COURT OF APPEAL

[COA Record No. 2015/000196]

Peart J.
Hogan J.
Cregan J.

BETWEEN

THE ELECTRICITY SUPPLY BOARD AND EIRGRID PLC

PLAINTIFFS/RESPONDENTS

- AND -

KILLROSS PROPERTIES LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Cregan delivered on the 11th day of July, 2016

Introduction
1. The appellant in this appeal made three separate and distinct arguments. These were:

(i) that the company was entitled to more extensive notice than that provided for in s. 53 (3) of the Electricity (Supply) Act 1927 ("the 1927" Act) (which issue has been dealt with by the judgment of Hogan J);

(ii) that the wayleave notice of 28th June, 2013 was invalid because of certain defects contained within it;

(iii) that there was an improper delegation of power pursuant to s.9 of the 1927 Act and/or that the notice was ultra vires.

2. In this judgment I will deal with the second and third arguments submitted by the appellants.

The second issue: Defects in the Wayleave Notice
3. The appellant submits, as its second issue, that the wayleave notice of 28th June 2013 was invalid because of a number of defects contained within it. These were that:

(1) the description of the nature of the works was ambiguous and uncertain because two alternative descriptions were given;

(2) the duration of the wayleave was not stated on the notice;

(3) there was a confusion of statutory powers contained within the notice, (and, in particular, a conflation of the statutory powers contained within s. 53 (1), s. 53 (3), s. 53 (9) and s. 98 of the Act) such as to render it invalid.

4. Before considering the arguments in relation to each of these alleged defects it is necessary to describe the wayleave notice served in this case.

The wayleave notice
5. The wayleave notice in this case was served by the ESB on 28th June 2013. It was signed by Mr Eoin Waldron, an authorised officer of ESB. It was addressed to Mr. Larry McKenna, Company Secretary, Killross Properties Ltd., Celbridge, County Kildare. It stated as follows:

"Electricity (Supply) Act, 1927 and subsequent amending Acts.

Dear Mr. McKenna,
I hereby give you notice as company secretary of Killross Property Ltd (the company) that the Electricity Supply Board (the Board) pursuant to the powers conferred on the Board by s. 53 of the Electricity (Supply) Act, 1927 as amended by subsequent amending Acts intends to carry out certain temporary works to the existing electric line, as defined by s. 46 of the Electricity (Supply) (Amendment) Act, 1945 (as amended) over across the company's lands and known as the Dunfirth-Kinnegad-Rinawade 110kv line. These temporary works form part of the repair and alteration works being carried out by the Board to the existing Maynooth-Ryebrook 110kv line, the existing Dunfirth-Kinnegad-Rinawade 110kv line and the existing Maynooth Rinawade 110kv line.

The said existing electric line is located on the company's property situated in the:-

☐ *Townland of Easton*

☐ *Barony of Northsalt*

☐ *County of Kildare*

The nature of these works and the position and manner in which they are intended to be carried out to the existing electric line is set forth on the attached schedule/has been indicated to the company by a representative of the Board.

The company has seven days from the date of service of this notice in which to consent to these works. Accordingly, if the company has any objection it should write to the below address setting out such objection and the reasons therefore.

I also give you notice as company secretary of the company that the Electricity Supply Board pursuant to the powers conferred on the Board by s. 98 of the Electricity (Supply) Act, 1927 as amended, intends after a period of seven days from the date of service of this notice to lop or cut certain trees, shrubs or hedges which obstruct or interfere with the existing electric line. If desired the particular trees, shrubs or hedges to be cut will be indicated to the company.

Yours faithfully,

Eoin Waldron.

Authorised Officer." (Emphasis added)

6. Attached to this wayleave notice of 28th June 2013 was a document entitled:-

Electricity (Supply) Act, 1927 and subsequent amending Acts.

Schedule

• *The existing electric line, referred to in the notice to which this schedule is attached is shown by a pink line on the attached map which is to a scale of 1:2500.*

• *The intended position of the diversion to the existing electric line to be placed on the company's lands is shown by a red line on the attached map. This diversion is temporary and will be retired and removed from the company's lands once the repair and alteration works to the existing Maynooth-Ryebrook 110kv line, the existing Dunfirth-Kinnegad-Rinawade 110kv line and the existing Maynooth-Rinawade 110kv line (all crossing the company's lands) have been completed.*

• *This temporary line diversion will also be at a voltage of 110,000 volts and will consist of three continuous wires supported by insulators on wood structures at a height of at least seven metres over ground.*

• *A triple red circle on the map indicates the intended position of the triple wood pole set. A "T" shape on the map shows the intended direction of a stay wire which will be anchored in the ground.*

• *A double red circle on the map indicates the intended position of a double wood pole set.*

• *Excavation will be done manually or by a mechanical digger.*

• *Tract excavators tractors and other vehicles may be used for carrying out the work.*

7. Attached to the schedule was a map setting out the various works which were to be done.

The statutory context

8. It is also important to set out the statutory context in which the appellant makes its submissions. I therefore set out below the relevant sections of the Act, as amended:-

"53(1) The Board and also any authorised undertaker may, subject to the provisions of this section, and of regulations made by the Board under this Act place any electric line above or below ground across any land not being a street, road, railway, or tramway.

(3) Before placing an electric line across any land or attaching any fixture to any building under this section the Board or the authorised undertaker (as the case may be) shall serve on the owner and on the occupier of such land or building a notice in writing stating its or his intention so to place the line or attach the fixture (as the case may be) and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached.

(a)…

(b)…

(4) If within seven days after the service of such notice the owner and the occupier of such land or building give their consent to the placing of such line or the attaching of such fixture (as the case may be) in accordance with such notice either unconditionally or with conditions acceptable to the Board, or to the authorised undertaker and approved by the Board (as the case may require), the Board or the authorised undertaker may proceed to place such line across such land or to attach such fixture to such building in the position and manner stated in such notice.

(5) If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing sub-section the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, the Board for this purpose being deemed to be a public authority.

(9) Where the Board or an authorised undertaker is authorised by or under this section to place or retain any electric line across any land or to attach or retain any fixture on any building the Board or such authorised undertaker (as the case may be) may at any time enter on such land or building for the purpose of placing, repairing, or altering such line

or such fixture or any line or apparatus supported by such fixture.

A holder of an authorisation or the holder of a direct line permission may, with the consent of the Commission, for the purpose of such authorisation, exercise the powers conferred on the Board by subsections (1) to (5) and (9) of section 53 of the Principal Act and references to the Board in those subsections shall be construed as including references to a holder of an authorisation."

9. Thus s. 53(1) of the Electricity (Supply) Act, 1927 as amended provides that the Board may place any electric line above or below ground or across any land.

10. However s. 53 (3) provides that before placing an electric line across any land the Board shall serve on the owner and occupier of such land a notice in writing stating its intention so to place the line "and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached".

11. Section 53 (5) of the Act provides that if the owner or occupier does not give his consent, then the Board may place the line across the land in the position and manner stated in the said notice subject to the entitlement of the owner or occupier to be paid compensation - such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919.

12. Section 53 (9) provides that where the Board is authorised to place or retain any electric line across any land then the Board may at any time enter on such land for the purpose of "placing, repairing or altering such line".

(1) The first alleged defect - the description was vague, ambiguous and uncertain.
13. Section 53 (3) provides that the wayleave notice must give "a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached".

14. The first submission of the appellant is that the wayleave notice is defective because the description of the nature of the line (and of the position and manner in which it is intended to be placed) is fundamentally vague, ambiguous and uncertain because the wayleave notice contains two possible descriptions of the nature of the line and the position and manner in which it is intended to be placed.

15. In this regard they rely on the fact that para. 3 of the wayleave notice states:

"The nature of these works and the position and manner in which they are intended to be carried out to the existing electric line is set forth on the attached schedule/has been indicated to the company by a representative of the Board."

16. The appellant's argument is that this sentence provides two descriptions of the nature of the line and of the position and manner in which it is intended to be placed. The first of these is that set out on the Schedule; the second is that "which has been indicated to the company by a representative of the Board."

17. The appellant accepts that the nature of the works set forth on the attached schedule is sufficiently certain. However it says that the second, alternative, description is completely uncertain. It is an undefined indication given by an unknown person to an unknown person at an unknown place and on an unknown date. Moreover it says that the insertion of the "slash" in the middle of the sentence effectively means that these two descriptions are in the alternative. It is either A or B. The appellant submits that it is unclear which of these two alternatives is to be considered and because there are two alternatives, one of which is certain and the other uncertain, the entire wayleave notice is void for uncertainty.

18. However it is clear that Mr. Larry McKenna of the defendant company, in his evidence to the High Court and in cross examination, accepted that the wayleave notice did describe the nature of the line, that it described the position of the line and that it also described the manner in which it was intended to be placed (i.e. on poles and as an overhead line). Therefore it is clear - even on the basis of the appellant's own evidence - that the notice of 28th June 2013 met the statutory requirements and was therefore valid.

19. Therefore the only argument of the appellant on this point is the fact that because the wayleave notice also set out an alternative method that this leads to uncertainty. This proposition must be considered both as a theoretical proposition and in relation to the facts of this case. In theory, it is, of course, possible that a wayleave notice could be described in such vague terms that it is completely uncertain and therefore does not comply with the statutory requirements. But one must also consider the facts of each particular case and see whether such uncertainty actually exists in the present case.

20. Mr. Sreenan S.C. on behalf of the respondent submitted that the wayleave notice came after a survey notice had been served, after considerable engagement and correspondence between the parties, after plans had been provided, and after a lengthy letter had been sent explaining what was being proposed.

21. Having considered the affidavits and correspondence in this case, it is clear that the appellant was indeed aware in considerable detail, both from conversations with representatives of the ESB, and also from correspondence even before the wayleave notice was served, about the nature of these works, the position and manner in which they were intended to be carried out and indeed the details set out in the schedule. Thus, any argument to the effect that just because there was an alternative, uncertain description set out in the wayleave notice that therefore the entire wayleave notice is void for uncertainty is, in my view, not well-founded, on the facts of this case.

The second alleged defect in the notice - the uncertain duration of the wayleave
22. The wayleave notice of 28th June 2013 provides in its first sentence that the

"I hereby give you notice ……that the Electricity Supply Board (the Board), pursuant to the powers conferred to the Board by s. 53 of the Electricity (Supply) Act 1927 as amended by subsequent amending Acts intends to carry out certain <u>temporary</u> works to the existing electric line….."

23. The covering letter accompanying this notice also dated 28th June 2013 indicated that the temporary line diversion would be on the lands between "July 2013 and November 2013 approximately". In the on-going discussions between ESB and Killross, it was made clear that the temporary line diversion would be in place for approximately four months. In fact ESB entered upon the lands in March 2015 and the works were completed in August 2015.

24. The appellant submits that s. 53 (3) of the Act provides that the wayleave notice which must be served by the ESB before placing an electric line across any land must give a description "of the nature of the line…and of the position and manner in which it is intended to be placed or attached". The appellant submits that inherent in these statutory requirements is a requirement that where a wayleave notice is served, the duration of that wayleave should be set out clearly and unambiguously in the notice. It submits that because the notice only uses the word "temporary", the right of the ESB to the wayleave could last for days, weeks, months or years and that the landowner is entirely unclear about how long the wayleave will last. It submits that there is such uncertainty about the duration and extent of the wayleave that the notice could not be regarded as complying with the requirements of s. 53 (3).

25. The respondents submit that in circumstances where the temporary line was in fact removed in August 2015 such an argument is entirely without merit as the wayleave notice has now been spent. In response, the appellant submits that the fact that the works have now been removed does not cure any defect in the original notice.

26. Again however, it is necessary to consider the appellant's argument both in theory and in practice. Section 53 (3) provides that the notice should give a description of the "nature of the line or fixture". There is, however, nothing in the wording of s. 53 (3) which provides that the Board should set out in the Wayleave Notice the estimated duration of the work. Moreover to interpret the words "giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached" as requiring a description of the duration of the works would be to strain the wording of that section and to give it a meaning which it cannot bear.

27. In any event, on the facts of the present case, it is clear from the evidence that the appellant was at all times informed of the likely duration of the works.

28. Moreover as the work has now been completed and the temporary line has been removed, the wayleave notice is now spent. Therefore the issue is moot. Any issue in relation to the duration of the wayleave will now result in appropriate compensation for the appellant. There is, in any event, no evidence that the temporary line frustrated the development of the lands, there was no evidence of planning permission being obtained or that any development might have taken place during the relevant period. It appears that the land in question is, and was at all relevant times, agricultural land. It is not the case that the uncertain duration of the wayleave notice fundamentally affected the right of the landowner to deal with its lands during that relevant time. Thus, in my view, any argument that the wayleave is invalid because it does not specify the duration of the works is not well- founded.

The third alleged defect – the confusion over statutory powers.

29. The third alleged defect in the wayleave notice is that the appellant submits that it confuses a number of statutory powers and that it is not clear to the landowner on what precise statutory basis, the ESB is exercising its powers. The wayleave notice purports to give notice that the ESB, pursuant to the powers conferred on the Board by s. 53 of the Act, intends to carry out certain temporary works to the existing electric line. It also states that these temporary works form part of the "repair and alteration works" being carried out by the Board to the existing line. The final paragraph of the wayleave notice also states that the ESB gives notice (pursuant to the powers conferred on the Board by s. 98 of the Electricity Supply Act 1927) that the Board intends after seven days from the date of service of the notice to lop or cut certain trees, shrubs or hedges which obstruct or interfere with the existing electric line.

30. Thus the notice in this case not only referred to the relevant notice under s. 53 (3) of the Act but also referred to the relevant notice under s. 98 of the Act. The notice also indicated that the temporary works form part of the "repair and alteration work" being carried out by the Board to the line which is a reference to s. 53 (9).

31. The appellant submitted that the notice was confused and ambiguous and that it conflated three separate statutory sections (i.e., s. 53 (3), s. 53 (9) and s. 98 (of the Act) and that this confusion rendered the notice defective. The appellant submits that the property owner simply does not know on what precise statutory basis the ESB is coming onto its lands. If it is under s. 53 (3), then it is a new line, notice is required and compensation is payable; if it is under s. 53 (9) (for repairs and alterations to an existing line) then no notice is required and no compensation is payable; if it is under s. 98, notice is required, but there is no compensation.

32. This confusion, it says, is caused entirely by the ESB and is of its own making. It submits that the notice must be simple, straightforward and understandable and it must be clear to the landowner on what precise statutory basis the ESB is coming onto its lands.

33. However, in my view, this argument is also not sustainable on the facts of this case. The wayleave notice on its face specifically refers to s. 53 of the 1927 Act and gives notice of intended works. It is true that it does not specifically refer in terms to s. 53 (3) and/or s. 53 (9). However, as the appellant itself accepts, s. 53 (9) does not require notice as it is simply for repairs and alterations to existing lines. The notice can, accordingly, only be referable to s. 53 (3). Therefore despite the appellant's submissions, there could not have been any confusion or ambiguity as to which of these statutory sections the wayleave notice was referable to. It could only have been referable to s. 53 (3) and could not be referable to s. 53 (9).

34. The appellants further submit that the wayleave notice is invalid because in addition to referring to s. 53 it also refers to s. 98 of the 1927 Act and purports to give notice under s. 98.

35. However there is no reason in principle why a wayleave notice should be invalid simply because it purports to give two separate notices to a landowner under two separate sections of the statute of what the ESB intends to do in one notice. Moreover there is no statutory prohibition on using the same wayleave notice to give notice under s. 53 and s. 98. Indeed in *ESB v. Harrington* the same wayleave notice purported to be a notice for s. 53 (3) and s. 98 and the Supreme Court took no issue as to its validity.

36. The appellant also submitted that as there were no trees or shrubs on this site, the serving of a s. 98 notice was defective and indeed an abuse of statutory power. However whilst the absence of trees or shrubs means that the serving of a s. 98 notice in this case was unnecessary, it could not be said that this renders the entire s. 53 (3) notice invalid. Such an argument is, in my view, illogical. Indeed, as the wayleave notice purports to be two separate notices under two separate statutory sections even if the s. 98 notice were invalid as a matter of law (which it is not) that of itself would not, in my view, be a sufficient ground for rendering invalid the s. 53 (3) notice entirely.

37. I am therefore of the view that the argument that the Wayleave Notice is invalid on these grounds is not well- founded.

IMPROPER DELEGATION OF POWER PURSUANT TO SECTION 53 – DELAGATUS NON POTEST DELEGARE

Introduction

38. The appellant also makes a number of arguments under this heading. These are as follows:

> (i) That ESB, in effect, delegated its power and/or discretion to issue wayleave notices to Eirgrid and/or ESB Networks Ltd to such an extent that it no longer has any ability to exercise a discretion as to whether to issue a wayleave notice or not;
>
> (ii) That Mr. Waldron is, in effect, directed and controlled by ESB Networks Ltd and therefore he is not in a position to exercise his power to issue a wayleave notice for on behalf of ESB;
>
> (iii) That the delegation by the Board to the Chief Executive and by the Chief Executive to Mr. Waldron of the Board's power to issue wayleave was ultra vires s.9 of the 1927 Act, was an unlawful delegation of power and was a breach of the principle *delegatus non potest delegare*.

Before I consider each of these arguments, I propose to briefly describe the regulatory structure of the electricity transmission system in Ireland.

The regulatory structure of the electricity transmission system.
39. It appears that under the current regulatory structure in Ireland the following is the division of responsibility for the transmission of electricity:

> ☐ ESB – Transmission Asset Owner (TAO)
>
> ☐ Eirgrid Plc – Transmission System Operator (TSO)
>
> ☐ ESB Networks Ltd – Transmission Asset Manager

40. The division in responsibility in relation to the distribution of electricity is as follows:-

> ☐ ESB – Distribution Asset Owner (DAO)
>
> ☐ ESB Networks Ltd – Distribution Systems Operator (DSO)
>
> ☐ ESB Networks Ltd – Distribution System Manager.

41. Mr. Padraig Ó hIceadha in these proceedings swore an affidavit on behalf of ESB and Eirgrid to set out:

> (1) who ESB is, who ESB Networks is, who ESB Network Ltd is, and who Eirgrid Plc is
>
> (2) the relationship between these entities;
>
> (3) who gave what direction in relation to the notice of 28th June 2013.

42. In the course of that affidavit Mr. Ó hIceadha explained that ESB owns the electricity transmission system, that the Commission for Energy Regulation (CER) has granted it the Transmission Asset Owner (TAO) licence and that ESB's functions and duties as TAO include the carrying out of maintenance tasks on the transmission network in accordance with the specifications of the Transmissions System Operator (TSO), namely, Eirgrid. As a condition of its TAO licence ESB was required to designate an internal division of its business to carry out its TAO functions. Accordingly ESB designated a division of its business called ESB Networks for this purpose. (Indeed much of the confusion in relation to this issue is caused because there is an internal division of ESB called "ESB Networks" and a separate company called "ESB Networks Ltd".)

43. Mr. Ó hIceadha's affidavit also sets out the fact that ESB Networks Ltd is the electricity distribution system operator (DSO) and that ESB Network Limited fulfils the same role in respect of the electricity distribution system as that which Eirgrid fulfils in respect of the transmission system. Article 15 of EU Directive 2003/54/EC requires that the DSO must be independent in terms of its legal form from other activities of ESB not relating to distribution. ESB remains the owner of the distribution system (the distribution asset owner) (DAO) but ESB Networks Ltd, as a wholly owned subsidiary, was established to discharge the DSO function. ESB Networks Ltd. is independent of ESB and is the holder of the DSO licence in its own right, not as the agent of ESB. Thus, decisions in respect of operating and ensuring the maintenance and development of the distribution systems are in the remit of the ESB Networks Ltd as DSO.

44. The issue of personnel and their various roles in these companies is also confusing. As is stated in the Respondent's legal submissions at para. 3.7:

> "3.7 The managing director and senior management team of the ESB Networks Limited have been transferred by means of secondment to ESB Networks Limited by ESB. In addition ESB has agreed to make available to ESB Networks Ltd relevant personnel to assist ESB Networks Ltd in carrying out its functions as operator of the distribution system (DSO). These personnel work in the ESB Networks Business Unit of the ESB."
>
> 3.8 Separately, with the approval of CER, ESB has also agreed with ESB Networks Ltd that ESB Network Limited will manage the discharge by ESB of its functions as DAO and TAO. ESB pays a management fee to ESB Networks Ltd in this regard. This means that ESB staff, working in the ESB Network Business Unit are involved in performing, DSO, DAO and TAO functions and are managed in this regard by ESB Networks Ltd. However there is an important distinction as to the capacity in which this management role is being performed at any given time: ESB Networks Ltd manages the staff and the performance of DSO functions as the DSO, but manages them in the performance of DAO and TAO functions as the entity to which ESB has assigned the management of the discharge, by its internal ESB Networks Business Unit of these functions. In the latter case – with which we are concerned in this appeal which relates to the maintenance of the transmission system – ESB Networks Ltd is managing ESB staff performing ESB functions for ESB. Accordingly when the staff in the ESB Networks Business Unit are carrying out TAO and DAO functions they do so for and on behalf of ESB, albeit under the management and direction of ESB Networks Ltd."

45. The respondents therefore submit that as of the date of service of the wayleave notice of 28th June 2013, the Transmission Asset Owner function was vested in the ESB and was carried out by the ESB Networks Business Unit, an internal division of its

business. They also submit that Eoin Waldron was, and remains, an employee of this business unit. They also submit that this arrangement had been certified two months previously as compliant with the relevant regulatory requirements by the European Commission (on 12th April 2013).

(1) The appellant's first argument – that ESB delegated its power to issue wayleaves to Eirgrid and ESB Networks Ltd and that ESB does not exercise any discretion in relation to service of notices.

46. The appellant submits that ESB has essentially delegated its statutory functions to issue wayleave notices under the Act to Eirgrid, that Eirgrid directed the operation of the particular project in this case, that Eirgrid then appointed ESB Networks International to carry out this project, that Mr. Waldron is under the control and direction of ESB Networks Ltd and that therefore Mr. Waldron in signing the wayleave notice is in effect "cut adrift" from the Board and the Board can exercise no supervisory powers over him. As a result therefore it submits that the wayleave notice was invalid.

47. In order to assess this submission it is necessary to consider each link in the chain of this argument.

48. Firstly, the appellant says that the ESB delegated its power to create wayleave notices to Eirgrid. It makes this argument based on clause 7.6.2 of an Infrastructure Agreement dated 14th March 2006 between the ESB and Eirgrid. Clause 7.6.2 provides as follows:

> "The Board, irrevocably for as long as this agreement exists, hereby appoints the TSO [Eirgrid] as its agent to
>
> *(a) ……*
>
> *(b) make and process all applications for the acquisition of wayleaves and rights of entry on behalf of the Board and*
>
> *(c) exercise all rights of entry on lands vested in the Board pursuant to regulation 29 of the statutory instrument or any other relevant statutory provision.*
>
> *Insofar as these rights may be required for the development of the transmission system."*

49. The appellant seeks to argue that under this contractual agreement the ESB has in effect delegated its power to serve all wayleave notices to Eirgrid.

50. However Clause 7.6.4 of the agreement provides as follows:

> *"Following receipt of relevant landowner details from the TSO under clause 7.6.2 the Board will issue wayleave notices, survey notices, borehole notices and similar instruments in accordance with the terms and arrangements agreed between the TSO and the relevant landowner and make all necessary payment arising under those terms."*

51. It is clear, therefore, despite the submissions of the appellant, that although the Board has appointed Eirgrid as its agent to make and process all underlying applications for the acquisition of wayleaves, the Board has specifically retained the power to issue wayleave notices. Thus the Board has not delegated the power to issue wayleave notices to Eirgrid at all. The appellant accept that this is the case but submits that in fact ESB has delegated all discretion as to whether to issue notices to Eirgrid or ESB Networks Ltd. The appellant submits that ESB has delegated the power to issue notices not once but twice: firstly to a separate company Eirgrid Plc and secondly to ESB Networks Ltd - which acts as Eirgrid's contractor in the carrying out of the acquisition. However, in my view, that analysis is not correct. What has been delegated by the Board to Eirgrid are preparatory matters in relation to applications for the acquisition of wayleaves, but not the issuing of the actual wayleave notice. Eirgrid simply does not have any authority to issue a wayleave notice on behalf of the Board. This function is specifically reserved to the Board by clause 7.6.4 and with it the essential decision in each case as to whether to issue notices or not.

52. The next link in the chain, according to the appellant, is that the project in this case is directed and controlled by Eirgrid. Eirgrid appointed ESB Networks Ltd as the contractor to carry out the project. The appellant goes on to say at (para. 3.8 of its legal submissions) that "Eirgrid as the party responsible for serving wayleave notices under clause 7.6.2(b) of the Infrastructure Agreement directed ESB Networks (under the management of ESB Networks Ltd) to serve wayleave notices to facilitate the works." However this submission is, in my view, also incorrect as a matter of law. Eirgrid is not the party responsible for serving wayleave notices under clause 7.6.2(b) of the infrastructure agreement. Eirgrid's role under 7.6.2(b) is to make and process all applications for the acquisition of wayleaves on behalf of the Board. Clause 7.6.4 however provides that following receipt of the relevant landowner details from Eirgrid under clause 7.6.2, "*the Board* will issue wayleave notices in accordance with the terms and arrangements agreed between Eirgrid and the relevant landowner." Thus Eirgrid could not have directed ESB Networks under the management of ESB Networks Ltd to serve wayleave notices, because it did not have that authority. The authority to issue wayleave notices was and always remained with the Board both under the 1927 Act and indeed under clause 7.6.4 of the Infrastructure Agreement with Eirgrid.

53. The next step in the chain of the appellant's argument is that Eirgrid request ESB Networks Ltd to carry out the project. ESB Networks Ltd. then does so. It may well be that Eirgrid directed ESB Networks Ltd to carry out some functions which Eirgrid was authorised to do as agent of the ESB under clause 7.6.2 and it may well be that ESB Networks Ltd did indeed carry out such actions. However, neither Eirgrid nor ESB Networks Ltd had any power or authority to issue wayleave notices.

54. While the appellant submitted that Mr. Waldron confirmed in evidence that his role was to complete the project as directed by Eirgrid, it is clear that this relates to completion of the operational details rather than to the legal right to issue wayleave notices. Whilst it may be the case that Eirgrid decides on the relevant projects, directs the relevant projects and then appoints ESB Networks Limited, as contractor for the project, and whilst it also may be the case that each aspect of the works is subject to the power of Eirgrid to accept or reject what might be proposed by ESB Networks Limited., these matters relate to the implementation and operational details of the project. They cannot, as a matter of law, relate to the service of the wayleave notice because that matter has been expressly reserved under the Infrastructure Agreement between ESB and Eirgrid to ESB. It must follow, therefore, as a matter of law, that Eirgrid could not issue any directions to ESB Networks Limited in relation to the issuing of wayleave notices. It must also follow as a matter of law and logic that ESB Networks Limited could not direct Mr. Waldron in relation to the issuing of wayleave notices because it never had that legal power.

55. The next link in the chain relied on by the appellant is that an agreement was made on 22nd December, 2008, between ESB and ESB Networks Limited. This was called an Asset Management Agreement. Clause 2.1 of the agreement provides that the purpose of the agreement:-

"Is to establish arrangements whereby the DSO i.e. ESB Networks Limited shall manage and direct ESB Networks Business Unit in the performance by that business unit of the Board's responsibilities as DAO and as TAO".

56. It is clear that this Asset Management Agreement is an agreement whereby ESB Networks Limited, a separate limited liability company, agrees to manage and direct the ESB Networks Business Unit in the performance by that business unit of the Board's responsibilities as DAO and as TAO. However, ESB Networks Limited is carrying on the business of managing and directing the ESB Networks Business Unit of the ESB, in effect, as a manager for and on behalf of ESB. The functions of ESB Networks Limited which they carry out pursuant to this agreement are entirely separate and distinct from the other functions they carry out in their other roles as ESB Networks Limited. The Asset Management Agreement is a specific management contract which it has entered into with ESB to manage a particular unit within ESB. There is no legal delegation of ESB's authority to issue wayleave notices to ESB Networks Limited contained either expressly or impliedly in this agreement.

57. The appellant then submits (in para. 3.38 of its legal submissions) that the Operating Agreement between ESB and ESB Networks Ltd in respect of distribution mirrors what is in the Infrastructure Agreement between ESB and Eirgrid Ltd and it includes a clause which it says, purports to allow ESB Networks Ltd to exercise the s. 53 wayleave power. It then refers to clause 8.1 of this operating agreement. Clause 8.1 (a) (b) and (c) contain provisions similar to clause 7.6.2 of the Infrastructure Agreement between ESB and Eirgrid. However it is clear as a matter of contractual interpretation that because clause 7.6.4 of the Infrastructure Agreement between ESB and Eirgrid specifically reserves to ESB the power to issue wayleave notices, that clause 8.1 (a) (b) and (c)must also be interpreted in a similar manner.

58. Whilst it is true that there does not appear to be any analogous clause to clause 7.6.4 in the Operating Agreement between ESB and ESB Networks Ltd, It is clear that there is nothing in clause 8.1 which confers on ESB Networks Ltd the power to issue wayleave notices. Moreover such a power could not be implied into this contract in these circumstances. The submission by the appellant that these provisions in the Operating Agreement confirm that ESB has purported to delegate its powers under s. 53 to ESB Networks Ltd is, in my view, incorrect as a matter of law.

59. I am satisfied, therefore, that the submissions of the appellant in this regard are, in effect, mischaracterising or misinterpreting the legal reality of what was going on between ESB, Eirgrid, ESB Networks Business Unit and ESB Networks Limited. Given the degree of overlap between names, functions and agreements it is hardly any surprise that there should be such a miasma of confusion over the roles, functions and legal responsibilities of the various parties involved. However I am satisfied that there is a clear legal distinction between ESB and ESB Networks Limited and that there is a clear distinction between the ESB Networks Business Unit (as a division within ESB) and ESB Networks Limited. It is also clear that ESB and ESB Networks Limited carry out different functions under the regulatory structure now in place in Ireland. It is clear that ESB and ESB Networks Limited have entered into various agreements required by the regulatory structure and it is also clear that ESB and ESB Networks Limited have entered into an Asset Management Agreement whereby ESB Networks Limited manage the ESB Networks Business Unit of ESB for and on behalf of ESB. However, this does not change the fundamental legal fact that nowhere in any of the arrangements or agreements between ESB and ESB Networks Limited can it be said that ESB has delegated the power of issuing wayleave notices to ESB Networks Limited. Indeed, it is clear that the Board of ESB has specifically retained the power to issue wayleave notices not only in its infrastructure agreement with Eirgrid but also in its agreement with ESB Networks Limited.

60. In the alternative, the appellant submits that even if ESB has retained the legal right to issue wayleave notices, the day to day decisions of whether to exercise a discretion in relation to issuing a wayleave notice does not rest with ESB. However, it is clear from the various contracts and the evidence of Mr. Waldron that the ESB has at all material times retained the power and the discretion as to when to issue wayleave notices and in my view, these arguments are misconceived.

61. The appellant also submits in the alternative, that even if neither Eirgrid nor ESB Networks Ltd have the power to acquire wayleaves under s. 53, that "this dilemma has been addressed and practiced by a very troubling three card trick: where Eirgrid decide, as in the present case, to develop or "operate" an electricity line and to acquire a wayleave for that purpose, it directs ESB Networks Ltd to effect the acquisition by serving a notice describing itself as ESB Networks so that it can argue that wearing its wayleave acquisition hat it is actually part of the ESB. This is despite the fact that all works are actually carried out by ESB Networks Ltd at the direction of Eirgrid".

62. However, in my view, the description of this issue as a "three card trick" is not correct. First, it is not correct to say that where Eirgrid decide to "acquire a wayleave" it directs ESB Networks to effect the acquisition…" because Eirgrid has no legal power to "acquire" a wayleave for that purpose; secondly, Eirgrid cannot direct ESB Networks Ltd to effect the acquisition by serving a notice describing itself as ESB Networks as it does not have the legal authority to issue a wayleave notice in the first place and therefore it could not direct any other party to serve a wayleave notice; thirdly the notice describing itself as ESB Networks is in fact a reflection that ESB Networks is an internal business unit of ESB which has retained the power to issue wayleave notices.

63. One of the errors which pervades the appellant's submissions in this regard appears to be its unwillingness to accept the distinction between the role of ESB Networks Ltd as the separate contractual entity carrying out certain functions under the new regulatory structure and the entirely separate and distinct role of ESB Networks Ltd in managing the ESB Networks Business Unit of the ESB. The appellant has conflated both of these roles and sought to argue that ESB has delegated its power to issue wayleave notices to ESB Networks Ltd when there is simply no evidence that this is so and indeed all the contractual documents appear to point in the opposite direction.

64. In summary, therefore, the argument that ESB has delegated its statutory power to issue wayleave notices to Eirgrid and/or ESB Networks Ltd is wrong as a matter of law and is misconceived. The appellant's argument that Eirgrid has a right to issue wayleave notices and, in effect, is directing ESB Networks Ltd to issue wayleave notices is also incorrect as a matter of law.

(ii) Mr. Waldron under control of ESB Networks Ltd.

65. The second argument of the appellant is that the wayleave notice must be signed for and on behalf of ESB, that Mr. Waldron was not in reality an employee of ESB ,but rather that he was controlled and directed at all times by ESB Networks Ltd, that ESB Networks Ltd directed him to sign the wayleave and therefore the wayleave could not be authorised by ESB.

66. However in my view this argument is unsustainable for the following reasons:

(1) Mr. Waldron is an employee of ESB and his salary is paid by ESB.

(2) He is one of the employees of ESB purportedly authorised to serve s. 53 (3) notices on behalf of ESB.

(3) The notice of 28th June 2013 was on ESB headed notepaper.

(4) Mr. Waldron's evidence was that he served the notice on ESB's behalf without a direction from any other person or party. He stated:

> *"As I said before the service of the wayleave notice is my responsibility as project manager and as an ESB employee. The wayleave notice was served by ESB, by an authorised officer, myself. The question as to whether ESB Networks Ltd can serve wayleave notices or should have in this case did not arise in my mind at all. I made the decision to serve the wayleave notice because it is my responsibility as project manager".*

(5) Mr. Waldron as an ESB employee works in the ESB Networks business unit, a division within ESB.

(6) Mr. Waldron's immediate superior Mr. Conor Healy is also an ESB employee working in the ESB Networks business unit.

(7) Although Mr. Waldron's ultimate superior is Mr. Padraig Ó hIceadha and although Mr. Ó hIceadha worked for ESB Networks Ltd – a separate entity to ESB – that in itself does not disprove the proposition that Mr. Waldron himself worked for the ESB in the ESB Networks business unit.

(8) Moreover Mr. Ó hIceadha gave evidence that "I have never directed anyone on ESB Networks to serve a wayleave notice. I have never seen a wayleave notice before looking at it in these proceedings". It is clear from this evidence that ESB Networks Ltd did not authorise, and, indeed, could not have authorised the wayleave notice in these proceedings.

(9) There is no evidence that ESB delegated or purported to delegate the power to serve notices under s. 53 to ESB Networks Ltd. The power to serve notices under s. 53 always remained with the ESB. In those circumstances it is difficult to see how the appellant could argue that ESB Networks Ltd could have had any legal right to serve a wayleave notice in this case, or that it had the lawful authority to direct Mr. Waldron to sign a wayleave notice on behalf of the ESB Networks Ltd.

67. The source of the confusion in relation to this issue arises because ESB, in addition to having an internal business unit entitled ESB Networks, also set up an independent company called ESB Networks Ltd to carry out functions of the transmission asset manager. In addition, however, ESB also contracted in ESB Networks Ltd to manage the internal ESB Networks business unit and to manage Mr. Waldron and his fellow ESB employees within the ESB Networks business unit. ESB Networks Ltd performed that management function on behalf of ESB and ESB paid them to do so.

68. Despite this confusion of nomenclature and of overlapping functions, it is clear that Mr. Waldron is and was at all material times acting for and on behalf of the ESB in signing and serving the wayleave notice on 28th June 2013 pursuant to s. 53 (3) of the 1927 Act.

69. In these circumstances I am of the view that the appellant's argument under this heading is not sustainable.

(iii) Whether the appointment of Eoin Waldron as an authorised officer was ultra vires the power of the Board under s.9 of the 1927 Act.

70. The final argument of the appellant is that the appointment of Eoin Waldron as an authorised officer for the purpose of serving s. 53 notices was an unlawful delegation of powers under s. 9 of the 1927 Act and that therefore the notice is unlawful.

71. Mr. Ó hIceadha in his affidavit stated that Mr. Waldron was an employee of ESB working in the ESB Networks Business Unit and at para. 8 of his affidavit he stated as follows:

> *"It is a mistake to think in terms of individual directions being given to Eoin Waldron in respect of any and every statutory notice he serves under s. 53 of the Electricity (Supply) Act 1927. Rather it is more appropriate to think in terms of Mr. Waldron being directed to carry out a project. As the ESB's project leader on the upgrade the subject matter of these proceedings, once he has directed to carry out the project, Mr. Waldron must, inter alia, decide whether the envisaged works require the service of any notices pursuant to s.*
>
> *53. If he determines that any such notices are required, he has by virtue of s.9 of the Electricity (Supply) Act 1927 the authorisation of the ESB to serve them. In this regard I beg to refer to a copy of the authorised officer list dated 3rd September 2012 adopted pursuant to s. 9 of the Electricity (Supply) Act 1927 by which ESB authorised Eoin Waldron to exercise powers conferred and/or imposed on it by the Act 1927 including the power to serve notices under s. 53 of the said act". (Emphasis added).*

72. This "Authorised Officer List" document of 3 September 2012 consists of a covering page and three pages of lists of names. It is headed "Authorization to sign statutory wayleaves and tree cutting notices". It states in its first paragraph:-

> *"Board decision No. 7(b) of 13th November 1973 authorised the Chief Executive to delegate to nominated officers the authority to exercise the powers and functions of the Board under s. 53(3) and s. (3) and s. 98 (2) of the Electricity Supply Act 1927 i.e. to sign the above notices on behalf of the Board. The staff listed in the attached Appendix have been nominated to exercise these functions.*
>
> Your approval is requested to the authorisation of these staff to sign the notices.
>
> *Signed Jerry O'Sullivan*
>
> *Executive Director Networks.*
>
> *Approved Pat O'Doherty*
>
> *Chief Executive.*
>
> *Dated 3 Sept 2012." (Emphasis added).*

73. Thus Mr. Eoin Waldron was nominated as an authorised officer and this nomination was approved by Pat O'Doherty Chief Executive of ESB who signed the relevant authorisation of 3rd September 2012 in accordance with the 1973 Board decision.

74. Moreover the respondent's legal submissions at para. 3.4, having set out para. 38 of Mr. Ó hIceadha's affidavit above, stated as follows:

> *"The exhibited authorisation recited that 'Board decision No. 7 (b) of 13th November 1973 authorised the Chief Executive to delegate to nominated officers the authority to exercise the powers and functions of the Board' under s. 53 (3). Eoin Waldron's nomination as an authorised officer was approved by Pat O'Doherty, Chief Executive of ESB. He signed the authorisation of 3rd September 2012 in accordance with that 1973 decision".*

75. This authorisation was exhibited as "P013" in the affidavit of Mr. Ó hIceadha dated 9th July 2014 (although the original Board decision of 13th November 1973 does not appear to have been exhibited). It is important to emphasise that this authorisation of 3rd September 2012 and the Board decision of 13th November 1973 are relied on by ESB (both in the affidavit of Mr. Ó hIceadha and in its legal submissions) as the instruments by which ESB authorised Mr. Waldron to exercise powers conferred and/or imposed on the Board by the Act of 1927.

76. The appellant argues that the actual decision of 1973 by the Board is not a valid exercise of its authority under s. 9 of the 1927 Act. It submits that whilst the Oireachtas has delegated certain powers to the Board and has also expressly authorised delegation by the Board to servants or officers, the power of delegation is not a power to sub-delegate and that s. 9 does not entitle the Board to permit a power of sub-delegation under s. 9. It submits that the Board decision and the delegation by the Chief Executive are ultra vires.

Analysis of legal principles

77. Section 9 of the 1927 Act provides:

> "The Board may exercise any of the powers and perform any of the functions and duties (other than the making of orders) conferred and imposed on the Board by this Act *through or by any of its officers or servants authorised by the Board in that behalf*". (Emphasis added).

78. The principle of *delegatus non potest delegare* has been considered by a number of writers on administrative law. In Hogan and Morgan, Administrative Law in Ireland (4th ed.) (at pp. 556,-557) the learned authors state as follows:

> *"The general principle here is that a power must be exercised by the authority (delegatus) in which it has been vested by the legislature. It cannot be transferred (delegare) to any other person or body…..*
>
> *The essential point is that the maxim is merely a rule of statutory construction rather than a rule of law and in predicting its operation it has been said that:*
>
> > *'whether a person other than that named in the empowering statute is empowered to act will be dependant upon the entire statutory context, taking into account the nature of the subject matter, the degree of control retained by the person delegating and the types of person or body to whom the power is delegated.'*

79. In *Administrative Law* (9th ed.) by Wade and Forsyth the learned authors state as follows under the heading "Delegation" at p. 311:

> *"An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred and by no-one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or bodies stated in the statute, and in condemning as ultra vires action taken by agents, sub committees or delegates however expressly authorised by the authority endowed with the power…*
>
> *The maxim delagatus non potest delegare is sometimes invoked as if it embodied some general principle that made it legally impossible for statutory authority to be delegated. In reality there is no such principle; and the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label… In the case of statutory powers the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates this is not normally allowable."*

80. In De Smith's *Judicial Review* (7th ed.) at p. 321 the learned authors state as follows:

> "Delegation of Powers
>
> The Rule against Delegation.
>
> *"A discretionary power must in general be exercised only by the public authority to which it has been committed. It is a well known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another…"*

81. The learned authors also state as follows at p. 331:

> *"Further Sub Delegation*
>
> *The restrictions on the power to delegate have on the whole been applied more strictly to the further sub- delegation of sub- delegated powers than to the sub- delegation of primary delegated powers. This is in accordance with the maxim that the expression of one excludes the other: where Parliament has expressly authorised sub- delegation of a specific character, it can generally be presumed to have intended that no further sub- delegation shall be permissible."*

82. Moreover, in considering the application of these principles to the facts of this case, it must be emphasised that this is not a case

where the Carltona principle applies. This doctrine was recently considered by the Supreme Court in *W.T. v Minister for Justice and Equality* [2015] IESC 73 where MacMenamin J stated at para. 1 of his judgment:

> *"Frequently a minister's officials will prepare documents for consideration, consider objections, summarise memoranda, and outline a policy approach to be taken by the Minister as an integral part of the decision-making process. Part of this arrangement, identified as the eponymous Carltona principle, is that the functions entrusted to departmental officials are performed at an appropriate level of seniority, and within the scope of responsibility of their government department. No express act of delegation is necessary…" (see Carltona Ltd. v. Commissioners of Public Work [1943] 2 All E.R. 560".*

83. As stated above, this, however, is not a case in which the Carltona principle applies. If it did, then the appellant's objection would have no application. However, the ESB is a statutory corporation established by the Electricity (Supply) Act 1927. It has the powers and functions given to it by that Act. Those powers and functions must be interpreted according to the normal rules of statutory interpretation. It is in that context that it is necessary to consider the language of s. 9 of the 1927 Act and whether it permits the delegation which has occurred in the present case.

84. One of the powers which the Legislature has delegated to the Board is the power under s.53 to issue wayleave notices. Under s. 9 the Board may exercise these s.53 powers through any of its officers or servants authorised by the Board. The question is whether, as a matter of statutory interpretation, the Board can authorise one of its officers to delegate this power to another officer.

85. Section 9 is drafted in simple and straightforward language. It consists of one sentence. It contains a simple concept, i.e., that the Board may authorise any of its officers or servants to exercise any of the powers of the Board. Therefore the Board could appoint its Chief Executive or Mr. Waldron or others to carry out s. 53 notice powers.

86. The question which then arises is whether this delegation by the Board of its powers and functions under the Act to its Chief Executive, with the authorisation that the Chief Executive could in turn delegate those powers and functions to such other persons as he deemed appropriate, is a matter which is permitted by s. 9 of the 1927 Act.

87. In my view, such a sub-delegation is not permitted by the Act for a number of reasons. Firstly, s. 9 specifically provides that the Board may exercise any of its powers through or by any of its officers or servants authorised by the Board. The statute is quite specific. Such persons have to be authorised by the Board. This means, in my view, that such persons have to be directly authorised by the Board and the Board does not have the statutory authority under s.9 to authorise officers to delegate these s. 53 powers to other persons authorised by that authorised officer.

88. Secondly, the section does not expressly say that the Board may authorise any of its officers to carry out any of its powers and that these officers may, in turn, authorise other persons to exercise these Board powers. Moreover that proposition, in my view, cannot be implied into the statutory section. There is nothing contained in the express language of the statute which permits the Board to authorise specific officers to delegate to other officers the powers and duties imposed on the Board by this Act. Any interpretation which seeks to justify the sub-delegation of powers by officers/servants of the Board to other officers/servants of the Board would require specific wording to be added to the section and in my view, this would be impermissible.

89. Thirdly, s. 9 also provides that such officers/servants must be authorised by the Board in that behalf. This means, in my view, as a matter of interpretation, that the officers/servants authorised to perform certain functions or powers must be specifically authorised by the Board in respect of those specific functions or powers. In other words the statute envisages that the Board not only authorises them directly but also authorizes them in respect of those specific powers or duties. This means that the statute envisages that the Board itself decides on the specific powers and functions so authorized. The section does not envisage therefore that the Board will delegate to one of its officers/servants the authorization to sub-delegate those powers or functions to a third party.

90. Fourthly, s. 9 clearly envisages a situation whereby the Board would delegate a power directly to an officer or a servant in circumstances where such an officer or servant would be within the control of the Board directly and/or answerable to the Board directly. If the Board authorised its Chief Executive to carry out its s. 53 powers and the Chief Executive did so there could be no objection to that process. Likewise if the Board had authorised Mr. Waldron and other persons directly to carry out its s. 53 powers there could no objection to that either. However what happened in this case is that Mr. Waldron is not authorised by the Board; he was authorised by the Chief Executive who in turn was authorised by the Board to delegate these powers.

91. Fifthly, whereas s.9 is an important statutory provision which enables the Board, to whom powers have been delegated under the statute, to avoid the strictures of the *maxim delegatus non potest delegare*, the provision in s. 9 must still be interpreted in the light of that principle. This means that although the Board may authorize certain officers to carry out certain specific tasks, it does not mean that the Board can authorize a person to delegate those functions to a third person. That would be to set at nought the *delegatus* principle.

92. Moreover, applying the maxim *"expressio unius, exclusio alterius"* to the statute, it is reasonable to conclude that the Legislature by permitting the Board to authorize certain parties to carry out certain functions, was expressly excluding a situation which allowed the Board to authorize someone to delegate those powers entirely to a third person.

93. Mr. Sreenan S.C., on behalf of the ESB, submitted that the evidence was that the Board delegated to the Chief Executive the power that the Board otherwise would have to authorise officers to sign wayleave notices on behalf of the board. He also submitted that having delegated that power to the Chief Executive, the Chief Executive did not further delegate it, the Chief Executive exercised it. He authorised Mr. Waldron to sign on behalf of ESB. Thus the essence of Mr. Sreenan's submission is that this was not a case of *delegatus non potest delegare*. However, in my view, this argument is not correct. Section 9 provides that the Board may exercise any of its powers through or by any of its officers or servants authorised by the Board in that behalf. This is a power to delegate certain powers to officers or servants authorised by the Board. The Board decision of 13th November 1973 expressly states that "it authorised the Chief Executive to delegate to nominated officers the authority to exercise the powers and functions of the Board" under s. 53(3). Thus the Board decision of 13th November 1973 is not a Board decision which authorises the Chief Executive to exercise its s.53 powers (which would be permissible under s. 9 of the Act); it is a decision authorising the chief executive to delegate to nominated officers the authority to exercise the powers and functions of the Board under s. 53(3). The Chief Executive acting pursuant to this decision did indeed delegate to nominated officers the authority to exercise the powers and functions of the Board under s. 53(3). Thus the Chief Executive did not exercise the relevant power or function under s. 53(3). Rather, the power which the Chief Executive exercised was an authorisation from the Board to delegate s. 53 powers to other persons. It is, however, that very authorisation which is in issue and which, in my view, is *ultra vires* the Board's powers.

94. Therefore the Board decision of 13th November 1973 (which authorises the Chief Executive "to delegate" to nominated officers the authority to exercise the powers and functions of the Board under s. 53 (3)) is in effect, *ultra vires* the powers of the Board pursuant to s. 9 of the 1927 Act. Moreover the decision of the chief executive of 3rd September 2012 to nominate Mr. Waldron as an authorised officer and to delegate to Mr. Waldron the authority to exercise the powers and functions of the Board under s. 53 (3) was also *ultra vires*.

95. In considering this question of statutory interpretation, consideration should naturally be given to its context. The ESB, in this context, is exercising important statutory powers to come onto a person's land and to interfere with their constitutionally protected property rights. Of course it has a right to do so in the interests of the common good, but it is a power which results in a payment out of compensation to the landowner under s. 53. In those circumstances, it is an important power of the ESB and it is one which must be exercised only by those persons who have the lawful authority to do so. In my view, Mr. Waldron did not have the lawful authority to do so as he was not a person authorized by the Board in that regard.

96. Thus, in the present case, the Legislature has delegated the power to issue wayleave notices to the Board of ESB. Section 9 of the 1927 Act permits the Board to exercise these powers through its officers or servants. Thus s. 9 itself permits the Board to sub-delegate these powers to specific authorised officers or servants. However there is nothing in the Act which permits these officers or servants to sub- delegate this power to other authorised officers. Moreover there is also nothing in the Act which permits the Board to authorise its Chief Executive or any other officer to sub- delegate the Board's powers to such other authorised officers or servants. This is a delegation upon a delegation. It is not authorised by s. 9 of the statute. It is therefore unlawful.

97. In the circumstances I am driven to the conclusion that the authorisation of the Board to permit the Chief Executive to delegate the functions of the Board to other persons was ultra vires the power of the Board under s. 9 of the Act and was unlawful. As such the s. 53 notices must be regarded as invalid and unlawful.

The pleading point on the Section 9 delegation argument

98. In addition to opposing this *ultra vires* argument on its merits, ESB and Eirgrid argued that this point was not properly pleaded. It is therefore necessary to consider the development of the pleadings and the running of this case.

99. In these proceedings, which are plenary proceedings brought by the ESB and Eirgrid Plc, the plaintiff pleaded at para. 2 of the Statement of Claim that:

> *"ESB has power, pursuant to s. 53 of the Electricity (Supply) Act, 1927 as amended, subject to the provisions of the subsection, to place electric lines over land. ESB has the power pursuant to the subsection, to enter onto lands for the purpose of placing, repairing or altering electric lines."*

100. In the Defence and Counterclaim at para. 10 the defendant pleads:

> *"On 28th of June, 2013 ESB Networks Ltd purported to serve on the defendant a wayleave notice pursuant to s. 53 (5) and (9) and s. 98 of the Electricity (Supply) Act, 1927 as amended. The said notice was void and of no effect for the following reasons:*
>
> > *` (1) The wayleave notice is invalid as it was served by an agent of ESB Networks Ltd and on its behalf without the direction of Eirgrid. The power to serve such a notice to acquire a wayleave over land by compulsion was conferred by s. 53 of the Electricity (Supply) Act, 1927 on the first named plaintiff (ESB) and cannot be delegated to an independent legal entity."*

101. Moreover in the counterclaim at para. 4 the defendant plead:

> *"Insofar as the notice of 28th June, 2013 is claimed by the plaintiff to be a wayleave notice served pursuant to ss. 53 (5) and 98 of the Electricity (Supply) Act, 1927 the purported notice is void and bad in law."*

102. Section 15 of the counterclaim provides as follows:

> *"Section 53 of the Electricity (Supply) Act, 1927 as amended provides a power for the respondent and any authorised undertaker to place or construct an electric line above or below ground subject to the provisions of s. 53 and to the scheme of the Act of 1927. A notice dated 28th of June 2013 was directed to be served on the applicant by Eirgrid Plc. It was signed on behalf of ESB Networks which is the trading name of ESB Networks Ltd, a separate legal entity to the Respondent, as the Respondent was required to unbundle the management of its electricity transmission assets to that entity. The service of the notice in those circumstances was not in accordance with the provisions of s. 53 and amounted to an unlawful transfer of a power of compulsory acquisition to an entity or entities with no power under s. 53".*

103. In the reply to the defence and counterclaim at para. 3 the plaintiffs plead:

> *"In relation to para. 10, the plaintiffs note the use of the term 'wayleave notice' by the defendant, a term that is not referred to the statute. It is denied that the notice of 28th June 2013 is invalid, void or of no effect for the reasons set out in para. 10 or at all and the contents of para. 10 (I to IV) are denied as if the same were fully set out herein and reversed seriatim. The said notice was not served by ESB Networks Ltd or by an agent of ESB Networks Ltd. The notice was served by Eoin Waldron, an employee of ESB currently working in ESB Networks, an internal division of ESB. The notice complied with statute. It is denied that the said notice was contrary to fair procedures or natural constitutional justice. The defendant availed of the opportunity to make submissions objections and representations in respect of the notice. The said submissions objections and representations were considered by ESB."* (Emphasis added).

104. Thus, as Mr. Bland S.C. submitted on behalf of Killross, the defence and counterclaim expressly pleaded that the s. 53 power was conferred on the Board and could not be delegated; the reply from ESB/Eirgrid was that the notice was served by an employee of ESB working in an internal division of ESB called ESB Networks. As Mr. Bland S.C. submitted "the implicit argument was that Mr. Waldron could exercise s. 53 [power] on behalf of the Board qua employee. No mention of s. 9 [was made] in the reply. I am meeting the case that any employee of ESB could serve a wayleave notice. That's the case that was made."

105. Moreover Mr. Bland S.C. drew the attention of the court to the urgent interlocutory injunction applications which arose in this case and the manner in which the case came on for trial. An interlocutory injunction was heard over a weekend in August 2013 by the

High Court (MacEochaidh J.). Consequently application was made to the President of the High Court for an urgent trial date and the President directed the trial would commence in three weeks time. An application was made for discovery which had to be somewhat truncated because the matter was coming on for trial with such urgency. The respondents undertook to swear an affidavit setting out the relationship between the parties and to exhibit relevant documentation. Padraig Ó hIceadha of ESB swore an affidavit on 9th July 2014 which, for the first time and within two weeks of the trial date of 22nd July 2014, set out the fact that ESB authorised Mr. Waldron to exercise powers conferred on the ESB in an authorised officer list of 3rd September 2012. The judicial review in these proceedings was then heard in July 2014 and the plenary action was heard in October 2014. It appears that a second affidavit was sworn by Mr. Ó hIceadha shortly before the plenary trial and Mr. Bland S.C. in cross examination tested the s. 9 delegation of powers by the Board.

106. The appellant's legal submissions before this court also state at para. 3.44 "that the doctrine of *delegatus non potest delegare* was expressly relied on in the written submissions, in the pleadings and in cross examination. The maxim itself was recited in the written submissions".

107. The appellant's written submissions at para. 3.46 also state "It is indeed the case that the written submissions did not specifically criticise the authorisation of 3rd September 2012 that was relied on by the respondents at trial. This can be explained. Following the service of the written submissions and some three days prior to the listing of the case for hearing, the respondents furnished an affidavit with exhibited documents in lieu of discovery. Those documents included the so called authorisation of 3rd September 2012. For the first time the respondents revealed the document relied on as the delegation of the statutory power to Mr. Waldron. The appellant could not address the issue in their submissions as they were not furnished with the document until shortly before the listing of the action. It should be remembered that it is the respondents – and not the appellant - who have sought to rely on this document, so it is unreasonable for the appellant to be penalised for not being aware of its frailty until it was revealed. The respondents did not even plead reliance on the authorisation of 3rd September 2012 in either the statement of claim or the Reply and Defence to Counterclaim but instead simply pleaded that Eoin Waldron was an employee of ESB working in ESB Networks an internal division of ESB". (Emphasis added).

108. It also appears that issues with the authorisation were brought to the court's attention on day 2 of the hearing without any objection being taken on pleading grounds by the respondent. Moreover counsel for the appellant cross examined Mr. Ó hIceadha of ESB Networks International about the authorisation of Mr. Waldron under s. 9. Subsequently Mr. Waldron was also cross examined about his authorisation and this cross examination continued until the learned trial judge intervened to indicate that this was really a matter for legal submissions at the closing of the case.

109. What then happened was that the appellant made legal submissions on this issue in their closing submissions; the respondents then argued that the issue was raised for the first time in closing submissions and the learned trial judge agreed.

110. It is also instructive to trace how this issue evolved through the course of the affidavits. Mr. Waldron swore an affidavit on 31st May 2013 grounding the application for an interlocutory injunction by the plaintiffs. However as at that time the wayleave notice had not been served nor was Mr. Waldron's purported authorisation exhibited. A second affidavit of Mr. Waldron also made no reference to his authorisation. His third affidavit of 29th July 2013 exhibited the wayleave notice but not Mr. Waldron's authorisation to sign it. Mr. Waldron also signed a witness statement on 1st October 2014 but his authorisation to sign the wayleave was not set out therein.

111. Indeed, the first mention of the power of Mr. Waldron to sign such notices as an authorised officer was in the affidavit of Mr. Ó hIceadha of 9th July 2014 which exhibited the authorised officer list is dated 3rd September 2012 and which was expressly stated to be "adopted pursuant to s.9 of the 1927 Act" by which ESB authorised Mr. Eoin Waldron to exercise powers conferred and/or imposed on it by the Act of 1927 including the power to serve notices under s. 53 of the said Act. Given that the defence and counterclaim had been filed on 29th November 2013 (some seven months earlier) and the plaintiff's reply and defence to counterclaim had been filed in January 2014 (some six months earlier) it is in my view unrealistic to have expected this matter to have been more specifically pleaded than it was. It is clear that the defendant was pleading that the wayleave notice was void and of no effect for the reasons set out in para. 10 of the defence. Moreover in para. 4 of the counterclaim they pleaded that the wayleave notice "was void and bad in law".

112. Therefore the question is whether the defendant/appellant should have brought an application to amend the pleadings. In my view this would have been wholly unnecessary given the broad plea at para. 4 of the counterclaim.

113. This entire issue was dealt with by the learned trial judge at p. 39 of his decision where he states as follows:

> *"A point was raised by the defendant in relation to improper delegation. This is an argument neither pleaded nor made specifically in the defendant's written submissions. I do not think the court should therefore take the point into consideration but I may observe in passing on from it that the only delegation occurring in this respect seems to be the perfectly normal one whereby any corporate body operates and functions through its officers and employees. Mr. Waldron was not making any order such as a compulsory purchase order which could only be made by the Board of the ESB. His action in finding the s. 53 notice was an ordinary administrative act by an officer of the ESB authorised so to do. The "delegatus" principle simply does not arise."*

114. However I am satisfied, having considered the pleadings, and the legal submissions, having considered the transcripts of the cross examination and the interventions of the learned trial judge, that this matter was pleaded in the defence and counter claim. It is clear from para. 10.1 of the defence and counterclaim that the defendant was fully putting at issue the validity of the wayleave notice and the fact that the power to serve such a notice could not be delegated. It is true that this plea was directed to whether it could be delegated to an independent legal entity. However there was also a broad plea in the counterclaim that the notice was void and bad in law and there was an answer to this plea in the reply that the notice complied with statute. Given the urgency with which this matter was brought on, given the truncated discovery process and given the fact that the relevant documents were only produced by the plaintiffs late in the day (by which no criticism is intended of the plaintiffs) it is clear that the exact legal argument of how the wayleave notice was invalid and how the principle of *delegatus non potest delegare* could arise is not a matter for which the defendant can be criticised. The s. 9 point is a further argument of the *delegatus* principle which can be subsumed within the general plea of para. 10 (1) and para. 4 of the counterclaim. In my view, the matter was properly pleaded and has to be considered in full by this court.

Conclusion

115. I would therefore conclude that the wayleave notice which was served in this case was served by a person who had no lawful authority to do so. Mr Waldron was not authorised by the Board; he was authorised by the Chief Executive. The authorisation of the Chief Executive by the Board to permit the Chief Executive to delegate these powers to other persons was *ultra vires* s. 9 of the

1927 Act. Thus the wayleave notices in this case were served unlawfully and must be set aside.