

## THE HIGH COURT

[2013 No. 5552 P.]

BETWEEN

ELECTRICITY SUPPLY BOARD AND EIRGRID PLC

PLAINTIFFS

AND

KILLROSS PROPERTIES LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Hedigan delivered on the 19th December, 2014**

1. The present case deals with the third and fourth of four sets of related proceedings before the Court as follows:

(i) *Rossmore Properties Ltd. and Killross Properties Ltd. v. An Bord Pleanála* [2014 No. 320 J.R.];

(ii) *Killross Properties Ltd. v. ESB and Eirgrid plc.* [2013 No. M.C.A.];

(iii) *ESB and Eirgrid plc. v. Killross Properties Ltd.* [2013 No. 5552 P.] and

(iv) *Killross Properties Ltd. v. ESB* [2013 No. 698 J.R.].

This Court gave judgment in the first two cases on 28th August, 2014. It has been agreed between the parties to amalgamate the third and fourth proceedings, comprising the plenary action and the judicial review of the s. 53 wayleave notice, and these now fall to be determined by this Court.

**2. The Parties**

The first plaintiff is a statutory corporation which was incorporated by the Electricity (Supply) Act, 1927, as amended ("the 1927 Act"). ESB is the owner of the electricity distribution system and the electricity transmission system in the State. Pursuant to Part 4 of the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445 of 2000), as amended, its functions include the maintenance of the electricity transmission system.

The second plaintiff is the independent electricity Transmission System Operator ("TSO") for Ireland under a licence issued by the Commission for Energy Regulation pursuant to s. 14(1)(e) of the Electricity Regulation Act 1999, as inserted by Regulation 32 of S.I. No. 445 of 2000.

The defendant is a limited liability company with a registered address at Unit 12, Block C, M4 Interchange Park, Celbridge, Co. Kildare and is the registered owners of lands on which part of a proposed development consisting of the construction of double current 110kV electricity transmission line is sought to be constructed. The defendant is the registered owner of lands located at Collinstown, Leixlip, Co. Kildare, as comprised within Folios 43406F and 43408F of the Register of Freeholders County Kildare.

**3. The Factual Background**

In the related judicial review proceedings, *Rossmore Properties Ltd. & Anor. v. An Bord Pleanála & Ors.* (2014 No. 320 J.R.), where judgment was given by this Court on 28th August, 2014, the extent of the uprate works and their location are set out in detail. The defendant purchased the relevant lands in and around 18th July, 2007. The 110kV electric transmission lines on shared structures, in respect of which the plaintiffs wish to carry out the uprate works, were present on the lands at the date of purchase. These lines are the Maynooth-Ryebrook 110kV line, the Maynooth-Rinawade 110kV line and the Dunfirth-Kinnegad-Rinawade 110kV line. The lands are currently in agricultural use although zoning for a town centre development was adopted by Kildare County Council on 25th January 2010.

In or about 2012, Eirgrid instructed ESB to upgrade or uprate these transmission lines, including parts of the said lines that crossed the defendant's lands, by replacing the existing conductor with new higher capacity conductor. On foot of this instruction, ESB designed and planned the uprate works and the uprate was scheduled to be carried out during the period from early summer 2013 until autumn 2013 and Eirgrid planned, scheduled and granted to ESB certain outages of the said electricity lines during this period to facilitate the necessary works. The plaintiff asserts, and it was accepted by this Court in the judicial review proceedings, that once the uprate works have been completed, the only transmission lines crossing the defendant's lands will be the pre-existing lines heretofore described, and there will be no alteration to their pre-existing route or supporting structures on the defendant's lands.

As set out at para. 7 of the plaintiff's statement of claim, the works involved in the uprate may be broadly divided into three stages. The first stage involves survey works, as both ESB and Eirgrid require to carry out surveys and investigations on site in order to establish and plan the precise nature of the works to be carried out. The second stage involves the ESB restringing lines with new, higher capacity conductor where this can be achieved without the necessity of erecting a temporary line diversion. The third stage comprises the erection of a temporary line diversion, the completion of the restringing works, and the retirement and removal of the temporary line diversion once the restringing works have been completed. The temporary line is being erected to ensure continuity of supply to certain customers. For safety reasons, it is necessary to de-energise a number of lines, which share the one structure, simultaneously. Thus, it is necessary to divert electricity on an alternate route away from this structure for the duration of the restringing works.

The initial request for access to the defendant's lands was made on 12th November, 2012 by Ciaran Hughes of ESB International ("ESBI"). In an e-mail to Lar McKenna, Mr. Hughes advised that ESB Networks intended to carry out works on the defendant's lands at Easton as part of the Maynooth-Ryebrook 110kV uprate works. The request was for access in order to carry out investigations on the foundations of angle structures 25, 26 and 27 to determine whether foundation reinforcement works would be required.

Communication ensued between the defendant and staff of ESB Networks, ESB Networks Ltd. and ESB International regarding, inter alia, requests for information on the works, access, the impact of the works on the development plan of the defendant, ESB's policy on mast interference payments and health and safety issues.

On 1st May 2013, Eoin Waldron of ESB Networks sent a survey notice, with accompanying cover letter and map, which stated that the purpose of entering onto the defendant's lands was to survey:

"The route of a temporary diversion to part of the existing Dunfirth-Kinnegad-Rinawade 110kV line on the Company's lands and of cutting any tree, shrub or hedge which obstructs or interferes with the survey. The temporary diversion is required only as part of the repair and alteration works to the existing Maynooth-Ryebrook 110kV line and for the duration of these works."

The present proceedings were instituted by the plaintiff on 13th May, 2013 in order to restrain the defendant from preventing the plaintiffs securing access to the defendant's lands for the purposes of carrying out the necessary works (including surveys) associated with the uprate of the three 110kV electricity transmission lines.

On 5th June, 2013, after the initiation of the present proceedings, the defendant consented to the making of an interlocutory injunction order and the High Court (Laffoy J.) made an order restraining the defendant, its servants or agents, from preventing both plaintiffs entering onto the defendant's lands and making such inquiries, investigations and examinations as they think proper relating to the repair and alteration of the said transmission lines. Surveys were subsequently carried out by ESB and Eirgrid on foot of the Order of the 5th June, 2013 and ESB ascertained the precise nature of the works which would be required as part of the second stage.

Thereafter, on or about 14th June 2013, the plaintiff made an application for further relief and the High Court (Gilligan J.) made an Order, after a contested hearing, which allowed ESB to restring lines where this could be achieved without the erection of a temporary line diversion. Certain restringing works were carried out on foot of the said order.

On or about 28th June 2013, ESB served a formal notice on the defendant pursuant to s. 53 of the 1927 Act. The wayleave notice informed the defendant that ESB intended to carry out temporary works, including a temporary line diversion, which formed part of 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. The nature of the works and the position and manner in which the works were intended to be carried out were set out in the attached Schedule to the said Notice.

By letter dated 5th July, 2013, the defendant's solicitor, Mr. Brian Harrington, wrote to ESB stating that the defendant's lands were currently occupied by Mr. David McKenna as tenant. In the third affidavit sworn by Mr. Waldron on 29th July, 2013, he stated:

"At no point during my extensive dealings and correspondence with the Defendant, and in particular with Mr Lar McKenna, has it been indicated to me or to ESB that the Defendant was not in occupation of the lands or that the lands had been leased to David McKenna. In fact, I say that on or about 24th June, 2013, Mr Lar McKenna informed me that there was no occupant or lessee on the lands. At paragraph 10 of my Affidavit of 31st May 2013, I stated my bona fide belief that the 'Defendant is the owner and occupier of [the] lands'."

Lar McKenna avers in his affidavit sworn on 7th August, 2013 that at no time did he conceal that the lands were being occupied and farmed separately from the company, and further that it was expressly stated to the Court before Gilligan J. that:

"The lands were occupied by a farmer and that that farmer was not the person who was before the Court and was occupied separate to and distinct from the defendant. I say Mr. Waldron was in Court when this submission was made and must have been aware of precisely what was said."

On or about 17th July, 2013, ESB served a formal notice, dated 16th July, 2013, on David McKenna.

The defendant did not consent to the ESB entering onto the defendant's lands to carry out the work specified and the defendant refused to allow the ESB enter for the purpose of carrying out stage three of the works.

On 7th August, 2013, the defendant instituted proceedings entitled *Killross Properties Limited v Electricity Supply Board and Eirgrid plc* pursuant to s. 160 of the Planning and Development Act 2000, as amended. Following the hearing of an application for an interlocutory injunction over the course of 9th, 10th and 11th August, 2013 before this Court (MacEochaidh J.), the Court directed that certain planning matters would be dealt with before other matters in these proceedings.

#### **4. The Proceedings**

The plaintiffs seek the following orders:

1. An order restraining the defendant, its servants or agents, or anyone whomsoever, from preventing the first named plaintiff, through its servants or agents, from entering onto the defendant's said lands situate in the Townland of Easton and Barony of North Salt and County of Kildare, being the property more particularly comprised in Folios 43406F and 43408F of the Register of Freeholders of the County of Kildare, and making such inquiries, investigations and examinations as it thinks proper relating to the repair and alteration of the existing Maynooth-Ryebrook 110kV line, the Maynooth-Rinawade 110kV line and the Dunfirth-Kinnegad-Rinawade 110kV line pursuant to section 20(4) of the Electricity (Supply) Act 1927, for the purpose of the exercise or performance of the powers and functions conferred on the plaintiff by the Electricity (Supply) Act, 1927, as amended, and the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000) and the amendments thereto;
2. An injunction restraining the defendant, its servants or agents, or anyone whomsoever, from obstructing or preventing the first named plaintiff, its servants or agents from entering and/or remaining on the defendant's land situate in the townland of Easton and Barony of North Salt and County of Kildare for the purposes of repairing and altering (to include restringing of the conductor) the existing Maynooth-Ryebrook 110kV line overhead electric line thereon, the existing Maynooth-Rinawade 110kV line thereon and the existing Dunfirth-Kinnegad-Rinawade 110kV line thereon in accordance with the first named plaintiff's statutory powers under section 53(9) of the Electricity (Supply) Act 1927, as amended;
3. An injunction restraining the defendant, its servants or agents, or anyone whomsoever from obstructing or preventing the first named plaintiff, its servants or agents, from entering and/or remaining on the defendant's lands situate in the

Townland of Easton and Barony of North Salt and County of Kildare for the purposes of altering the medium voltage network thereon by the replacement of three spans of bare overhead conductor with a PVC-coated conductor, the installation of one temporary stay, the subsequent removal of the said temporary stay and of one of the three spans of PVC-coated conductor and its replacement with bare conductor, in accordance with the first named plaintiff's statutory powers under section 53(9) of the Electricity (Supply) Act 1927, as amended;

4. An injunction restraining the defendant, its servants or agents, or anyone whomsoever from obstructing or preventing the first named plaintiff, its servants or agents, from entering and/or remaining on the defendant's lands situate in the Townland of Easton and Barony of North Salt and County of Kildare for the purposes of erecting a temporary line diversion to the existing Dunfirth-Kinnegad-Rinawade 110kV line and for subsequently retiring and removing same in accordance with the first named plaintiff's statutory powers under section 53(5) and/or 53(9) of the Electricity (Supply) Act 1927, as amended;

5. An order restraining the defendant, its servants or agents, or anyone whomsoever, from preventing the second plaintiff or its respective servants or agents, from entering onto the defendant's said lands situate in the Townland of Easton and Barony of North Salt and County of Kildare and making such inquiries, investigations, environmental surveys and other examinations as it thinks proper pursuant to section 20(4) of the Electricity (Supply) Act, 1927 and Regulations 8(2) of the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000) for the purpose of the exercise or performance of the powers and functions conferred on the second plaintiff by the Electricity (Supply) Act, 1927 and/or the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000);

6. An order, if necessary, directing the defendant, on or before such time as to this Honourable Court seems fit, to unlock all gates and remove all barriers, chains and obstacles which are blocking plaintiff's access and/or its servants' or agents' access to the defendant's said lands in the Townland of Easton and Barony of North Salt and County of Kildare;

7. A declaration that the first named plaintiff, its servants or agents, were and/or are entitled to enter onto the defendant's lands situate in the Townland of Easton and Barony of North Salt and County of Kildare, being the property more particularly comprised in Folios 43406F and 43408F of the Register of Freeholders of the County of Kildare, and making such inquiries, investigations and examinations as it thought fit and proper relating to the repair and alteration of the existing Maynooth-Ryebrook 110kV line, the existing Maynooth-Rinawade 110kV line and the existing Dunfirth-Kinnegad-Rinawade 110kV line and the temporary diversion to the existing Dunfirth-Kinnegad-Rinawade 110kV line pursuant to section 20(4) of the Electricity (Supply) Act, 1927 for the purpose of the exercise or performance of the powers and functions conferred on the first named plaintiff by the Electricity (Supply) Act, 1927, as amended and the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000) and the amendments thereto;

8. A declaration that the first named plaintiff, its servants or agents are and/or were entitled to enter and/or remain on the defendant's land situate in the Townland of Easton and Barony of North Salt and County of Kildare for the purposes of repairing and altering (to include restringing of the conductor) the existing Maynooth-Ryebrook 110kV overhead electric line thereon, the existing Maynooth-Rinawade 110kV overhead electric line and the existing Dunfirth-Kinnegad-Rinawade 110kV line thereon in accordance with the plaintiff's statutory powers under section 53(9) of the Electricity (Supply) Act 1927, as amended;

9. A declaration that the second plaintiff, or its respective servants or agents, was or is entitled to enter onto the defendant's said lands situate in the Townland of Easton and Barony of North Salt and County of Kildare and making such inquiries, investigations, environmental surveys and other examinations as it thinks proper pursuant to section 20(4) of the Electricity (Supply) Act, 1927 and Regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000) for the purpose of the exercise or performance of the powers and functions conferred on the second plaintiff by the Electricity (Supply) Act, 1927, as amended and/or the European Communities (Internal Market in Electricity) Regulations, 2000 (S.I. No. 445/2000) and the amendments thereto;

10. A declaration that the first named plaintiff, its servants or agents, are entitled to enter and/or remain on the defendant's lands situate in the Townland of Easton and Barony of North Salt and County of Kildare for the purposes of altering the medium voltage ("MV") network thereon by the replacement of three spans of bare overhead conductor with a PVC-coated conductor, the installation of one temporary stay, the subsequent removal of the said temporary stay and of one of the three spans of PVC-coated conductor and its replacement with bare conductor, in accordance with the first named plaintiff's statutory powers under section 53(9) of the Electricity (Supply) Act 1927, as amended;

11. A declaration that the first named plaintiff, its servants or agents, are entitled to enter and/or remain on the defendant's lands situate in the Townland of Easton and Barony of North Salt and County of Kildare for the purposes of erecting a temporary line diversion to the existing Dunfirth-Kinnegad-Rinawade 110kV line and for subsequently retiring and removing same in accordance with the first named plaintiff's statutory powers under section 53(5) and/or 53(9) of the Electricity (Supply) Act 1927, as amended.

Some of the reliefs sought have been superceded by the injunctive relief granted by this Court on 5th June, 2013 and 14th June, 2013, namely (1), (2) and (5). However, the matters still fall to be determined by this Court in order to deal with the costs of those applications. The works pertaining to the reliefs sought in (3) and (4) remain to be completed and determined by this Court.

The defendant counterclaims for the following reliefs:

1. An order of *certiorari* quashing the wayleave notice of the 28th day of June, 2013.
2. A Declaration that the plaintiffs are not entitled to enter onto the defendant's lands or carry out any works thereon on foot of the said wayleave notice.
3. A declaration that the plaintiffs have not acquired or created any rights over the defendant's lands pursuant to the said wayleave notice.
4. An order restraining the plaintiffs from entering onto the defendant's lands and carrying out any works thereon without lawful authority.
5. Damages for trespass and wrongful interference with the defendant's lands.

6. A stay on any steps to enforce or otherwise implement the said wayleave notice until the determination of the said proceedings.

## 5. Summary of the Application

Thus, the following issues are to be determined by this Court:

1. Whether ESB and Eirgrid were entitled to carry out the survey works on the defendant's lands, in the case of ESB pursuant to s. 20(4) of the Electricity (Supply) Act 1927 and in the case of Eirgrid pursuant to s. 20(4) of the 1927 Act and Regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 (S.I. 445 of 2000)?
2. Whether ESB and Eirgrid were entitled to carry out the restringing works to the existing Maynooth-Ryebrook 110kV overhead electric line, the existing Maynooth-Rinawade 110kV overhead electric line and the existing Dunfirth-Kinnegad-Rinawade 110kV overhead electric line pursuant to s. 53(9) of the 1927 Act?
3. As regards the temporary line diversion and the notice of 28th June 2013:

(i) Whether the notice of 28th June 2013 was served by ESB pursuant to its statutory functions under s. 53 of the 1927 Act or whether the statutory functions were exercised ultra vires by a subsidiary, ESB Networks Ltd;

(ii) Whether there has been a breach of fair procedures by ESB, namely (i) in failing to give notice to the defendant of its intention to serve a notice pursuant to s. 53(3), (ii) failing to give an opportunity to the defendant to make objections and representations to the proposed erection of the temporary diversion line and (iii) the Board of ESB was required to consider the objections and representations of the defendant to the proposals, but could not and did not give consideration before the decision was made;

(iii) Whether the notice is valid on its face and complies with requirements under s. 53(5) of the 1927 Act.

## 6. Legislative Framework

Section 53 of the Electricity (Supply) Act 1927, as amended, provides:

"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.

(2) The Board and also any authorised undertaker may attach to any wall, house, or other building any bracket or other fixture required for the carrying or support of an electric line or any electrical apparatus.

(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.

(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 subsection, 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.

(6) Where any authorised undertaker has under any terminable agreement or arrangement, whether made before or after the passing of this Act, placed any electric line across any land or attached any such fixture as aforesaid to any such building as aforesaid, such authorised undertaker may notwithstanding the termination of such agreement or arrangement but subject to the provisions of this section, retain the line across the land or the fixture attached to the building in the same position, on the same terms, and subject to the same conditions as during the continuance of the said agreement or arrangement.

(7) The owner or the occupier of any land or building across or on which an electric line or a fixture is or might be retained under this section after the termination of an agreement or arrangement may by notice in writing served on the authorised undertaker within two months before or at any time after such termination object to the retention of such line or fixture across or on such land or building and thereupon it shall not be lawful for the authorised undertaker to retain such line across such land or such fixture on such building without the consent of the Board.

(8) Where under this section the consent of the Board is required to the placing or retention of an electric line across any land or of a fixture on a building the Board may, if, after giving all parties concerned an opportunity of being heard, it thinks it just, give its consent either unconditionally or subject to such terms, conditions, and stipulations as it thinks just, and in deciding whether to give or withhold its consent or to impose any terms, conditions or stipulations (including the placing of any portion of the line underground) the Board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land or building of the placing of the line or the attaching of the fixture in the position and manner proposed.

(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."

Thus, pursuant to s. 53(1) of the 1927 Act, ESB is statutorily entitled to place any electric line above or below ground. Section 53(3) requires the service of a notice in writing by ESB on the owner and on the occupier of the land before it can place a line on the land. The notice must state its intention to place the line and give a description of the nature of the line and the position and manner in which it is intended to be placed. Section 53(5) provides that the ESB has the power to place the line after a period of seven days from the service of the notice, with or without the consent of the owner and occupier. This right is subject to the entitlement of the owner or occupier to be paid compensation in respect of the exercise by ESB of the powers conferred on it by s. 53, with such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. Section 53(9) provides that once ESB is authorised to place a line, it may at any time enter on the lands for the purpose of placing, repairing, or altering such line.

## **7. Submissions of the Plaintiffs**

### **7.1 Entitlement to Carry Out Survey Works**

The issue of whether the plaintiffs have the power to survey the lands of the defendant in respect of the repair and alteration works is no longer in dispute. With regard to the power of ESB to survey, section 20(4) of the 1927 Act provides:

"(4) For the purpose of the exercise or performance of any of the powers or functions conferred on the Board by this Act, the Board may enter on any lands or premises and there make such inquiries, investigations, and examinations as it thinks proper."

Thus, ESB has the power to enter on the lands, carry out a survey and investigate, examine and make inquiries on the land.

In terms of Eirgrid's power to survey, Regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 provides:

"(2) Any function of the Board under.... section 20 of the Electricity (Supply) Act, 1927 which is necessary for the discharge of the transmission system operator's functions under these Regulations shall, to that extent, be regarded as a function of the transmission system operator and not of the Board, other than where it is also necessary for the Board to discharge its functions as transmission system owner in which case that function shall be a function of both the Board and the transmission system operator."

The definition of "function" as set out in s. 2(1) of the 2000 Regulations includes

"A power and a duty, and a reference to the performance of a function includes a reference to the exercise of a power and the carrying out of a duty."

In regard to the uprating of the asset, Eirgrid provides the initial instruction and high level specification. A survey is then required to be carried out as a result of which ESB and Eirgrid engage as to the detailed project parameters. In order for ESB to discharge its functions, it is necessary for it to have access to the lands for the purposes of a survey. Accordingly, Regulation 8(2) provides that the power to carry out the survey, pursuant to s. 20(4) of the 1927 Act, is shared by both ESB and Eirgrid and thus both are entitled to enter the defendant's lands for that purpose.

### **7.2 Entitlement to Carry Out Restraining Works**

Section 53(9) of the 1927 provides:

"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."

The plaintiffs assert that it is clear that once an electric line or fixture is in place on land, ESB is entitled to enter the lands and carry out repairs or alterations to the lines and fixtures without the requirement of notice. Notice is only required pursuant to s. 53 of the 1927 Act where a line is placed on lands or any fixture attached to any building for the purpose of carrying or supporting electric lines or apparatus.

## **7.3 Temporary Line Diversion**

### **7.3.1 Service of Notice**

The first ground of challenge to the notice of 28th June, 2013 is that the notice was served by an entity other than the ESB. The plaintiffs submit that ESB is the only body that has purported to exercise the power to carry out alterations, restraining works and placing the temporary lines. The notice of the 28th June, 2013 is on ESB headed notepaper and is signed by Eoin Waldron of ESB Networks as Authorised Officer. There is no evidence for the proposition of the defendants that the notice of 28th June, 2013 was signed by Eoin Waldron on behalf of ESB Networks Limited. Mr. Waldron is an employee of ESB and works in its ring-fenced business unit, ESB Networks. ESB Networks is an internal business unit of ESB, which is designated to carry out ESB's transmission asset ownership and distribution asset ownership functions. Mr. Waldron is authorised by ESB to exercise the power to serve notices under s. 53 of the Act on its behalf pursuant to s. 9 of the 1927 Act and the Authorised Officer List of 3rd September, 2012.

The plaintiffs further submit that ESB Networks Limited is contracted by ESB to provide management services for ESB Networks. ESB Networks at all times remains a business unit of ESB and no powers have been delegated or assigned to ESB Networks Ltd. Mr. Waldron is an authorised officer and agent of ESB and served the wayleave notice in that capacity on behalf of ESB. It is argued that his status as an agent of ESB does not change as a result of the ESB Networks business unit being managed by an entity other than ESB, where such services are contracted in and paid for by ESB. Thus, the plaintiffs contend that the defendant's arguments are premised on misunderstandings and deliberate mischaracterisations of the facts and the legal relevance of the role of ESB Networks Ltd.

Regarding the argument of *delegatus non potest delegare*, raised by the defendant during oral submissions, s. 9 of the 1927 Act is of

wide import and provides that the Board can exercise any of its functions and duties through its servants or officers. Section 9 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."

It is argued that this is not a situation of *delegatus non potest delegare*. Eoin Waldron was nominated to become an authorised officer prior to the decision in this case. The Board had the power to approve the nomination and did so by delegating the power to approve a nominated officer to its Chief Executive, a power which he in fact exercised and never delegated.

### **7.3.2 Fair Procedures**

As regards the fair procedures argument, it is argued that this relates only to the proposal of placing the temporary line, rather than the complaint argued before the Court regarding the undergrounding of existing lines and the extent to which the existing lines might interfere with the defendant's development plans for the site. What fair procedures are required where it is proposed to construct a temporary line on certain lands. The thrust of the defendant's case is that the same principle should apply as when compulsory purchase of lands is contemplated.

The nature of the right acquired under s. 53 however is not the equivalent to compulsory acquisition of lands (*ESB v. Gormley* [1985] I.R. 129 and *Cooney v. Cooney* (High Court, Feeney J., 27th May 2009)). In *ESB v. Gormley*, Carroll J. stated at p. 141:

"It seems to me it was not necessary for the ESB to operate Section 45 [sic] and acquire the site of each pylon by compulsory acquisition. That would make the erection of transmission lines unworkable. On the contrary, in my opinion it is reasonable for the ESB to operate s. 53, serve a Wayleave notice, come on the land and erect the tower and leave."

Carroll J. also distinguished the circumstances of *O'Brien v. Bord na Mona* [1983] I.R. 255, which is relied on by the defendant, as the case did not involve compulsory purchases. Finlay C.J. in the Supreme Court decision in *ESB v. Gormley* classified a s. 53 power "as a power compulsorily to impose a burdensome right over land" rather than a compulsory acquisition of land or an interest in land. As it is a burdensome right over land, there is a right to compensation.

The plaintiffs, therefore, contend that the role of fair procedures in relation to electricity lines is limited. The extent of fair procedures depends on the circumstances of the case. The plaintiffs claim that *ESB v. Harrington* [2002] IESC 38 is even more pronounced about the extent to which s. 53 affords quite limited rights for the landowner. The extent of fair procedures, which the plaintiffs assert have been met in this case, is that the landowner receives seven days notice and an opportunity to consent. Even in the event of a refusal to consent, ESB is entitled to proceed but is required to pay compensation. The approach of Denham J. was subsequently applied by the High Court in *ESB v. Burke* [2006] IEHC 214, in which Clarke J. showed a deferential approach of the court to not interfering with the functions of the ESB and also accepted Denham J.'s finding that "the statute law was clear to the effect that the Defendant's only right is to compensation."

#### **(i) Notice**

The plaintiffs submit that the defendant gave the notice required under s. 53(3) and is not required to give notice of its intention to serve a notice. Once the notice has been served, the landowner and/or occupier have the opportunity either to consent to or refuse access. ESB is entitled to enter even in the event of the refusal of consent but is required to pay compensation. Fair procedures, meeting the constitutionally required standard, have been included in the statute by the legislature and ESB has complied with the provisions.

The plaintiffs submit that, in any event, the evidence and correspondence establishes that the defendant was on notice of ESB's intention to erect a temporary line diversion before the notice was served. The plaintiffs refer to the e-mail of 22nd January, 2013 from Patrick Graham to Lar McKenna in which Mr. Graham offers to provide an indicative route for the temporary line diversion. The e-mail stated:

"The proposed works at Easton currently require foundation investigations works only, no tower moves are deemed necessary as the towers in this area are AM type towers. A temporary by pass construction of a section of the line from AM27-AM25 (shown on route map previously attached [e-mail and attached maps sent from Patrick Graham to Lar McKenna on 18th January 2013]) is required to allow us to complete essential maintenance works on AM25 (branch in to Rinawade station and Hewlett Packard). We would be required to carry out a survey prior to finalising any design of this by-pass and as such a proposed route does not exist. If you wish I could give you a draft indicative route."

In a supplementary affidavit sworn on 9th August, 2013, Lar McKenna averred that he

"was aware of the route of the new 110kV transmission line since January 2013 and I further say that in May 2013, this Deponent, on behalf of the Defendant, made a Section 5 referral to Kildare County Council on the new 110kV line showing the exact route that is now the ESB's finalised route of the said line."

The defendant, therefore, knew well of the intention to erect a temporary line diversion and the plaintiff relies on the decisions of Blayney J. in *Gallagher v. Revenue Commissioners (No. 1)* [1991] 2 I.R. 370, and Costello J. in *Doupe v. Limerick Corporation* [1981] I.L.R.M. 456 for the proposition that the law accommodates a situation whereby the plaintiff knew of the case against him of which he claimed he should have had explicit notice.

#### **(ii) Opportunity to be heard**

The plaintiffs submit that there is no legal requirement for an opportunity to be heard to be afforded to the defendant. The judgment of Denham J. in *ESB v. Harrington* was relied upon, where she stated at para. 33:

"Under this statute law, the Defendants, having failed within seven days to give consent, the Plaintiff may place the line across their lands, subject to the Defendant's right to compensation. If those were all the facts of the case then the matter would not need any further consideration and the Defendants would fail. The only right under the statute for Defendants is compensation."

The plaintiffs also assert that, as a matter of fact, the evidence demonstrates that the defendant had ample opportunity to make representations and objections regarding the temporary line diversion to Eoin Waldron. These were then considered by Mr. Waldron on behalf of ESB. This process occurred both prior to and after the service of the notice on 28th June 2013.

As to Lar McKenna's assertion in cross-examination that he would have made representations regarding the undergrounding of the temporary line and the possibility of making this line permanent, the plaintiffs contend that Mr. McKenna had ample opportunity to make such representations to ESB and failed to do so in all the correspondence. Also, this point was never set out in pleadings, nor in any of the affidavits.

### **(iii) Judicial consideration by the Board**

The argument that members of the Board of ESB were required to consider the representations or objections to the proposed erection of a temporary line diversion is based on a misapplication of the Supreme Court decision in *O'Brien v. Bord na Mona*. ESB authorised Mr. Waldron to exercise s. 53 powers, pursuant to s. 9 of the 1927 Act, and in so far as he was required to do so, he considered the defendant's objections. There is no legal authority for the proposition that the decision to serve the notice must be made by the Board.

### **7.3 Validity of Notice on its Face**

The plaintiffs contend that the wayleave notice fulfils the requirement of s. 53(3). Section 53(3) of the 1927 Act provides:

"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."

The notice of 28th June, 2013, with attached schedule and map, describes the nature of the temporary line diversion and the position and manner in which it is intended to be placed. The plaintiffs argue that the notice, the schedule thereto and the attached map are to be read as a whole and the contention that the description of the temporary line diversion and the identification of the route (effectively, the rights created upon service of the notice) must be in the notice is overly technical and at odds with the general requirement of s. 53(3) (see *ESB v. Roddy* [2010] IEHC 158). In *ESB v. Harrington*, the nature of the intended line and the position and manner in which it was intended to be placed were set out in a schedule to the notice. No issue was raised in relation to compliance with the requirements of s. 53(3), Denham J. noting:

"The provisions of s. 53(3) require prior notice in writing of the placing of the line, the nature of the line, and the position and manner in which it is intended to be placed or attached. Wayleave notice was given in the case on the 31st August, 2001 and no issue arises on that notice. Thus this provision of s. 53(3) is met."

The notice states:

"This temporary line diversion will also be at a voltage of 110,000 volts and will consist of 3 continuous wires supported by insulators on wood structures at a height of at least 7 metres over ground."

It also states:

"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."

The intended position of the temporary line diversion is shown by a red line on the map. A triple red circle on the map indicates the intended position of a triple wood pole set and a 'T' shape on the map shows the intended direction of a stay wire which will be anchored in the ground.

Further, the argument of the defendant that the same notice cannot be served for the purposes of s. 53 and s. 98 of the 1927 Act has no basis in the statutory provisions.

The plaintiff also asserts that there is no requirement, pursuant to s. 53(3), that any notice refer to the entitlement to compensation on its face, as contended by the defendant. The entitlement derives from the terms of the statute and is payable upon the exercise of the statutory powers of ESB, whether pursuant to s. 53(3) or s. 53(9). Thus, in this case, the entitlement to compensation has not yet arisen and will only do so once ESB enters the lands and carries out the intended works.

## **8 Submissions of the Defendant**

### **8.1 & 8.2 Entitlement to Carry Out Survey Works and Restraining**

It is accepted by the defendant that ESB is entitled to carry out such works as are sanctioned by s. 53(5) and (9) of the 1927 Act in respect of the existing line on the defendant's lands. However, it is denied that the defendant interfered with the lawful exercise of any right of the plaintiffs pursuant to ss. 20(4) and 53 of the 1927 Act.

#### **8.3.1 Service of Notice**

The defendant submits that the purported acquisition of a wayleave over the lands of Killross Properties Ltd was ineffective as the wayleave notice was drafted, signed and served by ESB Networks Ltd., a company independent of ESB. ESB is only entitled to serve a wayleave notice pursuant to s. 53. For service to be valid, the decision to serve the notice must be made by the Board of ESB. The attempt to delegate a power to Mr. Waldron under s. 53 is invalid for three reasons:

(1) Mr. Waldron is outside the supervision, control or oversight of ESB and it would be a breach of the ESB's Transmission Asset Ownership (TAO) licence to influence him or to contact him in relation to the service of a wayleave notice;

(2) It is impermissible to have a statutory power pursuant to s. 53 under the control of an independent entity. Mr. Waldron is directly controlled, managed and directed by ESB Networks Ltd in the performance of this particular function involving the service of a wayleave notice. This was acknowledged in evidence by Mr. Ó hÍceadha, Head of High Voltage and Contracting, ESB Networks Ltd., where he agreed that his oversight role could involve directing Mr. Waldron as to the service of a wayleave notice;

(3) Mr. Waldron considered himself bound by the parameters of the project agreement of 24th June 2013, in which Eirgrid directed him to proceed on the basis of the agreement and to serve a wayleave notice. The defendant argues that this is also invalid as Mr. Waldron is purportedly performing a statutory power to acquire land by compulsion and considers that

he is bound to do so pursuant to an agreement with a third party.

Further, during oral submissions, counsel for the defendant argued that the purported authorisation of Mr. Waldron under s. 9 of the 1927 Act was invalid as the Chief Executive of the Board, and not the Board itself, purported to authorise Mr. Waldron. This particular aspect of the *delegatus non potest delegare* was not raised by the defendant in the defence and counterclaim, nor in the written proceedings, prior to the commencement of the hearing. The authorisation of 3rd September, 2012, is a document by which the Managing Director of ESB Networks Ltd. nominated a list of people in ESB Networks and ESB International Ltd. to exercise the powers of the Board under "Section 53(3) and Section (3) and Section 98(2) of Electricity Supply Act 1927 i.e. to sign the above notice on behalf of the Board." It also states 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, *inter alia*, s. 53(3). Section 9 does not entitle the Board to delegate the power to delegate to its Chief Executive and the decision of 1973 is not a valid exercise of s. 9. The Oireachtas expressly authorised the Board to delegate to its servants or officers but it is submitted that it cannot be presumed to have intended that this would be achieved by a further delegation to the Chief Executive to delegate to those servants or officers. The amplitude of power to create wayleaves and the impact on individual interests weighs heavily against such implied power to delegate the s. 9 power from the Board to the Chief Executive.

As in *O'Brien v. Bord na Mona*, where Finlay C.J. said it would be improper for Bord na Mona to delegate its powers of compulsory acquisition, it would be improper for ESB to delegate its power under s. 53 to Mr. Waldron.

### 8.3.2 Fair Procedures

The defendants argue that as the exercise of the power to place an electric line on land in s. 53 creates an interest in land (see s. 11(4)(j) and (k) of the Land and Conveyancing Law Reform Act, 2009) and that the interest can be created by compulsion, pursuant to s. 53(5), it follows that the wayleave provision is a power of compulsory acquisition. The power of compulsory acquisition must be exercised in accordance with natural and constitutional justice and requires the provision of fair procedures, as guaranteed by Article 40.3 of the Constitution. At a minimum, the fair procedures required pursuant to the exercise of power under s. 53, and which the ESB is obliged to give the defendant, is that notice is given to persons whose property is affected of the intention to serve a wayleave notice, but also that a reasonable opportunity is afforded to them to make representations or objections, that an inquiry is held and that such representations or objections be considered before the decision to acquire is made. ESB violated the defendant's rights to natural and constitutional justice by simply serving the wayleave notice on the defendant without any prior notice and ignored the right of the defendant to be heard. The Supreme Court established the necessity to give fair procedures in analogous circumstances in *O'Brien v. Bord na Mona*; the power of compulsory acquisition under s. 53 being similar to that of s. 29 of the Turf Development Act 1946. Finlay P. stated, in relation to the power to acquire land compulsorily:

"before deciding to acquire any particular piece of property, the acquiring authority must give ample and fair notice to the owner of such property of its intention so to do; it must give him an ample opportunity to make representations or objections and then consider such representations or objections in a judicial manner; finally, it must reach a decision whether to acquire or not upon the basis of that consideration."

The contention by the plaintiffs that there should be proportionately less fair procedures to that in *O'Brien v. Bord na Mona* as the right is intended to be exercised on a temporary basis is incorrect. All s. 53 applications should be afforded the same level of fair procedures protection.

#### (i) Notice

The defendant contends that ESB formed the intention to exercise its power of compulsory acquisition under s. 53(5) to acquire the wayleave as set out in the notice after 14th June and before the service of the wayleave notice on 28th June. ESB gave the defendant no notice of the intention to serve a wayleave during that period. Further, the defendant claims that ESB first provided specific details of the temporary diversion line in the notice of 28th June, 2014. Prior to this, the communications between ESB Networks and the defendant set out the proposed works in general terms but did not define the rights proposed to be acquired from the defendant.

#### (ii) Opportunity to be Heard

No opportunity was afforded to the defendant to make representations or objections to the works being carried out on the company's lands. In reliance on *Dellway Investments Ltd. & Ors. v. NAMA* [2011] IESC 4, the defendant argues that he should have had the opportunity to put forward reasons on why the decision should not be made or should not take the particular form proposed even if the decision was justified in the interests of the common good. It could not be argued that the defendant was afforded the opportunity to make representations prior to the decision to serve the wayleave notice when no actual notice was given to the defendant between the period of the decision to acquire after 14th June and service of the notice on 28th June. Further, as the details regarding the route of the line, which Mr. McKenna had been seeking from ESB, were not confirmed until the date of the notice, discussions before this date were irrelevant. Mr. McKenna also averred in his affidavit sworn on 7th August, 2013 that:

"The approach taken has been high-handed and treats with almost contempt the concerns raised and refuses to engage so as to resolve issues or comply with statutory procedures."

The defendant claims that Mr. Waldron closed his mind to the suggestions and representations of the defendant, which in part was underpinned by the fact that he was tied by the unbundling arrangements. Although Mr. Waldron stated he was authorised to make the decision to serve the wayleave notice, his understanding was that he was bound and had to deliver on the terms of the project agreement as set out by Eirgrid. Further, he was not responsible with issues concerning the design and route of the line and its impact on the development plans of the defendant. Mr. Waldron also stated:

"There was very little consideration that could have been given, I would say. The line has been planned or would have been located to be the shortest possible route to have the least impact and it was required to be between those two structures as indicated on the wayleave notice for safety reasons...the suggestion that there could have been lots of other alternative routes is incorrect."

Upon cross-examination, and particularly the question regarding whether he had any concerns about the temporary line diversion as opposed to what appeared to be a greater interest in the broader development of the entire site, Mr. McKenna stated that if he had been provided the opportunity to make representations, the possibility of undergrounding the temporary line could have been discussed. He stated:

"Well, up until this point I didn't have enough information to know exactly what was being proposed. Certainly when the notice came in I had serious concerns about the fact that a decision was made to go ahead and put this temporary line



up without giving us any opportunity to discuss the implications for it or the implications of the rights that were taken from the land because of the notice and because of the temporary line. There were certainly other possibilities, alternative arrangements for the line. As I said undergrounding would have been a possibility.”

### **(iii) Judicial Consideration by the Board**

The defendant submits that as the opportunity was not given to the company to make objections or representations as to the proposal to acquire a wayleave over its land, the Board of ESB did not and could not give any consideration to any objections and representations before the decision was made.

There was no notice or an opportunity given to make objections and representations post the formation of the intention to serve the notice. In any event, Mr. Waldron had closed his mind to the suggestions of the defendant.

Mr. Waldron confirmed in his letter of 17th July, 2013 that there was no enquiry made by or on behalf of the Board of ESB into the merits of the proposal to acquire an interest in the defendant's lands and that no such enquiry was required.

### **8.3.3 Validity of Notice on its Face**

The defendants argue that the wayleave notice is defective due to incoherent description of the works, temporal confusion, purporting to create a right under s. 98 and the failure to describe the right to compensation pursuant to s. 53(9) of the 1927 Act.

The defendant submits that there is an incoherent description of the nature of the works and the position and manner in which they are intended to be carried out, as there were two alternative descriptions of the right to be imposed or acquired compulsorily. The notice states that the nature, position and manner of the works “is set forth on the attached Schedule/has been indicated to the Company by a representative of the Board.” It is asserted that no representation as to the definitive route of the wayleave was given in advance of the service of the notice but even if it is determined that there was such representations, the wayleave notice did not contain an account of the discussions. Further, there are alternative descriptions, incoherencies and inconsistencies between the notice and attached schedule that make the notice fundamentally flawed. For example, the notice describes works to the existing line. Although the description in the notice is described by Mr. Waldron in his affidavit as referring to the temporary line diversion, the defendants submit that the description of the alternative works relate to an “existing electric line”. The notice of intention states:

“To carry out certain temporary works to the existing electric line...over across the Company's lands...These temporary works form part of the repair and alteration works being carried out on the existing Maynooth-Ryebrook 110kV Line, the existing Dunfirth-Kinnegad-Rinawade 110kV Line and the existing Maynooth-Rinawade 110kV Line.”

The notice also fails to identify the location of any “temporary line diversion” as referred to in the affidavit of Mr. Waldron and describes the location of “the said existing line”. The Schedule identifies the location of “the existing electric line” and refers to the “intended position of the diversion to the existing electric line to be placed on the Company's land.” The defendant argues that the Schedule is in direct conflict with the notice itself as it refers to a map which shows the route of the existing line and a new line. The notice refers to an existing line and it is submitted that the provision of a new line cannot be described as works to the existing line and is a substitute rather than a repair.

The notice, on its face, purports to effect the acquisition of interest in the defendant's lands on a temporary basis but does not state the temporal limitation. A temporal limitation should be certain and expressed in certain terms in the wayleave notice. It is submitted that the notice, schedule and map are not capable of complying with s. 53(4) due to uncertainty and ambiguity as to the nature, extent, duration and nature of the right purported to be acquired.

The defendant also argues that the notice purports to create a right under s. 98 of the 1927 Act, which is an invalid exercise of the power to acquire by notice pursuant to s. 53.

The defendant contends that the right to compensation arises on the date of the service of the wayleave notice. It is accepted that the valuation date is the date of entry or the date of assessment, whichever is sooner. However, the right to compensation cannot be denied if the acquiring authority never enters onto the land as the land is devalued by the existence of the right itself. The wayleave notice is flawed as it fails to provide, on its face, details of any right to compensation, the compensation procedures and provisions that apply to claiming and determining compensation and the mechanism for resolving disputes in respect of compensation.

## **9. Decision of the Court**

9.1 The final part of this series of cases involves the power of the plaintiffs to survey the lands in question, to carry out repairs and alteration works to the existing lines and to erect a temporary line on the said lands. In substance, there remains only the issue of a temporary line for the determination of the Court. The defendant challenges the power of the plaintiffs to enter on the defendant's lands to erect a temporary line diversion on the following basis:

- (a) The notice under s. 53 was invalidly served.
- (b) Fair procedures were not afforded the defendant, in that they did not have proper notice, they did not have the opportunity to make representations and objections and the Board of the ESB did not consider such representations and objections as they may have made.
- (c) The notice was invalid.

### **9.2 The Power to Enter and Survey**

The right to enter on the land, make surveys and carry out restraining works remains alive only to the extent of costs. Surveying has already occurred, as has all restraining capable of being done without the temporary line. In relation to the right to survey, interlocutory injunctions were granted to both plaintiffs on consent by Laffoy J. on 5th June, 2013. By order of Gilligan J. made on 14th June, 2013, ESB were allowed to restrain lines where possible without the temporary line diversion. This was following a contested hearing. The entitlement to enter on lands in order to survey for the purpose of performing any of its powers and functions is provided by s. 20(4) of the 1927 Act, which provides that:

“(4) For the purpose of the exercise or performance of any of the powers or functions conferred on the Board by this Act, the Board may enter on any lands or premises and there make such enquiries, investigations and examination as it thinks

proper.”

I can identify no credible argument as to why this statutory provision does not mean precisely what it says. As to Eirgrid’s power of survey, Regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 provides:

“(2) Any function of the Board under . . . s. 20 of the Electricity Supply Act 1927, which is necessary for the discharge of the transmission system operator’s functions under these Regulations shall, to that extent, be regarded as a function of the transmission system operator and not of the Board, rather than where it is also necessary for the Board to discharge its functions as transmission system owner, in which case, that function shall be a function of both the Board and the transmission system operator.”

This project involves the uprating of the existing line so as to improve service to the customers served by that line, including a major industrial customer. It is thus of great importance, as a part of maintaining the power infrastructure of this country and vital to our economic recovery. As I understand the evidence, the initial stage of identifying the specification for the linear uprating of this line must be done to a high degree of precision. To do this, it must obviously survey the existing lines and lands involved and ascertain how the uprating is to be achieved. Eirgrid and ESB then engage as to how exactly to progress the project. The ESB clearly must have access to the lands to perform this vital function. Regulation 8(2) provides that this function shall be a function of both the ESB and of the transmission system operator which is Eirgrid. Thus, the power to carry out the survey required is shared by ESB and Eirgrid.

### 9.3 The Power to Enter, Repair or Alter

Section 53(9) of the 1927 Act provides:

“(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.”

The provision could scarcely be clearer. The ESB has, for almost half a century, retained this line across the defendant’s lands pursuant to its power under s. 51(1) of the Act. It is thus authorised to do so. The provision of the right to enter at any time in order to repair or alter such line is an obvious necessity. Any failure of electric power or any danger arising from fallen lines is a something that requires immediate and effective remedies. The need to uprate such lines, as technology develops, is just as obviously required. Both residential and commercial enterprises demand and need the very latest in technology in the field of power transmission. That is what is involved here and the ESB and its authorised undertaker, Eirgrid, have quite plainly, under the statutory provision, the right to enter the defendant’s lands in order to alter the lines as they have determined is necessary.

### 9.4 The Temporary Line Diversion

(a) The defendant argues that the service of the s. 53 notice was invalid. They claim, in the first place, that it was served, not by ESB, but by ESB Networks Ltd. which is a separate corporate entity. The notice was signed by Eoin Waldron of ESB Networks as an authorised officer named in the authorised officers list of 3rd September, 2012. This body is a part of ESB and quite separate from the limited company of the same name. Mr. Waldron, in his evidence, stated he is an employee of ESB and works in its business unit. He said that it was in that capacity that he signed the notice. The notice is on ESB headed notepaper and is signed by Eoin Waldron of ESB Networks, which although an integral part of ESB, is ring-fenced and designated to carry out ESB TAO and DAO functions. 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 signing 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.

(b) In dealing with the fair procedures claim, the Court must first consider what sort of fair proceedings are required. In the context of interference with property rights, the Supreme Court in *Dellway v. NAMA* [2011] 4 I.R. 1, Fennelly J. observed that:

“Everything depends on the circumstances and subject matter.”

Reasonable fairness in all of the circumstances is what is required; see *International Vessels Ltd. v. The Minister for the Marine* (No. 2) [1991] 2 I.R. 93, McCarthy J. at p. 102.

De Smith’s *Judicial Review* (7th ed., Sweet & Maxwell, 2013) para. 7-009, dealing with this matter, states:

“The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interests affected will be too insignificant or too speculative or too remote to qualify for a fair hearing. Whether this is so will depend on all the circumstances, but a fair hearing is no longer to be rejected out of hand, for example, simply because the decision maker is acting in a ‘legislative’ capacity.”

And later:

“What fairness requires will vary according to the circumstances. We shall see that some decisions, while attracting the duty to be fair, will permit no more to the affected person than a bare right to submit representations. In other cases, however, there will be a right to an oral hearing with the essential elements of a trial. In between these extremes are a large variety of decisions which, because of the nature of the issues to be determined or the seriousness of their impact upon important interests, require some kind of a hearing (which may not even involve oral representations), but not anything that has all the characteristics of a full trial.”

So what are the circumstances herein? Power lines had been present on these lands for almost half a century. The project in question is to alter by way of uprating the power but without altering the linear footprint of the line where it marches across the defendant’s lands. The most significant remaining work is the erection of a temporary line that is expected to remain in situ for about four months. Compensation for any loss will be paid and the lands will be returned to their previous state. The interference with the defendant’s property rights is minimal. His arguments concerning moving or undergrounding the line have no relevance to this case. It is surprising that this part of the case took up so much of the Court’s time. It may be that there are other proceedings in train involving such claims, but in relation to a s. 53 notice, the position is quite clear. The defendant’s only right is to compensation; see *ESB v.*

It seems to me that in circumstances contemplated by s. 53(9), where urgent repair is necessary, for instance, following storm damage, no hearing for or conversation with the land owner is even required. The ESB is empowered to enter without any notice at all. The reasons for this are obvious. In certain circumstance, the need to repair may be of extreme urgency. In the circumstances prevailing here, this is not the case. The ESB want to erect, albeit temporarily, a diversionary line on the lands. This line will, however, only be present for about four months and then will be removed. No pre-existing rights of the defendant will be affected. The plaintiffs will simply enter, erect, alter and withdraw. Context being everything in determining what fair procedures require, it seems to me that the cautious approach adopted by the ESB was very wise. It is not a project that should be delayed since everybody should strive for the best technology possible. It should, however, be progressed with all due expedition. Because a new, albeit temporary line is proposed, a s. 53(3) notice was the correct way to proceed. However, as no pre-existing rights would be affected, the need for anything other than the statutory notice does not arise. The seven days notice was sufficient, and absent the landowner's consent, the only right it had was compensation. No authority, statutory or otherwise, was opened to the Court that supported the proposition that the defendant was entitled to notice of this notice. The Act is clear. Seven days notice is provided and that is all that is required. In any event, it is quite clear from the correspondence and the evidence that the defendant had ample notice of what was intended. Indeed, in his evidence, Mr. McKenna conceded that on 1st May, it was signalled that a notice would issue. As to the opportunity to be heard, no absolute right exists in relation to a s. 53 notice. It depends on the circumstances. Case-law opened to the Court that deals with a right to be heard where compulsory purchase of an interest in land is concerned is simply inapplicable to the situation herein. As noted above, only a right to compensation exists, no more. A right to be heard on a s.53 notice could only arise in the most exceptional of circumstances. I can find no such circumstances herein.

Notwithstanding, it is hard to understand why the defendant makes such a case. The evidence is clear that, even though not required to do so, the plaintiffs engaged in voluminous exchanges of information with the defendant to try to answer all questions that could reasonably arise. However, the continuous stream of questions raised by the defendant was not, in my view, reasonable. It seems that every new raft of information provided by the plaintiffs to the defendant was used as a platform for a new range of questions. The evidence shows that the defendant, in reality, had all the information that could reasonably be provided, and indeed, far more for the purposes of this notice. He had ample opportunity to make any case he wished to Mr. Waldron who was the officer authorized to issue such a notice. I am satisfied that the continuous stream of questions was really a part of a strategy of pressurising the plaintiffs to come to terms with the defendant in order to have the lines either moved or undergrounded. The plaintiffs declined to consider this request at this time. In the context of a s. 53 notice, such considerations were irrelevant. Thus, although not required, the defendant was heard and afforded all information that could reasonably be provided.

As to whether it was necessary for the Board of the ESB to consider the representations and objections of the defendant, I cannot accept the defendant's argument. Eoin Waldron was, as noted above, the person authorised to exercise the Board's s. 53 powers. Thus, it was he, insofar as might be required, who should consider any representations or objections, not the Board. The evidence overwhelmingly shows that he did do so. He did not engage with the defendant on the issue of moving the line or undergrounding it. This issue, however, was, as noted above, irrelevant to the project contemplated by the s. 53 notice.

#### **(c) The Defendant's Challenge to the Validity of the Notice**

I can see nothing that is left wanting in the s. 53 notice that was served herein. It does precisely what the section requires. It indicates the plaintiffs' intention to place the temporary line; it describes the nature of the line and the position of it and the manner in which it is to be placed. The notice quite clearly embodies its attached schedule and map. This was also the case in *ESB v. Harrington* and no issue was raised in connection therewith. The argument that the same notice cannot be served for the purposes of ss. 53 and 98 is just as technical as the argument concerning whether the notice, map and schedule can be read together. It is the kind of excessive technicality that does not find favour with the courts. The argument that the s. 53 notice does not refer to an entitlement to compensation is also in this category of technicality. In any event, s. 53 makes no such provision for inclusion. The right to compensation derives from the terms of the Act itself: see s. 52(5).

10. Thus, the Court finds that the plaintiffs have the right to enter and remain upon the defendant's land herein and there to make such enquiries, investigations, examinations, repairs or alterations as they think proper in connection with this project herein. They may also, for the purposes of the project, erect on the defendant's lands a temporary diversion to the Dunfirth-Kinnegad-Rinawade 110 kV line. They are thus entitled to those orders and declarations sought in their statement of claim and set out at para. 4 above.