Construction of Pipeline Infrastructure: 
A Practical Legal Guide

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New exploration and access rights have been granted to operators in the Infrastructure Act 2015 and the Government is keen to develop the hydraulic fracturing/unconventional oil and gas market.

It therefore seems highly likely there will be an increase in operators seeking to obtain the necessary rights to install exploration and production related infrastructure (specifically well/drilling sites and equipment, cross country sub-soil pipelines, valves and cathodic protection equipment in addition to fuel storage/processing facilities).

As a firm, we have a longstanding experience of matters relating to the upstream, midstream and downstream oil and gas sector for clients such as BP, Perenco, National Grid, the British Pipelines Agency and many others. We want to share a short summary of some of the key issues, from the land rights perspective, for those contemplating a project including pipelines.

Key considerations:

1. Project Timings
2. Location (engineering v legal considerations)
3. Access
4. Rights required
5. Planning Issues
6. Compulsory Powers v agreement
7. Protestors / Injunctions
9. Mining Code
10. Crossings / Protective provisions

Project Timings

One of the main challenges for promoters and operators is often project timing and the knock-on effect that will have on budgets (especially if there is delay).

This is usually due to the fact that, unless handled very carefully, timings and progress can still be significantly influenced by third party landowners and occupiers and the level of opposition to the project.

Experienced land agents can play an invaluable role in assisting the operator at this stage: by approaching affected landowners and occupiers (along with any other parties who need to consent); and providing them with copies of standard documents; together with an explanation of their main terms and a plan of the proposed routing, working areas and access routes etc; and a clear summary of the compensation and reinstatement obligations on the operator. At Fieldfisher we have created client-specific "landowner and occupier approach packs" containing the standard information and setting out how and when compensation and consideration is calculated. This can form part of the all-important ‘winning hearts and minds campaign’ (even before the landowners instruct advisors) and can greatly cut down on negotiations caused due to a lack of understanding of the project or the main terms of the agreement to be entered into.

Realistically, however well prepared an operator is, there will always be at least one landowner in any project who proves more difficult to deal with than the rest. In order to guard against the possibility of such landowners seeking to extract more consideration by waiting until project deadlines are close and then withholding agreement (and holding the project to ‘ransom’), it is crucial for each of the:

- Project Engineers,
- Lawyers negotiating the land rights; and
- Operator’s land agents
to have clarity at all times on:

(a) The latest date on which the project would become fully operational;
(b) The latest date on which the works must start (to achieve (a));
(c) Any practical considerations such as winter working shutdowns;
(d) The latest date on which all rights must be in place for (a) to be achievable;
(e) The location and type of the apparatus to be installed, including any ancillary rights eg pipelines / haul roads / working areas / lay down areas / bore holes etc and any possible alternative routes;
(f) Progress with planning consents and other statutory/regulatory consent;
(g) Progress obtaining every third party rights required;
(h) Progress with any compulsory rights application;
(i) Any ‘problem’ landowners; and
(j) Any other issues that may affect project timings (e.g. protesters);

as well as any changes to the above.

Overall project timings should take into account potential time windows required for the acquisition of rights by compulsion and the possibility of judicial review.

Timings will also need to include a contingency for issues coming to light after environmental reports are issued (such as dormice, bats, newts etc).
Location

Where the pipeline is to be situated can be extremely challenging. The issues we see at Fieldfisher can be broadly divided into four categories:

(a) Landowner consent - Some landowners along a chosen route may prove either unduly obstructive (perhaps requiring unreasonable compensation or even simply objecting to the project outright). Landowners who initially seemed 'on board' can sometimes change their mind late in the day in the hope of holding out for better terms/more consideration;

(b) Legal title issues - There can be problems with the title that the landowners are not in a position to remedy or cannot remedy in the timescales required. Examples include obtaining third party consents, satisfying restrictions/covenants and dealing with titles that are not registered at the Land Registry (where there is often insufficient evidence to show that the purported landowner does actually have all the necessary rights to the land);

(c) Special Land - Certain types of land require additional permits or consents. Examples include land owned by statutory authorities or the Crown, national parks or common land; and

(d) Engineering / Environmental considerations - Issues can arise on further site investigations such as SSSI areas, unsuitable gradients, archaeological aspects, issues with the water table, protected wildlife (e.g. newts) etc.

If any of these factors do cause the planned route of the pipeline to be changed it will have a 'knock-on effect' on matters such as the existing planning consents, project scheduling, legal spend, engineering costs and procurement.

To mitigate the risk it would be prudent to have at least two possible routes investigated for feasibility from the outset of a project. However, this advice does come with a 'health warning'. A CRO (see below) will require the operator to demonstrate that the operator/promoter has properly investigated the viability of all reasonable routes and that on balance it is indeed reasonable for the pipeline to be laid in the position applied for.

Access

At Fieldfisher our advice to clients would be that it is important that all access requirements (both temporary and long term) are identified at the outset of a project and for the land agents to be fully briefed so that agreement can be reached early on with the landowners and occupiers along with the main works' details.

This should involve:

- Highways searches to determine the extent of the publicly adopted highway (to check that there are no potential ransom strips);
- A clarification of which temporary access rights (e.g. during construction such as haul roads) and which permanent access rights are required. These will need to be protected by registration; and
- Consensus with the landowners and occupiers on the access routes

If these are left late in the day (possibly because of project changes or special land considerations), this can cause delay and aggravation with landowners and/or occupiers at a critical point in the negotiations.

Rights Required

These should be considered at an early stage. Wherever the project allows we would advise the operator to consider making these clear as early as possible as they will not necessarily be caught by the standard documentation (depending on depth/size/location etc).

Rights that might be required include:

- Cable easements;
- Cathodic protection equipment;
- Valve compounds;
- Electricity Kiosks;
- Keys to any farm gates;
- Rights to lay or maintain any access road;
- Rights to lay or maintain any ancillary equipment outside the easement strip;
- Any additional areas needed for the project due to road/rail river or canal crossings

Planning Issues

A detailed assessment should be undertaken early on in the project, to establish what planning permissions and consents are needed and whether the project falls under the ambit of the Pipelines Act 1962 or a Development Consent Order. It should be clarified what environmental assessments may be needed (e.g. an Environmental Impact Assessment). These assessments must, of course, be made where relevant, to all parts of the scheme.

Operators will need to consider whether their project is a Nationally Important Infrastructure Project and will require a Development Consent Order as this will take significant time.

It remains crucial to keep the local planning authority and DECC on side and informed at all stages. This is especially the case if the planned route runs into difficulty necessitating a change in the pipeline route. Having built up goodwill of these authorities may...
expedite new approvals being given if the consent working area/easement is insufficient or has to be altered.

Compulsory Powers or Agreement?

Operators often view applying for a Compulsory Rights Order ("CRO") under the Pipelines Act 1962 ("the Act") (assuming of course that the pipeline in question is subject to the Act) as expensive, time consuming and subject to a number of onerous requirements and therefore to be avoided if at all possible. The use of any compulsory powers should always be considered as a course of last resort but it should be recognised that on occasion it may be the only way of progressing the project.

In order to satisfy the necessary requirements for a CRO, the operator must show that:

- The pipeline is covered by the Pipelines Act 1962 and not subject to any of its exemptions;
- It has done all it reasonably can do to obtain the necessary rights privately (this does not include paying ransom amounts);
- That it is reasonably necessary that the pipeline go through the route chosen rather than an alternative route and in particular that it is necessary to acquire rights against this landowner;
- There is sufficient funding for the whole project;
- The project is, on a balance of convenience in the public interest;
- Planning permission is in place;
- Construction of the pipeline has not commenced (as rights cannot be used retrospectively); and
- All other consents have been obtained, or alternatively there is no other reasonable prospect of these being obtained by agreement and this is the "last link in the chain"

Ideally, the operator will start the process of seeking to obtain all necessary third party rights at least 2 years before the latest date on which work is to commence. That then means there will be a 6-9 month window in which to try and obtain the rights by private negotiation and satisfy the preconditions before the CRO process should be commenced.

The private negotiations would always continue in parallel with the compulsory acquisition procedure. It will always be the ultimate goal to obtain consent by agreement with all parties. One would however hope that most of the affected landowners and occupiers would consent rather than to have recourse to compulsion.

Dealing with Protestors

At Fieldfisher we are experts at dealing with all the traditional methods of dealing with protesters and unlawful trespass, including possession orders and injunctions. We have developed innovative solutions, such as using the Court’s powers to help pre-empt and to safeguard against third party disruption before any such action has even occurred.

(whether this is because emphasis is placed on private negotiations or because the operator is reacting to, rather than anticipating, events) can mean that certain remedies and solutions are no longer available. It may also give rise to issues becoming more complex and the potential solutions becoming more costly.

Working in conjunction with Fieldfisher to identify potential issues, and being proactive and obtaining legal advice as soon as possible, can significantly reduce project cost and delay.

Development Provisions ('Lift or Pay')

Development clauses otherwise known as 'lift or pay' or 'lift and shift' clauses typically require that a landowner proposing any development to:

- Consult with the operator,
- Use best endeavours to site the development in such a way as to not conflict with the pipeline,
- Obtain planning consent OR prove that the planning consent had been refused or the development prevented by virtue of the position of the pipeline.

At that point, the operator must elect (usually with a stated time) either to divert or pay compensation. Measures must be taken to ensure that the landowner recovers only once.

Typically, we are now seeing greater development pressure on agricultural land with, lift or pay clauses being exercised more frequently. Landowners not imminently facing the threat of compulsory powers may now be reluctant to:

(a) Sign up to a 'once' only lift or pay clause; or
(b) Agree the best endeavours wording, preferring a lesser 'reasonable endeavours' obligation

Mining Code

Standard pipeline leases or deeds of grant may or may not incorporate the Mining Code. Generally the older leases and deeds of grant will do so. These provisions deal with compensation available to landowners in respect of sterilized mines or minerals which cannot be worked due to the presence of the pipeline, (subject to the satisfaction of various conditions, notification and election procedures).

We would usually advise that it is not in the best interest of the operator to include these clauses. They not only increase the potential instances in which compensation is payable to the landowner but a further complication may arise where pipelines owned by different operators are laid in the same trench, or share all or part of an easement strip. This may mean that a situisational landowner (who believes that they have suffered a loss or an injury), claims against one operator but not the other. The operator of the pipeline behind the pipeline facing the claim will need to play a cautious 'waiting game' and take legal advice to ensure that any counter notice is served at the appropriate time.
situation arises where the landowner claims against one operator but not the other. The operator of the pipeline behind the pipeline facing the claim will need to play a cautious waiting game while the works progress and ensure that any counter notice is served at the appropriate time.

**Conclusion**

As we have seen there are many and varied traps and practical considerations for the wary promoter. However, given time and careful strategic planning together with our experienced team, we can help develop the relevant project plan in such a way as to maximise efficiency and minimise risk and project cost.