With the government announcing the approval of eight new major renewable energy projects in April this year and a further 49 awaiting approval, statutory undertakers remain as busy as ever behind the scenes seeking to acquire the appropriate rights to access property, construct apparatus, and transport gas and electricity through a landowner’s property through the ever-sprawling gas and electricity infrastructure networks. Some of the common methods of obtaining rights are through direct negotiation with the landowners or by acquiring the rights by way of a compulsory purchase order (“CPO”).

Direct negotiation
The negotiation process is unpredictable. It can be quick and straightforward with one landowner, with terms agreed, payments made and documents entered into in a matter of weeks. For others, the process can be lengthy, protracted and argumentative or simply lose momentum and drag on for months or even years. The process typically involves the statutory undertaker contacting the landowner directly and asking them to sign consent agreements or access agreements to allow the statutory undertaker permission to enter the property and install its apparatus. There will usually be an obligation to enter into further legal documentation formalising the rights. Most landowners will be advised to instruct their own land agent and/or solicitor and are offered terms for the use of the land.

The major statutory undertakers are all too familiar with the repetitive arguments between landowners in order to negotiate terms. These have led to the generation of standardised documentation by the major statutory undertakers and a dogged determination to stick to it to avoid the significant delays and complications that are caused by having hundreds, if not thousands, of different documents and terms being negotiated simultaneously.

While the standardisation of the negotiating procedure and documentation has assisted to some degree in facilitating this process, what happens when a landowner is obstructive, cannot be identified, or simply refuses to agree terms or engage in the process?

Compulsory purchase
Compulsory purchase powers might be viewed by the statutory undertakers as a sensible tool enabling certain bodies to carry out their statutory duties efficiently. Landowners may view them as a set of draconian powers implemented to interfere with their fundamental rights to property.

Nonetheless, the compulsory purchase process can be an effective way of acquiring rights where landowners will not, or cannot feasibly, be brought to the table. The statutory undertaker may consider starting the compulsory purchase procedure even while meaningful direct negotiations are on-going and this will give it peace of mind by protecting the project timetable. In the event that negotiations are not fruitful, it will be able to fall back on the on-going compulsory purchase procedure.
Privatisation
In relation to gas and electricity respectively, the functions previously carried out by the government under the British Gas Corporation and the Central Electricity Generation Board were privatised under the Gas Act 1986 and the Electricity Act 1989 and those same acts of parliament granted the requisite compulsory purchase powers to the current line of statutory undertakers with the purpose of enabling functions that parliament believes to be in the public interest.

The greatest users of compulsory purchase powers are local authorities; other statutory bodies with such powers include the Highways Agency, government departments, infrastructure companies, and notably, major utilities companies.

The procedure
Having exercised their powers under the relevant enabling statute applicable to that particular statutory undertaker, the most common procedure then followed is the one contained under the Acquisition of Land Act 1981 (“the 1981 Act”), however; the procedure is complex, requires specialist advice from planning experts and may vary depending on modifications contained in the enabling act.

As a brief introduction to the commonly-used procedure set out in Parts I and II of the 1981 Act, the statutory undertaker will:
- Determine the land to be compulsorily purchased or the rights to be acquired and demonstrate that there is proper justification to support its compulsory acquisition.
- Conduct an information gathering exercise to determine interests that will be affected by the exercise of its powers. This may give an indication as to the overall cost and also identify any special category land that is afforded protection against being compulsorily purchased. Such special categories are defined in Part III of the 1981 Act and include land owned by the National Trust, a local authority, or a different statutory undertaker for the purposes of its undertaking; and land forming part of a common, open space, fuel or field garden allotment. The protection is provided by affording the landowners additional rights to resist the exercise of the acquiring authority’s powers.
- In addition to the information gathering exercise, carry out a referencing exercise which may involve sending out statutory notices requiring the receiver to give information as to the ownership and occupation of the land. This can be a useful tool to prompt landowners to engage in the process of negotiation and be mindful of settling by agreement.
- After the information has been obtained, the order will be drafted and (prior to submission) the statutory undertaker will publish notices in the local newspaper, affix them on the land and serve them on qualifying persons and locally for inspection. If this is not done in accordance with statute, the confirming authority may not confirm the order or, if confirmed, the order could be challenged at the High Court. After a period of 21 days, if no objections to the making of the order have been made, the order may then be confirmed. Further notices are then placed, served, and affixed and a period of six weeks is left to pass to allow for any applications to the High Court by aggrieved persons pursuant to Part IV of the 1981 Act querying the validity of the order.

Objections
An objection must be made in writing within the period stipulated in the notice (at least 21 days from the date of the notice). On the expiry of the period, the confirming authority is required to hold a public inquiry, to arrange a hearing or, in certain circumstances, to use the written representations procedure. Private hearings are very rarely used in practice. At the root of most objections there will be anxious interested parties. Notices will have alerted them to the tight timetable within which they have a chance to challenge the CPO. As such, any residual query or niggling doubt could compel them to submit an objection purely to slow the process and protect their position.

Practical steps
Even where there are no objections raised in respect of a proposed CPO, it still involves a very expensive and lengthy process before the acquiring authority can secure the land or the rights it needs. If the risk of negotiations falling through is apparent, or the landowners cannot be identified, it is advisable to commence the process as soon as practicable; as it could be some time before entry onto the land is possible.

Early contact with those directly affected should be made and a clear explanation of the project and the rights or land sought is essential. Appropriate avenues of communication should be offered to avoid negative communication being made solely through legal channels. This will allow any fears to be quelled before they are escalated and save on potential delays. In addition to this, the information gathering exercise is imperative to both the direct negotiation and CPO procedures and the initial order and information gathering exercise can be served for dual purposes.

A statutory undertaker carrying through any project will want to take all reasonable steps to manage interest in their project and ensure that accurate information and guidance is given on what is intended. This is especially the case as regards those parties which are directly affected. If they are not convinced as to the necessity of a project or are unclear as to the extent of their rights that will be extinguished, they have the scope to interfere with its progression.

Compulsory purchase is often regarded as a controversial power which puts the purported interests of wider society ahead of those of the individual. People are attached to land and local people can be suspicious of any supposed advances and opposed to changes in their community. If left to their own devices, speculation can escalate and misinformation spread quickly. The local press may pick up on this and is more likely than not to be biased towards what will be seen as the community’s interests and against those of the outsider, the statutory body.

It is therefore imperative that an acquiring authority takes what opportunities it can to reduce the risk to the project. Reaching an agreement with the landowner is usually the simpler, faster and cheaper option. Any issues with compensation will usually arise where a voluntary agreement for the transfer of land is being negotiated. The acquiring authority should be mindful of being firm but fair in its negotiations. It should ensure that the relevant parties understand the basis on which offers are being made and the likelihood of less compensation being found to be payable if the matter were to escalate to the Lands Chamber.

It may well be that the CPO process would take longer than agreeing directly with a landowner. It is for this reason that statutory undertakers may want to consider running a CPO alongside the direct negotiations with the landowner. The longer the project the more attractive a CPO might become on the basis that the time and cost of negotiating with each individual landowner may end up being significantly longer and more expensive than that of following the CPO procedure. Commencing the information gathering and referencing stages of the procedure can put the landowner on notice, which itself is a useful tool for encouraging parties to join the negotiating table. The relevant body should not be complacent in its negotiations due to the cost and length of running a full compulsory acquisition process and the statutory undertaker must always be mindful that the confirming authority will want to see that all reasonable efforts have been made to secure the necessary rights outside of the compulsory purchase procedure.

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