

## Implementation and delivery - some current issues



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## Overview

- Public rights of way
- Changes to the consented scheme / detailed design developments
- Actions seeking to prevent scheme implementation

## Public Rights of Way (1)

- Consent for an infrastructure project will often involve the need to divert or extinguish existing PROW
  - TWA 1991: s.5(6)
  - PA 2008: s.136
  - High Speed Rail (London to West Midlands) Act 2017 Sch 4
  
- The consent will often provide that:
  - The highway may not be stopped up / rights extinguished until the specified substitute is provided
  - The highway is to be completed to the “reasonable satisfaction” of the highway authority

## Public Rights of Way (2)

- Issues:
  - Not a general power to extinguish a PROW on provision of a substitute. Substitute will be specified – to varying degrees of particularity – in consent itself: eg, description in schedule, and/or as shown on rights of way plans
  - Consent will not include the level of detail required for a modification order under s.53 of the Wildlife and Countryside Act 1981
  - Consent may not provide for dispute resolution between nominated undertaker and local highway authority

## Public Rights of Way (3)

- Changes to the proposed new PROW?
  - Unlikely to be able to rely on any general provision permitting construction of works within LOD if material departure from replacement specified in Schedule / shown on identified plans
  - A replacement / substitute PROW not in accordance with that specified in/through the Order not effective to extinguish existing rights as provided for in the Order

## Public Rights of Way (4)

- How can this be resolved?
  - DCO: potential to apply for non-material amendment under PA 2008 Schedule 6, but:
    - May be excessive depending on changes required
    - In the discretion of the Secretary of State
  - Application under Highways Act 1980:
    - S.119: diversion of footpaths, bridleways and restricted byways
    - S.118: stopping up of footpaths and bridleways
    - S.116: stopping up/diversion on application to Magistrates Court
    - S.118A/s.119A: stopping up/diversion of PROW across railways
    - S.25: public path creation agreements

## Public Rights of Way (5)

- Recording changes on Definitive Map and Statement:
  - S.53(2)(b) Wildlife and Countryside Act 1981
  - ‘Legal event’ modification under s.53(3)(a). The ‘legal event’ will be the coming into operation of the enactment/instrument by which PROW is extinguished, diverted or created.
  - S.54(4): “ *The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.*”
  - That detail will not usually be included in consent. How can the local highway authority obtain it?

## Public Rights of Way (6)

- Consent provides that new PROW is to be completed to the reasonable satisfaction of the local highway authority. What if it is not satisfied?
  - Consents do not always make provision for dispute resolution
  - Some resistance to deeming provisions (eg unless notification by highway authority within 28 days to the contrary, new PROW shall be deemed to be completed to their reasonable satisfaction / to have been certified)
  - Particularly an issue where consent establishes ‘principle’ of (eg) diversion but not the detail – and reliance placed in consenting process on local highway authority having to be satisfied



## Public Rights of Way (7)

- Practical solution: side agreements
  - Can provide for the process to be followed for PROW to be certified as being completed to reasonable satisfaction of highway authority
  - Can include the details which nominated undertaker is to provide in order for that to occur (eg, the details which would be required for modification order under s.53)
  - Can include requirement to provide details prior to works commencing to new PROW – allowing early identification of any departures from what was authorised under the Order and/or make provision for how such departure are to be addressed
  - Can include dispute resolution procedures
  - Can make provision for legal expenses / costs incurred by local highway authority

## Changes to design post consent (1)

- Can be problematic / controversial – particularly where limited scope for public participation at the post-consent stage
- Recent example:
  - *R (on the application of Granger-Taylor) v High Speed Two (HS2) Ltd* [2020] EWHC 1442 (Admin)
  - C challenged changes to emerging design for Euston Approaches under Phase 1 of the HS2 project
  - Decision challenged in the claim was D’s “ongoing failure” to provide C with updated drawings (etc) in respect of the final design of the HS2 railway in that area and to commission and disclose an updated EIA relating to the emerging design proposals

## Changes to design post consent (2)

*R (on the application of Granger-Taylor) v High Speed Two (HS2) Ltd* [2020]  
EWHC 1442 (Admin)

- Permission refused on grounds 1 and 2 (failure to provide updated drawings / failure to commission and provide updated EIA) but granted on grounds 3 and 4 – alleged breaches of Article 8 and A1P1 ECHR
- In granting permission, Lang J drew attention to D needing to disclose relevant material as part of its duty of candour, and subsequently made an order for specific disclosure of various categories of documents.
- Claim was ultimately unsuccessful but note what was stated by Jau J at [103]:

## Changes to design post consent (3)

“103. Mr Jacobs might have made more of the following passages in the ECtHR's judgment in [Oneryildiz](#) [[Oneryildiz v Turkey](#) [2004] 39 EHRR 25]

"84. The Court reiterates that, in the *Guerra* case, it held that the State had infringed Art.8 of the Convention for failing to communicate to the applicants essential information "that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

85. The Court does not see any aspect in the circumstances of the present case distinguishing it from the circumstances of *Guerra* , taking into account that the reasoning in that judgment is applicable a fortiori in respect of Art.2 and, moreover, fully applies to the present case."

In my view, this reasoning cannot yet be made applicable to the instant case because any risk or danger does not presently exist. However, it should at least be borne in mind for the future as the Stage 2 works progress. Effective communication remains important in this case regardless of any legal requirement.”

## Continued objections to the scheme: protests (1)

- Use of injunctions / claim for possession orders well established in context of protests seeking to restrain development
- BUT: some issues have arisen over the past 18 months:
  - Title where land to be used under temporary possession rather than compulsorily acquired
  - Protest on a highway / including a highway

## Continued objections to the scheme: protests (2)

- Title where land is used under temporary possessions powers
  - In principle, a possession order is available in such circumstances:
    - Secretary of State for Transport & High Speed Two (HS2) Ltd v Persons Unknown (22<sup>nd</sup> June 2020) (David Holland QC sitting as a DHCtJ)
  - BUT: may not be available where notices required to be served prior to exercise of those powers have not been served on occupiers – even if those occupiers are trespassers:
    - Secretary of State for Transport & High Speed 2 (HS2) Ltd v Persons Unknown [2021] EWHC 822 (Ch) (Mann J) at 19-21
    - The possession order was, however, made in that case as HS2 Ltd had entered into possession of the surface of the land lawfully as against the legal owners of the site, and thus had a legal claim in possession “*against those who would undoubtedly have been trespassers as against the legal owners*” (paras 34-40)

## Continued objections to the scheme: protests (3)

- Protests on or involving highway / PROW:
  - 3 cases to be aware of
    - Secretary of State for Transport v Persons Unknown [2020] EWHC 1437 (Ch)  
(David Holland QC sitting as a DH CtJ)
      - » Application to vary and extend an interim injunction which was directed at restraining (inter alia) incidents of trespassing onto the site from the adjoining public highway and incidents of activity on the bell-mouths either on or just off the site on the public highway which had been intended to, and had in fact, obstructed access to and egress from the site
    - Hillingdon Borough Council v Persons Unknown [2020] EWHC 2153 (QB) (Kerr J)
      - » Interim injunction to restrain certain acts on land adjoining the HS2 Harvil Road construction site which included PROW.
    - DPP v Ziegler [2021] UKSC 23
      - » Consideration of Article 10/11 ECHR rights in context of prosecution under s.137 of the Highways Act 1980 (wilful obstruction of highway without lawful authority or excuse)

## Continued objections to the scheme: legal challenges

- Emerging trend of applications for injunctive relief to restrain works on environmental grounds
  - *R (oao Packham) v Secretary of State for Transport* [2020] EWHC 829 (Admin)
    - Application for injunction to restrain works in ancient woodlands pending challenge to Government’s decision to proceed with HS2
  - *R (oao Kier) v Natural England* [2021] EWHC 1059 (Admin)
    - Interim injunction granted by Lang J restraining the carrying out of “works or other activities” within a licensed area pending determination of C’s claim challenging a licence granted by NE under reg 55 of the Habitats Regulations for works likely to affect bats in Jones Hill Wood. Interim injunction discharged by Holgate J
  - Forthcoming JR to EA regarding consents granted in association with HS2 tunnelling works in the Chilterns.



# Thank you for listening

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