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The overriding power

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Legislation:

Housing and Planning Act 2016 (c.22) s.203

Town and Country Planning Act 1990 (c.8) s.237

Cases:

R. v City of London Corp Ex p. Mystery of the Barbers of London (1997) 73 P. & C.R. 59; Times, June 28, 1996 (QBD)

R. v Leeds City Council Ex p. Leeds Industrial Cooperative Society Ltd (1997) 73 P. & C.R. 70 (QBD)

*J.P.L. 244 Abstract

Easements and restrictive covenants on land can complicate the design of schemes and cause delay in their implementation. Local planning authorities and agencies with regeneration powers have statutory powers to override these rights when undertaking development (subject to the payment of compensation).¹

The powers referred to above were originally contained in the Town and Country Planning Act 1971 s.127 then re-enacted as the Town and Country Planning Act 1990 s.237, which has been replaced by the Housing and Planning Act 2016 s.203. These legislative provisions will be referred to collectively as "the Overriding Power".

When a local authority exercises the Overriding Power then the owners of the land, which has the benefit of the easement or covenant, are no longer able to enforce their rights by obtaining an injunction but they are entitled to compensation. The rationale for the Overriding Power is explained by Dyson J in *R. v City of London Corp Ex p. Mystery of the Barbers of London*:²

"... the statutory objective ... is that, provided that work is done in accordance with planning permission, and subject to payment of compensation, a local authority should be permitted to develop their land in the manner in which they, acting bona fide, consider will best serve the public interest. To that end, it is recognised that a local authority should be permitted to interfere with third party rights."

The Overriding Power has been under the spotlight recently in a couple of high profile schemes in the City of London; No.22 Bishopsgate (site of the Pinnacle scheme)³ and No.21 Moorfields.⁴ The key difference between these schemes and the scenario envisaged by Dyson J above is that in these schemes, the land was in private ownership and the developers approached the local authority requesting that the authority purchase the land (which would activate the Overriding Power) and then sell or lease it back to the private developer.

The purpose of this article is to explore the nature of the Overriding Power and the impact of recent reforms. First, it will consider the changes to the Overriding Power, then explore the compensation rules before comparing the regulation of the Overriding Power to the compulsory purchase regime and considering to what extent it stands up to scrutiny. *J.P.L. 245

The previous legislation: Town and Country Planning Act 1990 s.237

The legislation conferred a power on local authorities to override easements and other rights. It authorised the development of the land (subs.1) and the use of land (subs.1A) which "has been

acquired or appropriated by a local authority for planning purposes" if it is in accordance with planning permission even if it involves:

- (a) "interference with an interest or right to which this section applies, or
- (b) a breach of a restriction as to the user of the land arising by virtue of a contract."

In subs.2 the interest or rights are defined as including: "any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support".

The new legislation: Housing and Planning Act 2016 s.203

Section 203 confers a similar power to s.237; the key differences are examined below.

Authorities with powers under this section

In addition to local authorities this now encompasses urban development corporations, local highways authorities, the Greater London Authority, the Homes and Communities Agency, Mayoral Development Corporations, the National Assembly for Wales or Welsh Ministers, statutory undertakers and housing action trusts.⁵ Despite the HPA 2016 s.203 only coming into force on 13 July 2016 it has already been amended. The Neighbourhood Planning Act 2017 s.37 amends s.203 to ensure that the Greater London Authority and Transport for London can use it.

Additional condition on the exercise of the power

Under subs.2(c), 3(c), 5(c) and 6(c)⁶ the power to override only applies in relation to land where the *authority could acquire the land compulsorily for the purposes of the building or maintenance works or their use*. Some commentators have debated the meaning of the italicised words and have suggested that it could require the authority to provide a full justification for the use of the powers including obtaining a legally binding commitment from the developer to complete the project.⁷ However, in para.573 of the 2016 Act's Explanatory Notes⁸ it states that the "specified authority" must be able (i.e. have the necessary "enabling powers" in legislation) to acquire the land compulsorily" for the relevant purpose(s). This narrower interpretation of the statute appears to mirror the position pre the enactment of the 2016 legislation.

Judges dealing with s.237 schemes did not have to concern themselves with whether or not the local authority would have been able to exercise compulsory purchase powers to implement the scheme. However, given the breadth of the compulsory purchase powers that local authorities possess (in particular under the Town and Country Planning Act 1990 s.226) it is unlikely to lead to a significant difference in practice. It will limit the ability of other authorities to use the Overriding Power. Indeed, the *Encyclopaedia of Planning Law and Practice* states that the requirement appears to have been imposed as "a means of constraining" the wide categories of "specified authorities". **J.P.L. 246*⁹

Successors in title

Section 237 explicitly referred to "persons deriving title"¹⁰ from the local authority. This created scope for local authorities to acquire land from a developer for planning purposes and then sell or lease it back to the developer having overridden third party rights that could have impeded the development. This wording is not included in the new legislation. However, it appears that the intention is for the Overriding Power to be relied on by subsequent owners as subs.1 and 4 authorise "a person" carrying out the works or use rather than limiting the power to the authority. According to the Act's Explanatory Notes the reference to "a person" would include a successor in title to the "specified authority".¹¹

The use or development of the land

There is a new statutory condition that the development in which the Overriding Power is being used must be related to the purposes for which the relevant land has been acquired or appropriated. Under subs.2(d), 3(d), 5(d) and 6(d) the ability to override rights only arises when the development or use is "for purposes related to the purposes for which the land was vested in, or acquired or appropriated". This was however, the position under case law before the coming into force of this legislation.¹²

In *Midtown Ltd v City of London Real Property Co Ltd*¹³ the defendants sought to rely on s.237 on the basis that their land had been acquired by the City of London Corporation for planning purposes in 1956. The land was originally acquired to address war damage. The works were substantially complete by 1960 (45 years before the current scheme was due to commence). It was held that the defendant could not rely on s.237 as the proposed development was not connected with the original appropriation purposes and that the defendant developer was merely a successor in title to the original Local Authority.

Compensation

Although a landowner whose rights are overridden loses the opportunity to prevent infringement of their rights by way of an injunction they are entitled to compensation. One of the issues for the neighbouring landowners is the difference between:

- The damages that would be awarded by a court for an infringement of an easement or covenant in lieu of an injunction ("Infringement Damages"); and
- The compensation which is payable to the beneficiary of an easement or covenant whose rights are overridden ("Overriding Damages").

Infringement damages

Where damages are awarded in lieu of an injunction they are assessed on what is referred to as the "negotiating basis".¹⁴ This principle was propounded by Brightman J in *Wrotham Park v Parkside Homes*.¹⁵ In *Wrotham Park*, the defendants argued that the damages should be nominal as there was no evidence that the breach of covenant diminished the value of the dominant land. This argument was rejected by the judge on the grounds that a suitable alternative to a mandatory injunction would be "such sum of money as might reasonably have been demanded by the plaintiffs ... as a quid pro quo for relaxing the covenant". *J.P.L. 247¹⁶ This is generally calculated by reference to the profit the development is set to make or the diminution in the value of the dominant land (normally with an uplift).

In *Carr-Saunders v Dick McNeil Associates Ltd*,¹⁷ Millett J decided to award damages in lieu of an injunction in respect of a nuisance caused by interference with a right to light easement. After assessing the diminution in the value of the property at £3,000 the judge continued to examine the bargaining position of the claimant and what amount he would have sought had the defendant developer negotiated compensation prior to commencing the scheme and awarded £8,000 in damages. It appears that following this case applying a multiplier of three or four times the diminution in value has become a common practice.¹⁸

In determining damages based on a hypothetical negotiation the courts will often have regard to the amount of profit that the developer is expecting to achieve. In *Tamara (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*,¹⁹ Moss J awarded damages in lieu of an injunction which equated to 28% of the profits the developer was expecting to achieve for that part of the scheme. The Law Commission reported that a number of consultees (in response to the Right to Light consultation)²⁰ thought that this level of profit sharing was inequitable as the developer was taking all the risk.²¹

Overriding damages

These are now governed by the HPA 2016 s.204. The damages payable following the exercise of the Overriding Power are calculated on the basis of severance (Compulsory Purchase Act 1965 s.7) or injurious affection (CPA 1965 s.10). Compensation for severance and injurious affection are based on the diminution in value of the retained land. In *Holliday v Breckland DC*,²² the claimant unsuccessfully sought compensation for the value of the easement being the amount that the claimant would have been able to obtain in exchange for the releasing the easement.

It therefore will make a significant difference to a beneficiary of a covenant or easement whether or not the servient landowner has the benefit (directly or indirectly) of the Overriding Power. Where the Overriding Power is effective not only does the dominant landowner lose the opportunity to obtain an injunction restraining the infringement but the compensation they are entitled to is less than Infringement Damages. It is interesting to note that in the *Wrotham Park*²³ case the servient land was sold by Potters Bar Urban DC a matter of weeks before the Overriding Power was first created (28 October 1971). If the sale had taken place a month or more later then the Overriding Power would have had effect and the claimants instead of receiving £2,500 (calculated on the negotiating basis as 5% of the developer's profit) may have received nothing as it was common ground that the claimants' land was not diminished in value by the breach of covenant.

Critique of the Overriding Power and comparison with compulsory purchase

As discussed earlier the Overriding Power has many similarities with compulsory purchase powers. The key difference in their effect from a dominant landowner's perspective is that the rights are not necessarily lost forever, as they have been overridden not extinguished. In reality though, it is unlikely that the **J.P.L. 248* beneficiary of an easement or a covenant will be able to enjoy those rights again. It is striking that although the effect of the Overriding Power is similar to compulsory purchase powers the process and checks on its exercise are far less robust.

Public interest

The new legislation emphasises the analogies between using the Overriding Power and compulsory purchase powers. These similarities are evident from a review of cases, which include a discussion of s.237. One of the key questions the courts will consider when scrutinising a decision to use the Overriding Power is to what extent the proposed development is in the public interest.

In *R. v Leeds CC*,²⁴ Mccullough J stated that a local authority should not consider using its powers:

"unless it has good reason to believe that such interference with rights is necessary. The same degree of requirement or necessity should apply in the case of appropriation as in the case of compulsory purchase."

In this case, the defendant's property was subject to restrictive covenants restricting its use to recreational use but the Council wanted the land to be developed for housing. Negotiations had taken place with the adjoining land owner (who had the benefit of the covenant) to release the covenant but this would have been at the cost of £900,000 and following advice from counsel the defendant was concerned that there may have been other beneficiaries who could have enforced the covenant. Accordingly, the defendant council decided to appropriate the land for housing and rely on s.237 to override the covenants. The defendant Council's decisions were upheld as lawful as Mccoullough J who accepted the Council's reasoning that the land was no longer required for recreation, that housing development was desirable and that without using appropriation and s.237 the development was not commercially viable.

Last resort?

There is no requirement set out in the legislation (old or new) that other mechanisms have to be exhausted before the Overriding Power is used.²⁵ DCLG guidance²⁶ makes it clear that compulsory purchase powers should only be used as a last resort. Fielding and Rosen²⁷ argue that although the Government Guidance does not expressly refer to the Overriding Power "it is generally thought to be sufficiently analogous that the guidance should be followed". It is evident from some of the case law

decided under s.237 that there is perhaps an inconsistent approach to this issue.

In the *Leeds* case,²⁸ Mccullough J was keen to ensure that other options for dealing with the covenant had been explored (for example a Lands Chamber application and indemnity insurance) to be able to conclude that the use of these powers was "required" or "necessary". However, in response to concerns raised by the City of London Corporation the Law Commission²⁹ stated that they had found no evidence of a decision to exercise the Overriding Power being held to be unlawful due to an omission to make an application under the Law of Property Act 1925 s.84 to modify or discharge a covenant. It would therefore appear that the Overriding Power may be used without attempting to use all the other available tools first. ***J.P.L. 249**

Process

Where land is being compulsorily purchased there is detailed legislation setting out publicity requirements and mechanisms for dealing with "qualifying objectors"³⁰ which if not withdrawn would result in a public inquiry. There are no equivalent rules governing the exercise of the Overriding Power.

In the *Leeds* case³¹ one of the neighbouring landowner's (with whom the Council had been negotiating a deed of release of the covenants) complaints about the local authority's actions was that they had not been individually notified of the LCC's decision to appropriate the land. The Council had advertised its intention to appropriate the land on two occasions. The Council was obliged to publicise its decision to appropriate the land because it was a public open space and not because of its intention to utilise the Overriding Power.³² The judge held that as the Council had satisfied their statutory obligations he would not comment on the propriety of their actions. There cannot be many however, who would commend this Council's approach to dealing with neighbouring landowners.

In *R. (on the application of Derwent Holdings Ltd) v Trafford BC*,³³ the landowner who had the benefit of an easement was also aggrieved by the lack of communication from the local authority. In that case, the land subject to the easement was transferred from Manchester Syndicates Ltd to Trafford BC and then, once the Overriding Power had been activated re-conveyed to MSL. Ockleton J observed that if the land had been compulsorily purchased then publicity would have been necessary but as this was a private sale then no publicity was required. The claimant only became aware of the sale and repurchase a couple of years after it had occurred. In their claim, Derwent asserted that their rights under arts 1 (the right to own property) and 6 (the right to a fair hearing) of the European Convention on Human Rights had been contravened. Derwent's claim for judicial review had limited prospects of success as it related to the decision to grant planning permission rather than the decision to enable the use of the Overriding Power—Derwent was outside the time limit to bring a claim in relation to the s.237 decision. The judge acknowledged that the claimant's human rights had been engaged but as the decision being challenged was the grant of planning permission rather than the s.237 transaction it was not relevant.

One of the interesting aspects of the rules relating to the Overriding Power is that as there is no duty to inform those directly affected by its use the neighbouring landowners may not have the ability to contribute to the decision-making process and may lost the opportunity to challenge the resolution to exercise the Overriding Power due to the time limit for judicial review expiring. It is apparent that it is considered best practice by some local authorities to conduct a formal consultation. For example, the London Borough of Tower Hamlets had a 28-day consultation period in relation to their proposal to use s.237 powers in relation to City Pride and Island Point Development.³⁴ That was the first time Tower Hamlets had sought to use the Overriding Power and it is apparent from records of other Overriding Power decisions that such formal consultation processes have not been implemented, for example City of London Corporation No.22 Bishopsgate,³⁵ No.21 Moorfields³⁶ and Lambeth LBC in relation to Streatham High Road.³⁷

Conclusions

The effect of the exercise of the Overriding Power on beneficiaries of covenants and easements is akin to the compulsory purchase of their rights but these landowners do not benefit from the same level of ***J.P.L. 250** protection as landowners whose interests are appropriated. Some local authorities, including the City of London Corporation and Lambeth LBC have developed their own policies governing when the power can be used. In light of the potential impact on human rights and the complexity of the arguments about determining what is in "the public interest" it would be

preferable to have mandatory national guidance.

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