by OFGEM and OFWAT with other supervision by DBEIS (Department of Business, Energy and Industrial Strategy)
- ▶ Although they exercise some statutory powers and are under statutory duties, they are not public bodies.
 - ▶ For example, the companies are under a statutory obligation to efficiently maintain and operate their networks. Often leading to the reinforcement of, and additions to, the relevant network.

Statutory rights of utility companies



Electricity Act 1989

- ▶ Confers on DNOs statutory rights over privately owned land, including:
 - Right to enter land to replace, repair or alter lines or plant.
 - Right to compulsorily purchase land.
 - Right to obtain a necessary wayleave.

Statutory rights of utility companies



Water Industry Act 1991

- ▶ Confers on water suppliers statutory rights over privately owned land, including:
 - Right to lay a water pipe above or below ground.
 - Right to enter land to maintain, adjust, repair or alter a pipe.
 - Right to compulsorily purchase land.

Statutory rights of utility companies



Gas Act 1986

- ▶ Confers on Gas Transporters a statutory right to compulsorily purchase private land.
- ▶ GA 1986 specifically states that it does not provide a Gas Transporter with rights to:
 - "lay down or place any pipe or other works into, through or against any building or in any land not dedicated to public use".*

Statutory rights of utility companies



Compulsory purchase

- ▶ Used where direct negotiation with a private land owner has not been successful, or alongside direct negotiations, as a fall back.
- ▶ Utility company has the power to compulsorily acquire land for the purposes of carrying out its statutory function.
- ▶ Right to compulsorily acquire land includes right to:
 - Acquire an interest in the land;
 - Acquire an existing right over the land;
 - Create a new right or interest in the land (such as an easement).

Statutory rights of utility companies



Compulsory purchase

- ▶ The compulsory purchase process is governed by (1) the enabling statute (i.e. the EA 1989) and (2) the Acquisition of Land Act 1981.
- ▶ Process requires the utility company to:
 - Demonstrate to the Secretary of State that the acquisition is justified (this requires a "need" case to be established, and the wider "public interest" test to be satisfied);
 - Identify all land interests that will be affected and serve statutory notices on the owners of those land interests;
 - Publicise the proposed Compulsory Purchase Order;
 - Pay compensation to the land owners affected by the Order.

Utility companies' use of easements



This varies between the different industries:

Water

- ▶ Mainly rely on pipe laying powers – no need for land rights
- ▶ Will sometimes take easements

Gas

- ▶ Apparatus is mainly held on easements
- ▶ Often obtained via CPO

Electricity

- ▶ More often land rights are obtained by negotiation.
- ▶ Will sometimes use wayleaves rather than easements
- ▶ If compulsory powers are required, can resort to necessary wayleave rather than CPO

All of the utilities also have Street Works powers and can work under the Street Works Code. These powers extend to ALL streets, not just highway

Acquiring easements



By negotiation:

- ▶ Utility companies will have their own precedent documents for various situations. Most are variations on a theme and there will be little scope for negotiation.
- ▶ However, points to consider and negotiate are:
 - ▶ The consideration
 - ▶ The length of term, or a freehold right
 - ▶ The extent of the rights and particularly the width of easement strips
 - ▶ Restrictive covenants (often constrained, as with easement strips by safety regulations)
 - ▶ "Lift and shift" or compensation provisions for potential future planning permissions – although not an option on major linear projects
 - ▶ The types of easement being acquired – beware(!)

Acquiring easements



By compulsory acquisition

- ▶ Compulsory Purchase Order (CPO) / Development Consent Order (DCO)
- ▶ Both temporary and permanent rights
- ▶ Sweeping up the unknowns
- ▶ Setting the parameters for the voluntary 'deal'

The common hybrid

- ▶ Utility companies are no longer afraid of their statutory powers and the key outcomes are (i) certainty and (ii) project security.
- ▶ A case study: the Bicester to Claydon Connection Project
 - ▶ 18 km of underground cable between Bicester to East Claydon
 - ▶ c.30 landowners plus tenants
 - ▶ outcome

Interference with easements



- ▶ Interference must be of a substantial nature to be actionable.
- ▶ Must be shown that the right cannot be exercised as easily as before.
- ▶ Gives rise to a claim in private nuisance.
- ▶ Remedies:
 - Declaratory relief
 - Injunction
 - Damages
 - Abatement (i.e. self help)
- ▶ No claim in trespass.

Interference with easements



Rights of way

- ▶ Caselaw examples of interference with a right of way by the servient owner:
 - Building on the right of way, thereby narrowing it;
 - Ploughing up a right of way, so it is less easy to use;
 - Erecting a building over a right of way, making it a 10ft high tunnel;
 - Altering the route of the right of way without consent (no defence to offer suitable alternative route).
- ▶ Absent an express covenant:
 - Neither the servient nor dominant owner obliged to maintain the way;
 - But either are entitled to do so at own cost.

Interference with easements



Gates and locks

- ▶ Regular disputes arise about the placement of gates (with or without locks) over a right of way.
- ▶ Does the gate or lock constitute a substantial interference?
 - Several gates over a short route may;
 - One gate over the same route may not.
- ▶ The Court has held that locked gates or doors do not necessarily constitute a substantial interference.
 - Depends whether the right can be "*practically and substantially exercised as conveniently*" as before.
- ▶ In two recent cases concerning electric gates, the Court held:
 - Replacing a manual gate with a button operated electric gate is not a substantial interference;
 - Erecting a gate controlled by a fob or key code is.

Interference with easements



Pipes, drains and cables

- ▶ Useful caselaw (though beware of undertaker's statutory rights):
 - Difference between a right to lay/install and a right to pass a flow or current. Absent the latter, the right to lay/install useless;
 - Dominant owner is entitled to enter the servient tenement to clear or repair pipes or drains;
 - If a servient owner builds over a pipe or cable, interfering with the dominant access for repairs, he may be ordered to remove the works;
 - A servient owner is under no obligation to ensure a supply, but is obliged not to take any positive steps to prevent water or electricity entering his property, or passing over it.