

The Sawkill case - gaining entry for survey



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Introduction

- 1) ***R (Sawkill) v Highways England*** [2020] 1 WLR 3661, and the availability of powers of entry to public or quasi-public organisations already with a “particular standing”
- 2) Availability of powers of entry to private bodies
- 3) Enforcing powers of entry - practicalities

(1) Sawkill

- A303 tunnel intended to pass through a chalk aquifer underneath the Claimant's land
- National Highways (or Highways England as it then was) sought entry to undertake pumping tests to understand the transmissivity of the aquifer
- Two issues arose:
 - 1) Was National Highways able to rely on the powers of entry provided by s. 172 Housing & Planning Act 2016 (the simple route) or was it required to rely on s. 53 Planning Act 2008 (the less simple route; first requiring the Secretary of State's approval)?
 - 2) Did the pumping tests amount to a "survey" for the purposes of either provision?

(1) Sawkill

- S. 172 2016 Act

“(1) A person authorised in writing by an acquiring authority may enter and survey or value land in connection with a proposal to acquire an interest in or a right over land.

...

(6) In this section and sections 173 to 178 -

(a) “acquiring authority” means a person who could be authorised to acquire compulsorily the land to which the proposal mentioned in subsection (1) relates (regardless of whether the proposal is to acquire an interest in or a right over the land or to take temporary possession of it), and

(b) “owner” has the meaning given in section 7 of the Acquisition of Land Act 1981.

(1) Sawkill

- S. 53 2008 Act

“(1) Any person **duly authorised in writing by the Secretary of State** may at any reasonable time enter any land for the purpose of surveying and taking levels of it, or in order to facilitate compliance with the provisions mentioned in subsection (1A), in connection with—

(a) an application for an order granting development consent, whether in relation to that or any other land, that has been accepted by the Secretary of State,

(b) a proposed application for an order granting development consent, or

(c) an order granting development consent that includes provision authorising the compulsory acquisition of that land or of an interest in it or right over it...”

(1) Sawkill

- **Issue 1**: Mr Sawkill's argument was that the 2008 Act provided a complete code which governed all actions regarding applications for DCOs, such that only the survey powers in the 2008 Act were available to National Highways
- He relied upon a principle of statutory interpretation that the general words in a later statute (here the Housing and Planning Act 2016) cannot exclude the specific provisions of an earlier statute (the 2008 Act)
- National Highways: said, no. It is simply the case that the powers overlap. NH can choose between them as it sees fit.
- The consequence: legally likely little or nothing since the survey powers in both Acts are largely the same, BUT it would lead to delay and put landowners in a better bargaining position in terms of negotiating licences for survey, and potentially in respect of compulsory acquisition negotiations

(1) Sawkill

- Mr Sawkill relied in support of his arguments on guidance from PINS “The Planning Act 2008 (as amended), Section 53: Rights of entry, Frequently asked questions (FAQ)”
- “In the case of a prospective DCO, the policy intention is that the power of entry in s53 of the Planning Act 2008 should be used. ... The Inspectorate notes the principle of statutory interpretation that where a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation is intended to continue to be dealt with by the specific provision rather than the later general one.”

(1) Sawkill

- Mr Sawkill advanced several arguments:
 - The 2008 Act provided a complete code
 - The 2008 Act provides for supervision by the Secretary of State, which is an important procedural safeguard to prevent unnecessary intrusion upon a private landowner's property
 - There are related specific powers relating to survey in the 2008 Act which makes clear that Parliament's intention for the s. 53 procedure to be relied upon
- Dove J rejected all the arguments

(1) *Sawkill*

- The powers of survey in s. 172 and s. 53 should be understood to be overlapping powers, akin to the position in other statutory contexts in which the same conclusion (of simple overlapping of powers) has been reached, e.g. *Cusack* [2013] 1 WLR 2022
- As a matter of straightforward statutory construction, both provisions were able to be relied upon by National Highways, including because there is no material difference between the scope of the powers of survey under the respective provisions
- In so far as the crux of the argument boiled down to the greater procedural protection under s. 53 (given the need for Secretary of State approval to rely on powers of survey), this was both not determinative and readily explicable

(1) *Sawkill*

- “44... the existence of the difference between the two powers constituted by the need for the Secretary of State’s approval under section 53 of the 2008 Act is not determinative of the point, and is readily explicable. The power to use section 172 of the 2016 Act has been granted by Parliament specifically to the defendant, in particular, in its role as an acquiring authority: **it is therefore an organisation with a particular standing, to which the statutory power has been granted.** By contrast it is open to any individual to make an application for a DCO and to pursue it through the provisions of the 2008 Act. When that fact is borne in mind, the need for supervision by the Secretary of State in cases where the power under section 53 is invoked can be readily understood...”

(1) Sawkill

- The second issue related to the scope of the power to enter land to survey
- The issue with the proposed pumping tests was not the boring of holes on the Claimant's land, but the significant discharge of water required to see how rapidly the chalk aquifer's would refill
- While this was undoubtedly an intrusion upon a landowner's possession and enjoyment of his land, that was no different, for example, to an archaeological survey which may involve an extensive array of trial trenches, and could be equally if not more intrusive
- Compensation is payable for loss and damage; this is the appropriate remedy for a landowner in a position akin to Mr Sawkill

(2) Powers of survey for private bodies

- Dove J’s reasoning begs the question: what if you are a private entity intending to apply for a DCO and you are not an “organisation with a particular standing”?
- There is a short and a long answer...
- The short: the language in s. 172 is clear. An “acquiring authority” means a person who **could be** authorised to acquire compulsorily the land to which the proposal mentioned in subsection (1) relates ...” Any private entity “could be authorised” to compulsorily acquire land for the purposes of a DCO
- Dove J’s comments should not be followed
- The long answer is more nuanced...

(2) Powers of survey for private bodies

- The legislative history may suggest a more restrictive approach is required to the availability of powers of entry to private entities, even those intending to undertake nationally significant infrastructure projects
- When first enacted, s. 172 acquiring authority bore the same meaning as found in s. 7 of the Acquisition of Land Act 1981
- The amendment of s. 172 to the present definition was consequential upon the partial introduction of powers which provided for the temporary possession of land by s. 18 of the Neighbourhood Planning Act 2017, and related powers of entry to survey under s. 26 of the 2017 Act; since the previous definition was tied to the ALA, a new definition was needed
- Arguably, then, there was no intention to broaden the scope of those able to rely upon the powers of s. 172

(2) Powers of survey for private bodies

- The Explanatory Memorandum to the NPA 2017 says this:
- Section 26 “...also extends the right to enter and survey land in section 172 of the Housing and Planning Act 2016 by making it available in connection with a proposal to take temporary possession under section 18 of the Act. A consequential amendment is also made to the definition of "acquiring authority" in section 172 of the Housing and Planning Act 2016 to clarify its meaning in this context.”
- Many private entities can be provided compulsory purchase powers under orders or directions made by the Secretary of State, e.g. the granting of an Electricity Generation Licence, and would avoid this potential pitfall

(3) Enforcing powers of entry - practicalities

- Section 172(1) provides that a person authorised in writing by an acquiring authority (i.e. which includes a person who **could be** authorised to compulsorily acquire land) may enter land for survey
- So the only necessary preliminary requirement to enter private land is a relevant written authorisation
- But what if a private landowner refuses?
- Section 173 can then bite:

(3) Enforcing powers of entry - practicalities

“s. 173 Warrant authorising use of force to enter and survey land

A justice of the peace may issue a warrant authorising a person to use force in the exercise of the power conferred by section 172(1) if satisfied-

- (a) that another person has prevented or is likely to prevent the exercise of that power, and
- (b) that it is reasonable to use force in the exercise of that power”

(3) Enforcing powers of entry - practicalities

- The application is made to the Magistrate's Court, where the procedural rules are not at all straightforward for this type of application
- CrimPR 47 – Investigation Orders and Warrants; CrimPR 47.34 addresses applications for warrants under “any other power”
- Be prepared for a judge unfamiliar with the power in issue, its requirements, and the necessity for any order
- The warrant issued authorises the use of such force as may be “reasonably necessary” to enter for surveys, i.e. it authorises forcible entry on to privately owned land, so the judge will need persuading
- It will be necessary to demonstrate that there is a real “proposal to acquire an interest in or a right over land”, so 2008 Act provisions / powers will require explanation

Thank you for listening

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