

The Public Interest and Private Rights

SECTION 237 TOWN AND COUNTRY PLANNING ACT 1990

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1. Whether or not the judgment in HKRUK II (CHC) Limited v. Heaney [2010] EWHC 2245 (Ch) (“Heaney”) represents any change of direction in the law, it has certainly had an effect on those wishing to develop land in way which would infringe rights of light. The developer who wishes to avoid the threat of an injunction has come to see section 237 of the Town and Country Planning Act 1990 (“TCPA 1990”) as the solution to his problems.
2. Although section 237 authorises infringements of rights in relation to land which is or has been held by a local authority, it is often those who wish to develop land, and those who fund such development, who are most interested in the authorisation which it can confer.
3. In this paper I will consider how use can be made of section 237 to facilitate development which is considered to be in the public interest, notwithstanding that private law rights of light may be infringed.

Section 237

4. Section 237 of the Town and Country Planning Act 1990 (“TCPA 1990”) provides:

237.— Power to override easements and other rights.

(1) Subject to subsection (3), the erection, construction or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that 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 land arising by virtue of a contract.

[(1A) Subject to subsection (3), the use of any land in England which has been acquired or appropriated by a local authority for planning purposes (whether the use is by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is in accordance with planning permission even if the use 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 land arising by virtue of a contract.

(2) Subject to subsection (3), the interests and rights to which this section applies are any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.

(3) Nothing in this section shall authorise interference with any right of way or right of laying down, erecting, continuing or maintaining apparatus on, under or over land which is—

(a) a right vested in or belonging to statutory undertakers for the purpose of the carrying on of their undertaking, or

(b) a right conferred by or in accordance with the [electronic communications code] on the operator of [an electronic communications code network] .

(4) In respect of any interference or breach in pursuance of subsection (1) [or (1A)] , compensation—

(a) shall be payable under section 63 or 68 of the Lands Clauses Consolidation Act 1845 or under section 7 or 10 of the Compulsory Purchase Act 1965, and

(b) shall be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections in respect of injurious affection where—

(i) the compensation is to be estimated in connection with a purchase under those Acts, or

(ii) the injury arises from the execution of works on [, or use of,] land acquired under those Acts.

(5) Where a person deriving title under the local authority by whom the land in question was acquired or appropriated—

(a) is liable to pay compensation by virtue of subsection (4), and

(b) fails to discharge that liability,

the liability shall be enforceable against the local authority.

(6) Nothing in subsection (5) shall be construed as affecting any agreement between the local authority and any other person for indemnifying the local authority against any liability under that subsection.

(7) Nothing in this section shall be construed as authorising any act or omission on the part of any person which is actionable at the suit of any person on any grounds other than such an interference or breach as is mentioned in subsection (1) [or (1A)]

5. Section 237 authorises interference with rights or interests other than rights of light. For the purposes of this paper I shall concentrate on rights of light.
6. There is an exemption (under subsection (3)) for rights of statutory undertakers and electronic communications code system operators. Section 271 TCPA 1990 makes specific provision relating to interference with statutory undertaker's rights.

7. The policy that underlies section 237, the statutory objective, was identified by Dyson J in R v. City of London Corporation and Royal Mutual Insurance Society ex parte Mystery of the Barbers¹

There is nothing surprising about the wider interpretation. The statutory objective which underlies section 237 of the 1990 Act 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 its land in the manner in which it, acting bona fide, considers 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. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes, and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237(1) is the result of the balancing exercise. Parliament has decided to give local authorities the right to develop their land and to interfere with third party rights, but on the basis that work is done in accordance with planning permission (with the protection inherent in the planning process), and that third parties affected are entitled to compensation under section 237(4).

How is section 237 engaged?

8. The essential requirements to be satisfied in order for reliance to be placed on section 237 are:
 - a. The erection, construction or carrying out of maintenance of any building or work is carried out on land².
 - b. Such land has been acquired or appropriated by a local authority for planning purposes
 - c. The development is carried out in accordance with a planning permission.
9. It is relatively simple to ascertain whether requirements (a) and (c) have been satisfied.
10. In order to satisfy requirement (b) the land has to be acquired or appropriated for planning purposes by a local authority.
11. The term “planning purposes” is defined in section 246(1) TCPA which provides:

(1) In this Part—

(a) any reference to the acquisition of land for planning purposes is a reference to the acquisition of it under section 226 or 227 of this Act or section 52 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (or, as the case may be, under section 112 or 119 of the 1971 Act or section 68 or 71 of the 1962 Act); and

(b) any reference to the appropriation of land for planning purposes is a reference to the appropriation of it for purposes for which land can be (or, as the case may be, could have been) acquired under those sections.

12. Section 226(1) and (1A) TCPA 1990 provide powers to acquire land compulsorily:

¹ (1997) 73 P & CR 59 at page 64

² Section 237 can also apply to the use of land – see section 237(1A)

226.— Compulsory acquisition of land for development and other planning purposes.

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area [...]—

[(a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land; or

(b) [which] is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

[(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects—

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.

13. Section 227 TCPA 1990 provides for acquisition by agreement.

227.— Acquisition of land by agreement.

(1) The council of any county, [county borough,] district or London borough may acquire by agreement any land which they require for any purpose for which a local authority may be authorised to acquire land under section 226.

(2) The provisions of Part 1 of the Compulsory Purchase Act 1965 (so far as applicable), other than sections 4 to 8, section 10 and section 31, shall apply in relation to the acquisition of land under this section.

14. The procedures to be followed by a local authority when acquiring land whether by compulsion or by agreement are well understood and I do not consider them in this paper. As powers of appropriation are less familiar I will refer to them.

15. Section 122 of the Local Government Act 1972 (“LGA 1972) gives principal councils the power to appropriate land:

122.— Appropriation of land by principal councils.

(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.

16. Restrictions are imposed upon the appropriation of land forming parts of a common, open space etc..

17. The meaning of the words “no longer required for the purpose for which it was held immediately before the appropriation” (as they appeared in the predecessor to section 122)

were considered by Russell LJ in Dowty Boulton Paul v. Wolverhampton Corporation [1976] 1 Ch 13 who stated at page 26:

"I would construe "not required" in the section as meaning "not needed in the public interest of the locality" for the original purpose: and it appears that Maugham J. so construed them. Now that question, it is plain to me, involves matters both of degree and of comparative needs, as to which there can be no question but that the local authority is better qualified than the court to judge, assuming it to acting bona fide and not upon a view that no reasonable local authority could possibly take."

18. In R v. Leeds City Council ex parte Leeds Industrial Co-operative Society Limited (1997) 73 P & CR 70 McCullough J considered the approach to be taken by a local authority when considering whether to appropriate land in order to engage section 237. At page 77 he stated:

"I do not find the concept of "appropriation" easy to grasp, since land which is "appropriated" is already in the council's ownership. More must surely be involved than a mere decision that land held for one purpose will henceforth be held for another. Otherwise, for example, if an authority decided to build houses on a small part of land it was holding for future light industrial development, the change of purpose would involve, indeed require, an "appropriation", and, as a consequence of section 237, could materially effect the rights of any interested third parties. It seems to me that, at least in a case where third parties are known to have rights, an authority cannot properly embark on such a course unless it has good reason to believe that interference with such rights is necessary. I regard it as significant that a single provision in the 1990 Act, section 226, empowers an authority both to acquire land compulsorily and to "appropriate" its own land. I see "appropriation", therefore, as the equivalent of compulsory purchase of a council's own land, and the same degree of "requirement" or "necessity" should apply in each case."

19. McCullough J suggested that appropriation is the equivalent of compulsory purchase. If the same degree of "requirement" or "necessity" is to apply, the approach taken when confirming compulsory purchase orders will have to be considered.
20. The Human Rights Act 1998 has been enacted since McCullough J's decision in the Leeds case. In R (Derwent) v. Trafford BC³ the deputy judge described it as "probably unarguable" that use of section 237 constitutes a breach of human rights. Article 1 Protocol 1 rights will be engaged, and if interference with rights of light affects a person's home, Article 8 rights may also be engaged.
21. When determining whether to appropriate land for a planning purpose in order to engage the provisions of section 237 a local authority will have to consider all the relevant factors and in particular:
- a. Whether the land is no longer required for the purpose for which it is held, by asking the question, is it needed in the public interest of the locality.
 - b. Whether the land should be appropriated for planning purposes. In answering that question the local authority will have to consider:

³ [2009] EWHC 1337 (Admin) at paragraph 52

- i. Whether appropriation will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land.
 - ii. Whether the local authority think that the development redevelopment or improvement will contribute to the achievement of one or more of the following objects:
 - 1. The promotion or improvement of the economic well-being of their area;
 - 2. The promotion or improvement of the social well-being of their area;
 - 3. The promotion or improvement of the environmental well-being of their area
 - c. Whether rights, capable of being overridden by section 237 TCPA 1990, exist.
 - d. Whether interference with such rights as exist is necessary. Consideration of that issue would include whether agreement could be reached for the release of rights of light, and whether extinguishment of those rights is necessary in order to allow the development to proceed.
 - e. Whether it is in the public interest that the development proposed in the planning made or granted should be carried out.
 - f. Whether section 237 TCPA 1990 should be applied in relation to the rights of light and any other easements which would be overridden, and whether any interference with those rights would be proportionate. Any interference with Convention rights should be considered. Article 1 Protocol 1 rights would have to be considered. In addition if the rights of light are enjoyed by residential premises, Article 8 rights are likely to be engaged.
22. In order to given consideration to the question of whether agreement could be reached for the release of rights of light, and whether extinguishment of those rights is necessary in order to allow the development to proceed it would be advisable to establish whether those entitled to the benefit of the rights of light are prepared to relinquish those rights. I suggest that the approach to be taken is similar to that followed when considering whether to promote and to confirm a compulsory purchase order. Paragraph 24 of the Memorandum to Circular 06/04 advises:

Before embarking on compulsory purchase and throughout the preparation and procedural stages, acquiring authorities should seek to acquire land by negotiation wherever practicable. The compulsory purchase of land is intended as a last resort in the event that attempts to acquire by agreement fail. Acquiring authorities should nevertheless consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan a compulsory purchase timetable at the same time as conducting negotiations. Given the amount of time which needs to be allowed to complete the compulsory purchase process, it may often be sensible for the acquiring authority to initiate the formal procedures in parallel with such negotiations. This will also help to make the seriousness of the authority's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.

23. In the case of rights of light, before considering appropriation a local authority should identify all those with rights which would be infringed if the development contemplated was carried out, and seek to secure release of those rights by negotiation.

Compensation

24. Section 237(4) provides:

(4) In respect of any interference or breach in pursuance of subsection (1) [or (1A)] , compensation—

(a) shall be payable under section 63 or 68 of the Lands Clauses Consolidation Act 1845 or under section 7 or 10 of the Compulsory Purchase Act 1965, and

(b) shall be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections in respect of injurious affection where—

(i) the compensation is to be estimated in connection with a purchase under those Acts, or

(ii) the injury arises from the execution of works on [, or use of,] land acquired under those Acts.

25. The obligation to pay compensation lies with a person who has derived title from a local authority who acquired or appropriated the land. However if that person fails to discharge that liability the liability becomes enforceable against the local authority (section 237(5)). As a result any local authority which is prepared to acquire or appropriate land to engage section 237 to facilitate the carrying out of development should be careful to ensure that it does not result in the authority incurring liability to pay compensation for any infringement with rights of light.
26. In most cases those entitled to compensation would be entitled to compensation under section 10 of the Compulsory Purchase Act 1965.
27. Under section 10 compensation is available “ ... in respect of any land, or any interest in land, which has been injuriously affected by the execution of the works.....”.
28. In rights of light cases the injurious affection arises as a result of execution of the works, not use.
29. The normal measure of compensation is the diminution in the value of the land held by the person entitled to the right which is interfered with.
30. Compensation based on diminution value is likely to be significantly lower than damages in lieu of an injunction.
31. In Ward v. Wychavon DC [1986] 2 EGLR 205 the Lands Tribunal considered a claim for compensation under the provisions of section 127 of the Town and Country Planning Act 1971 (the predecessor to section 237 TCPA 1990). The right interfered with was a right of way along a farm track. The local authority provided an alternative right of way. The Lands Tribunal held that the value of the Claimant’s interests in land had not been lowered by the new arrangements and as a result the claim for compensation failed.
32. In a rights of light case it is possible that betterment attributable to the new development could outweigh any diminution in value attributable to the interference with the right of light.

Issues

33. I have sought to consider a number of issues which might arise when considering the use of section 237 to authorise infringement of rights.

Challenge to a decision to acquire or appropriate

34. The decision to appropriate land for planning purposes is susceptible to judicial review, as is a decision to acquire land by agreement.
35. Such a decision can be challenged on normal public law principles.
36. If land is acquired compulsorily the order will be subject to objection and an inquiry will be held if statutory objections are maintained.
37. It will be necessary to consider whether a particular restriction to the local authority's power to appropriate land applies. For example, section 19(2) of the Housing Act 1985 provides that where a local authority have acquired or appropriated land for housing purposes they shall not, without the consent of the Secretary of State, appropriate any part of the land consisting of a house or any part of a house for any other purpose.
38. As there is no equivalent to an inquiry to consider objections to a compulsory purchase order a court is likely to subject any decision to appropriate land to particular scrutiny.

Does the planning purpose now contemplated fall within the ambit of the purpose for which the land was acquired or appropriated

39. It will be necessary to consider whether the scheme to be developed pursuant to a planning permission can be said to fall within the planning purpose for which the land was acquired or appropriated by the local authority.
40. In Barbers case Dyson J rejected the argument that the effect of section 237 is restricted to the purpose that the land is put to when first acquired or appropriated⁴:

It is difficult to see what rational basis there could be for restricting the operation of section 237(1) to the first development after acquisition or appropriation. Buildings become obsolete. Sites have to be redeveloped from time to time. The need for a local authority to be able to override third party rights is no less when it is carrying out a subsequent redevelopment than it is when it is executing an initial development.

*As Mr Sullivan and Mr Spence point out, it should not be overlooked that section 237(1) also applies where land has been appropriated by a local authority. Suppose that Shelley House had been acquired by the first respondents for educational purposes, and 30 years later they decided that they wanted to redevelop the site as an office block for purposes of commercial letting. They would appropriate the land for planning purposes, and there could be no doubt that in those circumstances, subject to the requirements as to planning permission and compensation, they could interfere with the rights enjoyed over the land by third parties. It is difficult to see why Parliament should have intended that the first respondents could *65 override those rights in that situation, but not do so on the facts of this case, where the Site was acquired by the first respondents for the purposes of constructing Shelley House in the first place.*

⁴ (1997) 73 P & CR 59 at pages 64-65

41. The issue was considered further in Midtown Property Company Limited v. City of London Real Property Company Limited [2005] EWHC 33 (Ch). The Defendant sought to erect a building which would interfere with the claimant's rights, and to rely on the fact that the land had been acquired by the local authority in 1956 to deal with extensive war damage, secure improvements in the road pattern. Peter Smith J held (at paragraph 47):

47. In my view, if a Local Authority or a successor of a Local Authority wishes to rely upon the power to override under section 237, where the land has been appropriated for a planning purpose, the proposed development, which it seeks to impose on adjoining owners must be related to the planning purposes for which the land was acquired or appropriated. In other words, I agree with Dyson J's provisional view. That would apply to the situation whether or not the Local Authority was the owner at the time, or whether a successor was the owner. I accept of course that in the case of a Local Authority it would be able under the statutory provisions set out above to re-appropriate the land for an appropriate purpose to facilitate the development (subject to complying with the statutory requirements) and of course paying the compensation. Whilst I accept Dyson J's analysis that the breadth of the section clearly intended a Local Authority (and its successor) to be able to redevelop or continue to redevelop a site appropriated for planning purposes from time to time, I cannot believe (or accept) that that width extends to a development taking place unconnected with the original appropriation purposes by a developer who is merely a successor in title to the original Local Authority. For that submission to be correct, for example, it would mean many hundreds of years in the future a developer could override rights which came into existence long after the original appropriation and long after the purpose of the original appropriation had been disposed of. I do not see that the appropriation can in effect lie in the ground to be available to spring forth fully armed to enable a future developer to pick it up when its development has no causal connection or relevance to the appropriation.

42. In cases where there is doubt as to whether the development now contemplated can be said to be for the planning purposes for which a local authority originally acquired or appropriated the land, the following steps should be considered:
- a. If the land is held by the local authority they should be asked to consider appropriating the land to the specific planning purpose now contemplated.
 - b. If the land is no longer held by the local authority the position is more complex. Consideration might be given to disposing of the land to the local authority and re-acquiring it.

Acquisition by a Local Authority and disposal to developer

43. It is open to a local authority to acquire the land for planning purposes and to then dispose of it to a developer.
44. The disposal to the developer can be made pursuant to section 233 TCPA 1990. Consent of the Secretary of State will be required where the disposal is to be for a consideration less than the best that can reasonably be obtained and is not for a short lease (section 233(3)).
45. If the existence of rights of light is likely to frustrate beneficial development a local authority may be prepared to acquire the land from the developer and then sell it back to the developer.

46. Such a transaction is likely to be subject to particularly careful scrutiny. As noted by McCullough J in the Leeds case the effect of relying on section 237 is akin to compulsory purchase of rights.
47. A local authority considering such a transaction would have consider all the relevant factors including those set out at paragraph [21] above. Subject to such careful consideration I do not consider that such a transaction could be said to be inconsistent with the statutory scheme. The purpose of section 237 is allow development to be carried out in the public interest. If a local authority concludes that it is necessary to engage section 237 to facilitate the carrying out of beneficial development there would be no conflict with the statutory objective as identified by Dyson J in the Barbers case. In R (Derwent) v. Trafford BC⁵ the court considered a challenge to a grant of planning permission in a case where it was too late to challenge a transaction whereby the LPA acquired land and re-conveyed to the developer so as to engage section 237; the judge's observations do not suggest that such a transaction was unlawful.

Compensation

48. The compensation payable pursuant to section 237 is considered above.
49. I have identified the advice given (in Circular 06/04) to an authority promoting a compulsory purchase order, namely that they should seek to negotiate with landowners to acquire land and rights by agreement. When conducting such negotiations the basis for agreeing price is relatively clear. The price offered will reflect the amount that a claimant would receive under the statutory compensation code. The position when seeking to acquire rights of light is somewhat different. Damages payable in lieu of an injunction to restrain a breach of rights of light may be calculated on some basis other than diminution in value (e.g. Wrotham Park damages).
50. In a compulsory purchase case a local authority is likely to be held to have made reasonable attempt to secure land or rights by negotiation if it offers to pay a sum equivalent to compensation under the statutory code, and the claimant seeks compensation on some other basis. However in the case of rights of light, an authority or landowner may be prepared to pay compensation based on diminution in value of the claimant's land, whereas a claimant may seek a payment based upon the measure applicable when considering damages in lieu.
51. In those circumstances the local authority will have to consider whether it is necessary to appropriate or acquire the land. Consideration of that issue will depend upon the facts of the case. However, if a local authority seeks to appropriate land on the basis of a dispute relating solely to compensation, the authority will have to consider whether reliance on section 237 is necessary; any report to committee will have to be drafted with great care.
52. It is likely that a local authority will conclude that it is not necessary to appropriate or acquire the land if those entitled to the rights are prepared to relinquish them on payment of a sum equivalent to the sum payable if damages were awarded lieu of an injunction, whereas a local authority is likely to conclude that appropriation is necessary if owners of right are not prepared to relinquish them and indicate that they wish to seek an injunction.

⁵ [2009] EWHC 1337 (Admin)

Conclusion

53. As is clear the decision whether to appropriate or acquire the land in order to engage the provisions of section 237 will turn on the facts. I anticipate that developers faced with the threat of an injunction to prevent them implementing a planning permission may seek assistance from the local authority. The local authority should tread carefully when considering whether such assistance can be given in a particular case.
54. The purpose of section 237 would appear to be to facilitate development which is considered to be desirable in the public interest. The approach taken by the courts has been to allow the public interest, as identified in the TCPA 1990 (and by the grant of planning permission) to prevail.
55. The judgment in BDW Trading Limited (t/a Barratt Homes) v. Anne Marie Spooner and others⁶ is a recent example of a case where competing interests had to be considered. That case concerned section 241, not section 237 of the TCPA 1990, but the observations made by the judge are of interest. He held that the TCPA provides the “.. fundamental legislative architecture for the planning use of land, with both over-arching provisions, and highly detailed specific provision for individual areas, and checks and balances for resolving countervailing interests.”
56. The TCPA continues to provide that fundamental legislative architecture and contains the specific provisions which allow the public interest to override private rights. However, once the land has been sold on by the local authority the connection with the public interest may be seen to be weakened, and hence the need (identified in Midtown) to ensure that any proposal does serve the planning purpose for which the land was appropriated.

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⁶ [2011] EWHC 1486 (QB)