

**Hardwicke Chambers**  
Prepared by Kysen PR

**Date** 10 October 2013  
**Publication** New Law Journal  
**Type of publication** Legal

**New Law Journal**  
Leading on debate, litigation and dispute resolution

## Crowning glory?

Nicholas Asprey tackles the issue of the Crown & compulsory purchase



### IN BRIEF

► In a case of attempted compulsory purchase, what happens when the freehold is vested in the Crown and a lease is held by a non-Crown body?

It is an established rule of statutory interpretation that the Crown is not bound by a statute which imposes restraints on persons in respect of property unless the statute says so expressly or by necessary implication (see *British Broadcasting Corporation v Johns* [1964] EWCA Civ 2, [1964] 1 All ER 923; cited with approval in *Lord Advocate v Dumbarton DC* [1990] 2 AC 580, [1990] 1 All ER 1). It is for this reason that an interest in land held by the Crown cannot be compulsorily acquired unless the statute expressly provides the acquiring authority with the power to acquire Crown interests.

In the case of interests held by persons or bodies other than the Crown in land which otherwise belongs to the Crown, such as where the Crown owns the freehold and a non-Crown body holds a lease, statutes often provide for the compulsory acquisition of the non-Crown interests, but this power is only exercisable with the consent of the appropriate Crown authority. A recent example of these provisions is contained in s 135 of the Planning Act 2008.

Section 135(1) provides that an order granting development consent (DCO) may include provision authorising the

compulsory acquisition of an interest in Crown land only if—(a) it is an interest which is for the time being held otherwise than by or on behalf of the Crown, and (b) the appropriate Crown authority consents to the acquisition.

This article is concerned with a question which can arise where the freehold is vested in the Crown and a lease is held by a non-Crown body. Without doubt the grant of consent by the Crown to the acquisition by the acquiring authority of land comprised in the lease or of rights over that land would, on the face of it, be a clear breach of the covenant for quiet enjoyment and of the lessor's obligation not to derogate from the grant. These obligations will be referred to as the Crown's "contractual obligations".

The question which arises is whether the lessee can prevent the Crown from consenting to the exercise of the power or whether the Crown is relieved of its contractual obligations by the rule which precludes a public authority from fettering the future exercise of its statutory discretion or on some other ground. This question is likely to become of increasing importance as economic activity increases and major infrastructure projects are promoted and pursued.

### The Crown immunity

In the case of *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623 Devlin LJ said this: "I think that where the legislature confer powers on anybody to take lands compulsorily for a particular

purpose, it is on the ground that the using of that land for that purpose will be for the public good".

Section 135 does not confer a power on the Crown to take lands compulsorily for a particular purpose but it does confer on the Crown a discretion whether to consent to the inclusion of such a power in a DCO and it is hard to see why the principle enunciated by Devlin LJ should not, on the face of it, apply to this section and similar enactments.

If it does apply the discretion conferred on the Crown must be exercised by the appropriate Crown authority for the public good and any exercise of the power which failed to take proper account of the public interest would be susceptible to judicial review; and the Crown would not be able to contract itself out of its duty to exercise the discretion in the public interest: per Lord Denning MR in *Molton Builders Ltd v City of Westminster LBC* (1975) 30 P & CR 182.

In the result, the lessee would be unable to compel the Crown to comply with its contractual obligations (ie not to interfere with the lessee's quiet enjoyment of the land and not to derogate from its grant) by the rule which prevents a public authority from fettering the future exercise of its statutory powers—the so called "no fetter" rule. In the writer's view however this is not the right way to construe s 135.

### Erosion of the Crown immunity

The general immunity of the Crown from statutory regulation applies to the Monarch and to all the institutions of central government. In their book *Constitutional and Administrative Law* Bradley and Ewing state that the immunity of central government from the regulation that applies to private persons goes much further than is justifiable and that Parliament "has begun to remove the immunity piecemeal".

Section 135 is part of a series of provisions, beginning with the Town and Country Planning Act 1947, by which Parliament has eroded the Crown immunity from the compulsory purchase powers contained in the planning enactments. To this day the immunity remains absolute in relation to interests in Crown land which belong to the Crown. The discretion to grant consent applies only to an interest in Crown land which belongs to a non-Crown body.

The writer suggests that the discretion vested in the Crown by s 135 is part of the piecemeal erosion of the Crown immunity to which Bradley and Ewing refer and should be construed in that light so that the Crown's right to refuse its consent is

part of the Crown immunity and therefore absolute: ie exercisable without regard to the public interest.

It is after all hard to conceive that Parliament intended an exercise of discretion by the Monarch, or by the Speaker of the House of Lords or the Speaker of the House of Commons who are also included in "The Crown" for these purposes, to be susceptible to challenge by judicial review; and the Court of Appeal in the past has baulked at having to distinguish between one Crown body and another (See Lord Denning in *Molton Builders*).

If, as the writer contends, the Crown is entitled to refuse consent without having regard to the public interest there is no reason to doubt that it can be compelled by the lessee to abide by its contractual obligations in the usual way. But there are, in any event, other reasons which point in the same direction.

#### The "no fetter" rule

In *Commissioners of Crown Lands v Page* [1960] 2 QB 274, [1960] 2 All ER 726 Devlin LJ said this: "When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion".

This is a broad expression of the so called "no fetter" rule and was based on cases such as *Ayr Harbour Trustees* which are generally regarded as the foundation of the rule. The paragraph has been cited time and again in subsequent cases and it formed the basis of Lord Denning's equally broad statement in *Molton Builders*, namely that the Crown "cannot contract itself out of its public duty". But on its own this is an incomplete statement of the law.

Public authorities such as the Crown are nearly always equipped with different powers for different purposes where the exercise of one power might prevent the future exercise of another. The mere fact that the exercise of one power would be incompatible with a possible future exercise of another does not render the exercise of the first power void, and the decision in *Ayr Harbour Trustees* has been expressly distinguished on this ground (*Birkdale District Electric Supply Co v Southport Corporation* [1926] AC 355, [1926] All ER Rep Ext 714; *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 2 All ER 277).

The Crown in its various guises clearly has power to grant leases and covenant for quiet enjoyment and not to derogate from grant. Although such obligations would be incompatible with a future exercise of the discretion under s 135 it would be extraordinary if such incompatibility should make the contractual obligations void. They would surely be valid pending any actual exercise of the discretion and, being fundamental to the lease, if they then became void the lease itself would become void.

There is nothing in s 135 to suggest that Parliament had any such intention in mind and it is considered that the "no fetter" rule cannot apply. But it is still necessary to consider whether there is any other ground on which the Crown might be exonerated from its contractual obligations.

***"By entering into the contractual obligations in the lease the Crown in effect gives the lessee a right to veto the exercise of that discretion"***

#### Implied term in the lease

In *Commissioners of Crown Lands v Page* premises comprised in a lease granted by the Crown were requisitioned by the Crown in exercise of emergency powers conferred by statute. It was held that the implied covenant for quiet enjoyment did not preclude the Crown from exercising its statutory powers. The implied covenant for quiet enjoyment was held to be subject to a proviso excluding the exercise of those powers. Devlin LJ said this: "When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation. No one can imagine, for example, that when the Crown makes a contract which could not be fulfilled in time of war, it is pledging itself not to declare war for so long as the contract lasts. Even if, therefore, there was an express covenant for quiet enjoyment, or an express promise by the Crown that it would not do any act which might hinder the other party to the contract in the performance of his obligations, the

covenant or promise must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown takes for the public good".

In reaching this conclusion Devlin LJ applied the "officious bystander" test. He concluded that if at the time when the lease was granted the officious bystander had asked whether it was clear that the Crown was not undertaking to limit the use of its general executive powers there could have been only one answer, namely that the Crown was not undertaking to limit the use of those powers.

His judgment therefore invites the Crown to contend that by virtue of an implied term in the lease the contractual obligations do not preclude the grant of consent under s 135. But s 135 is not concerned with wartime emergency powers and the facts of that case differ from the case under discussion. Although s 135 is concerned with "nationally significant infrastructure projects" it could not, in the writer's view, be predicated with any degree of certainty that if the parties were asked by the officious bystander if such a term should be implied in the lease they would both answer in the affirmative.

The only other relevant test is the "business efficacy" test, and this cannot lead to any different conclusion because the contractual obligations make good sense without the implication of such a term. It is therefore submitted that there is no proper basis for implying any such term in the case under discussion.

#### Conclusion

Section 135 gives the Crown a discretion to consent to the inclusion of compulsory purchase powers in a DCO. By entering into a covenant for quiet enjoyment and agreeing not to derogate from grant the Crown in effect gives the lessee a right to veto the exercise of that discretion. One might expect a court to strive to find some reason to conclude that the contractual obligations do not have this effect. It is suggested that there is no legitimate basis for arriving at such a conclusion.

On the contrary, the writer considers that a lessee confronted by the Crown's intention to consent to the inclusion of compulsory purchase powers in a DCO would be entitled to enforce the contractual obligations against the appropriate Crown authority to prevent such inclusion.

NLJ

Nicholas Asprey, barrister, Serle Court ([www.serlecourt.co.uk](http://www.serlecourt.co.uk))