Southampton to London Pipeline Project

Deadline 2

Response to the Examining Authority's First Written Questions Draft Development Consent Order (DCO)

Application Document: 8.6.05

Planning Inspectorate Reference Number: EN070005
Revision No. 1.0
November 2019

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1 Response to the Examining Authority's Written Questions – Draft Development Consent Order (DCO)

Table 1.1: Applicant response to Question

ExQ1	Question:	Applicant response to Question:
DCO.1.1	A number of Articles contain provisions deeming consent to have been granted in the absence of a response from the consenting authority. The ExA notes that no evidence has been advanced that such consenting authorities agree with the draft DCO [AS-059]. Provide this assurance.	1.1 On 2 April 2019, the Applicant issued a draft Development Consent Order for comment to county, borough and district councils, with a copy issued to the South Downs National Park Authority on 3 April 2019. The draft was also issued to the Environment Agency, Historic England and Natural England. This is noted in paragraph 7.3.4 of the Consultation Report (**Additional Submission AS-013**). 1.2 The Applicant received one response. This was from the Planning Lead at Winchester City Council, who raised some questions for clarification. 1.3 Copies of the emails issued can be made available at the Examining Authority's request.
DCO.1.2	A number of Articles make provision for "compensation to be determined, in case of dispute, under Part 1 of the 1961 Act". Part 1 of the 1961 Act only relates to compensation for compulsory acquisition.	1.1 The Applicant does not consider that further modification of the compensation and compulsory purchase enactments in the draft DCO (**Document Reference 3.1 (3)**) is required. 1.2 First and foremost, it is the Applicant's view that there is enough clarity that the application of Part 1 of the 1961 Act would not be confined to cases of compulsory acquisition. To a large extent, this clarity is provided by the drafting of the DCO articles themselves, which refer to compensation being determined under Part 1 of the 1961 Act in case of dispute (see e.g. article 12(7) in relation to the temporary stopping up of streets, articles 29(6) and 30(8) in relation to the temporary use of land and articles 41(5) and 42(4) in relation to works to trees).

ExQ1	Question:	Applicant response to Question:
	The ExA considers that in order for there to be certainty that it would apply in other situations (e.g. the temporary use of land under Articles 29 and 30 of this Order, modification should also be included as with the other compensation provisions in Schedule 6 of the draft DCO [AS-059]. Respond.	1.3 This clarity is also provided by case law. In this regard, the Applicant refers the Examining Authority to the case of BPP (Farringdon Road) Ltd v Crossrail Ltd UKUT 0356(LC), a copy of which is appended to this document at Appendix DCO.1.2.1. In that case, the Upper Tribunal considered whether a reference could be made to the Tribunal to assess compensation arising due to temporary relocation as a result of works associated with the construction of the Crossrail scheme. The Applicant would draw specific attention to paragraph 21 of the Upper Tribunal's decision, which provides: *'21. Finally, although section 1 of the 1961 Act (and thus Part 1 as a whole) is couched in terms of the compulsory acquisition of interests in land, Part 1 is very commonly adopted as supplying sufficient machinery for the resolution of disputes over compensation for the temporary possession and use of land. Paragraphs 1(4) and 1(5) of Schedule 5 to the Crossrail Act 2008 are in the model form derived from the Transport and Works (Model Clauses for Railways and Tramways) Order 2006, and in substantially the same form they appear in similar primary and secondary legislation authorising temporary possession (for example the Channel Tunnel Rail Link Act 1996).'* 1.4 Second, the Applicant is not aware that it has been considered necessary in the context of previously made Orders to modify the compulsory purchase enactments in the manner suggested. For example, the Applicant notes that whilst this same suggestion was made by the Examining Authority during the examination of the A19/A184 Testo's Junction Alteration Development Consent Order 2018, the Secretary of State did not subsequently consider that it was necessary to modify the Order in reaching his decision to grant development consent. Modifying the draft DCO in the manner suggested could also have unforeseen consequences, since it might have the effect of undermining the compensation provisions contained in previous made Orders. 1.5 For these reasons, the Applicant considers that it is sufficiently clear that Part 1 of the 1961 Act would apply in situations not limited to compulsory acquisition and that further modification of the draft DCO is therefore not necessary.

ExQ1	Question:	Applicant response to Question:
DCO.1.3	The Explanatory Memorandum (EM) [APP-028] states that it is envisaged that works which are de-minimis and have minimal potential for adverse effects are excluded from the definition of commence. It is not clear from the draft DCO [AS-059] that the works excluded from the definition of commence are limited in this way. Respond.	1.1 The Applicant considers that the wording of this definition is clear and the exclusions are limited. 1.2 The activities excluded from the definition of 'commence' do not include the works themselves and merely comprise investigative, remedial and site mobilisation / preparatory works. These are small scale activities in the context of this nationally significant infrastructure project. The Applicant does not consider that these activities are likely to generate significant environmental effects. In this regard, the Applicant notes the Planning Inspectorate's following comments in Advice Note 15 regarding the use of the term 'commence' within Development Consent Orders: *'In some decisions the Secretary of State has removed definitions of 'commence' and/ or 'preliminary works' which could have allowed for a range of site preparation works (such as demolition or de-vegetation) to take place before the relevant planning authority had approved details of measures to protect the environment under the Requirements.* *The definitions were removed because the Secretary of State considered them to be inappropriate, particularly where such advance works were themselves likely to have significant environmental effects, for example, in terms of noise or impacts on protected species or archaeological remains.'* 1.3 The Applicant considers that the wording of this definition is therefore consistent with this advice. 1.4 The approach to drafting adopted by the Applicant is also consistent with DCO precedent. Notably, the Applicant is not aware that, in the context of previously made Orders, it has been considered necessary to further refine the definition of 'commence' in the manner suggested in order to enhance clarity. 1.5 For these reasons, the Applicant considers that meaning and intention of the definition is sufficiently clear and the exclusions are sufficiently limited.

ExQ1	Question:	Applicant response to Question:
DCO.1.4	The definition of maintain includes “divert”, and Part 2 Article 4 restricts such works to within the Order Limits. The ExA nevertheless is concerned that maintenance works could result in a lateral diversion of the authorised development from the route for which development consent is sought. The Applicant’s assertion that this Article accords with s21 of the PA2008 is questionable as the ExA considers a diversion beyond the limits of lateral deviation granted by a DCO requires development consent if the pipeline has not yet been constructed. If it has been constructed whether development consent is required depends on the length of the pipeline being diverted.	1.1 In response to (i) and (ii), the Applicant can confirm that any diversions to the replacement pipeline route would need to be located within the lateral limits of deviation. The Applicant has replaced the words ‘the Order limits’ with ‘the limits of deviation’ in article 4(2)(a) of the draft DCO submitted at Deadline 2 (**Document Reference 3.1 (3)**). This wording is now consistent with s. 21 of the 2008 Act. 1.2 For completeness, the Applicant considers that it is sufficiently clear that the term ‘divert’ as used here is referring to the diversion of a pipeline which has been constructed, since it is employed in the context of the Applicant’s power to *maintain* the replacement pipeline (i.e. once the replacement pipeline has been built). Given that s. 21 of the 2008 Act makes clear that it is only those diversions to a constructed pipeline which exceed the permitted limits of lateral deviation that *may* engage a requirement for development consent, the Applicant considers that it can reasonably be inferred that a power to divert the pipeline within the limits of lateral deviation may be included with an Order granting development consent. This is the approach which the Applicant has taken and it is an approach which was approved by the Secretary of State in the Willington C Gas Pipeline Order 2014 and the Thorpe Marsh Gas Pipeline Order 2016.

ExQ1	Question:	Applicant response to Question:
	i) Confirm that the term "divert" requires such diversion to be within the lateral Limits of Deviation as well as those within the Order Limits; and if so ii) Amend the DCO accordingly; or iii) Provide a justification for the current position.	
DCO.1.5	While the ExA accepts the need for the Applicant to undertake maintenance works, the ExA is nevertheless concerned that the definition as worded is not sufficiently precise. This is specifically the case where such maintenance works would be allowed "insofar as such activities are unlikely to give rise to any materially new or materially different environmental effects from those assessed in	1.1 In response to i), an effect which is materially new relates to an effect which was not reported in the Environmental Statement (ES) certified by the Secretary of State but which is significant in EIA terms. An effect which is materially different relates to an effect which was reported in the ES but in respect of which there is a change in the significance attributed to the effect from that reported in the ES. 1.2 This wording is considered important to distinguish from effects which are merely "new or different", which would capture all new effects, irrespective of significance, and all different effects, whether or not they are such as to alter the level of significance attributed to the effect from that reported in the ES. 1.3 It is also relevant to note that the permanent rights to maintain the replacement pipeline as set out in the Book of Reference (**Additional Submission** AS-011) relate to a 6.3m strip of land. The Applicant would not be authorised to exceed the scope of these rights in maintaining the replacement pipeline and, as such, would not be authorised to work outside the Rochdale Envelope of the ES.

ExQ1	Question:	Applicant response to Question:
	the environmental statement". As currently worded, the ExA is concerned that maintenance activities could exceed the Rochdale Envelope of the ES. i) Explain what is meant by "materially new or materially different". How is this distinguished between "new or different". ii) Explain where "materially new or materially different" is defined in the draft DCO [AS-059]. iii) Who would be the arbiter or assessor that such maintenance works were "new or different" as opposed to "materially new or materially different", and how would this be secured in the draft DCO.	1.4 This form of wording is also precedented in a number of made Orders, including the River Humber Gas Pipeline Replacement Order 2016 and the Drax Power (Generating Stations) Order 2019. 1.5 In response to ii), this term is not defined in the draft DCO (**Document Reference 3.1 (3)**) and the Applicant does not consider that it is necessary to define it. 1.6 This language has been widely used in previously made Orders, where it has not been considered necessary to provide a supporting definition. The approach to drafting taken by the Applicant is therefore consistent with this established body of precedent. 1.7 In response to iii), just as it is for the Applicant to check that it is building the project within the physical and environmental limits set by the DCO, It would be for the Applicant to consider and determine whether a particular maintenance activity would result in a materially new or materially different effect and, where appropriate, the Applicant would consult with relevant bodies to ensure compliance with any legal requirements. It is a criminal offence to breach the terms of a DCO and so there would be a strong incentive on the Applicant to stay clearly within its terms; this would additionally be policed by local planning authorities under their enforcement powers in the Planning Act 2008. 1.8 In response to iv), it would fall upon the Applicant to ensure that any proposed maintenance activity complies with the terms of the DCO and/or legislative requirements and it would therefore need to make an informed and responsible determination about whether a particular maintenance activity (individually or collectively) would result in a materially new or materially different effect to that reported in the ES. At the time of undertaking the work, the Applicant would carry out a screening exercise and where appropriate consult with relevant bodies to ensure compliance with any legal requirements. The local planning authorities have an existing policing role under the Planning Act 2008 that already applies. 1.9 In response to v), the Applicant does not believe that the definition of "maintain" would apply to the wholesale replacement of the pipeline. In practice, the need to replace the whole pipeline would only arise towards the end of the design life of the replacement pipeline (approximately 60

ExQ1	Question:	Applicant response to Question:
	iv) Explain whether the relevant planning authority would have any role in checking whether maintenance works, individually or collectively, would be "materially new or materially different" and how would this be secured in the draft DCO. v) Explain how the definition as worded would prevent the whole of the pipeline being replaced as maintenance works.	years), at a time when the underlying baseline reported in the ES is likely to have evolved significantly from that assessed for the purposes of this application for development consent. This means that there is no realistic prospect that the replacement of the whole of the pipeline would fall within the scope of the likely significant effects assessed and reported in the ES. As a result, the Applicant considers that the proviso in the definition of "maintain", that any maintenance works must not give rise to any materially new or materially different environmental effects to these assessed in the ES, would apply so as to preclude the wholesale replacement of the replacement pipeline. 1.10 In addition, it should be noted that the permanent rights to maintain the replacement pipeline as set out in the Book of Reference (**Additional Submission** AS-011) relate to a 6.3m strip of land. The Applicant would not be authorised to exceed the scope of these rights in maintaining the replacement pipeline. As a result, the replacement of the whole of the pipeline is unlikely ever to be possible in practical terms as the power to take temporary possession of the land for areas such as the working width, access and construction compounds under article 29 of the draft DCO (**Document Reference 3.1 (3)**) will fall away within the time periods specified in that article.
DCO.1.6	The ExA is unclear what enactments might apply to land within the Order Limits which affect the authorised development or how this Article provides clarity in this respect. Respond.	1.1 Article 3(2) of the draft DCO (**Document Reference 3.1 (3)**) is necessary to ensure that there are no acts of a local or other nature which would hinder the delivery of this nationally significant infrastructure project. Whilst the Applicant carried out a thorough search of local legislation that applied within reasonably close proximity to the Order Limits and identified local acts and byelaws to be disapplied (under article 35), such a search cannot be conclusive in identifying all relevant enactments, particularly for a long linear scheme such as this which spans multiple local authority boundaries. There is therefore a risk that there may be some unidentified statutory provisions which could be incompatible with the delivery of the project. 1.2 Relevant enactments may, for example, include Acts and Orders authorising the construction, maintenance and operation of other infrastructure, including water, gas, electricity and transport infrastructure, which may contain restrictions which would otherwise conflict with or impede the construction of the replacement pipeline. The article is drafted relatively broadly to reflect the

ExQ1	Question:	Applicant response to Question:
		range of enactments which may present an impediment to the project. However, the article is limited in geographic scope to the land within or adjacent to the Order limits. 1.3 The Applicant has therefore taken a cautious approach by including article 3(2) (which, as noted in the Explanatory Memorandum (**Document Reference 3.2 (3)**), is an approach approved in other consented schemes) to ensure the delivery of this nationally significant infrastructure project.
DCO.1.7	The wording of the said sub-paragraph differs sharply and conflicts with the definition of "maintain" in Part 1 Article 2. This Article uses the words "materially new or materially worse adverse effects". Correct this wording to reflect the definition of "maintain".	1.1 The Applicant can confirm that article 4(2)(c) has in fact now been deleted from the version of the draft DCO submitted at Deadline 2 (**Document Reference 3.1 (3)**). This is because the definition of "maintain" in article 2(1) of the draft DCO already makes it clear that the Applicant may only undertake maintenance activities provided that those activities would not give rise to any materially new or materially different environmental effects to those identified in the environmental statement. Therefore, article 4(2)(c) only serves to repeat that which the Applicant is already prevented from doing, in accordance with the definition of "maintain" in the draft DCO. The Applicant does not consider that it is necessary to repeat this information and has deleted article 4(2)(c) accordingly.

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DCO.1.8	The ExA is concerned by the tailpiece in Article 6(2). i) Justify the level of flexibility sought, in particular why and in what circumstances it will be necessary to permit amendment to the maximum limits of vertical deviation by the SoS at a later date. ii) Explain why it is appropriate to permit amendments to the Limits of Deviation other than by applying to amend the Order in accordance with the provisions of PA2008. iii) Explain what process is in place for the SoS to determine whether exceeding the vertical limits would not give rise to any materially new or materially worse adverse environmental effects.	1.1 In response to i), this article has been included to make appropriate allowance for unexpected ground conditions encountered during construction or the presence of infrastructure located at, above or below ground level which may render it dangerous or impracticable to install the replacement pipeline within the vertical limits of deviation specified in article 6(1). 1.2 The Applicant has given careful consideration to the selection of the vertical limits of deviation in article 6(1) and has, as far as possible, sought to provide appropriate allowance/flexibility in defining those limits in order to reduce the likelihood that paragraph (2) would need to be deployed. The Applicant is of the view that paragraph (2) would only be engaged in very limited circumstances where a localised issue arises (particularly during construction), which means that it is impracticable or simply not feasible to comply with the vertical limits of deviation specified in article 6(1). 1.3 The article is also subject to the oversight of the Secretary of State (in consultation with the relevant planning authority) and to the proviso that any deviation in excess of the specified vertical limits must not give rise to any materially new or materially different environmental effects to those reported in the Environmental Statement (ES). The Examining Authority can therefore be satisfied that the provision is subject to appropriate checks and balances; if there are no new or materially different environmental effects, then no third party should be prejudiced by the variation. 1.4 In a number of cases, the Applicant's ability to construct under the limits within article 6(2) may serve to offset the potential negative impacts which could arise if the replacement pipeline were required to be constructed to the levels set out in article 6(1), for example where extending the limits would allow the Applicant to reduce the scope for interference with activities or assets located at, above or below ground level. 1.5 Without the provision, there is a risk that minor departures from the limits of deviation in article 6(1) would subject the project to onerous and disproportionate delay, in circumstances where the Secretary of State can be satisfied that such departure would not give rise to any materially new or materially different environmental effects to those reported in the ES. Article

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		6(2) would therefore allow the Applicant to respond in an agile manner to previously unforeseen issues encountered during construction, without imposing undue and disproportionate delay to the delivery of this nationally significant infrastructure project. The provision is precedented in made Development Consent Orders (DCOs) and was approved by the Secretary of State in the A19 / A184 Testo's Junction Improvement Development Consent Order 2018. 1.6 In response to ii), the Applicant considers that it is appropriate to permit amendments to the limits of deviation in the manner provided for under article 6(2), because the application of that provision would not be such as to allow the Secretary of State (following consultation with the relevant planning authority) to approve changes or details which are outside the parameters authorised by the DCO (if granted) or to permit any fundamental change to the scope of the authorised development applied for and examined. This position is secured by article 6(2), which confirms that a deviation in excess of the limits in article 6(1) must not be such as would give rise to any materially new or materially different environmental effects from those reported in the ES. 1.7 In this regard, the Applicant considers that the drafting of article 6(2) is consistent with the Planning Inspectorate's advice at paragraphs 17.4 and 17.5 of Advice Note 15 ('Drafting Development Consent Orders') and that this provision does not seek to circumvent the statutory process in Schedule 6 of the 2008 Act for seeking changes to a DCO once made. In particular, paragraph 17.5 of Advice Note 15 confirms that any process for the approval of details '*should not allow the discharging authority to approve details which are outside the parameters authorised within any granted DCO.'* The drafting of article 6(2) does not depart from this fundamental principle. It is simply what the DCO allows, it is not allowing a change to the DCO. 1.8 Article 6(2) is also precedented in other made DCOs. A similar provision was included in the A19 / A184 Testo's Junction Alteration Development Consent and the M20 Junction 10a Development Consent Order 2017. The Applicant also notes the comments of the Examining Authority in respect of the A14 Cambridge to Huntingdon Improvement Scheme, where at paragraph 8.2.21 of its Recommendation to the Secretary of State it is stated that: *'The Panel considers that with … the additional drafting clarity at 7(b) in respect of the role of the SoS and the relevant planning authority and confirmation that the approach to*

ExQ1	Question:	Applicant response to Question:
		the use of certification has precedent in other consented DCOs, Article 7 can be included in the recommended Order.' 1.9 In response to iii), the Applicant does not consider that there needs to be a formal process in place for the Secretary of State to make determinations of this nature. Rather, it appears to have been accepted in the context of previously made DCOs – and the Applicant has not sought to depart from this approach – that this provision would operate in a flexible manner, enabling the Secretary of State to adapt to the specific nature of the request before it. 1.10 In the first instance, it would be incumbent upon the Applicant to satisfy itself that a deviation in excess of the limits in article 6(1) would not give rise to any materially new or materially different environmental effects from those reported in the ES and to compile such evidence as may be necessary to demonstrate this fact to the Secretary of State. The product of that work would be packaged up in a submission to the Secretary of State, who would need to consider (in consultation with the relevant planning authority) whether it agrees with the view that the environmental impacts of the deviation would not give rise to effects which are materially new or materially different to those set out in the ES. 1.11 As noted, where this article has been included in previously made DCOs, the Applicant is not aware that the specific process for referrals to the Secretary of State has been defined in the DCO. This is for a good reason. It enables the Secretary of State to consider such requests on a case-by-case basis and in a manner which is proportionate to the particular case under consideration.

ExQ1	Question:	Applicant response to Question:
DCO.1.9	The wording of the said sub-paragraph differs sharply and conflicts with the definition of "maintain" in Part 1 Article 2. This Article uses the words "materially new or materially worse adverse effects". Correct this wording to reflect the definition of "maintain".	1.1 The Applicant can confirm that an amendment has been made to article 6(2) of the draft DCO submitted at Deadline 2 (**Document Reference 3.1 (3)**) so that the wording of this sub-paragraph is consistent with the definition of 'maintain' in article 2 of Part 1.
DCO.1.10	Explain the circumstances in which Article 7(2) is likely to apply.	1.1 This article is most likely to apply in the context of works which may be carried out by statutory undertakers pursuant to the protective provisions in Schedule 9 of the draft DCO (**Document Reference 3.1 (3)**). For example, paragraph 7 in Part 1 of Schedule 9 allows for alternative apparatus to be constructed by affected utility undertakers, where those undertakers' existing apparatus is required to be removed by the Applicant in order to construct the authorised development. An exception to the general rule in article 7(1) – which confirms that the powers conferred by the draft DCO take effect for the sole benefit of the Applicant – is therefore required to enable utility undertakers to construct these works themselves, pursuant to the draft DCO. 1.2 The article also provides clarification that works which are intended to take effect *inter alia* for the benefit of the owners and occupiers of land, such as mitigation works which the Applicant is authorised to construct under Schedule 1 of the draft DCO, are in fact capable of doing so. Without this provision, there would be a potential for contradiction, since strictly speaking only the Applicant could benefit from these works *per* article 7(1) of the draft DCO. In addition, it is possible that a landowner may wish to undertake certain aspects of the reinstatement of its land

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		(albeit funded by the Applicant) for example in the case of sports pitches or playgrounds, and article 7(2) would allow the landowner to undertake such works.
DCO.1.11	The ExA considers that the explanation contained within the EM [AS-061], which centres on the need for consent from the highway authority, is insufficient justification for such wide powers conveyed within the Article. To the Applicant: i) Provide justification for the wide powers sought in these Articles. To All Relevant Local Highway Authorities: ii) Provide a response as to the appropriateness of the powers sought by these Articles.	1.1 Generally, these powers (articles 9 and 10) are granted by the draft DCO (**Document Reference 3.1 (3)**) to undertake works to streets named in a schedule without further consent, and any further works to as yet unknown streets require the consent of the street authority. This is a standard and precedented approach. 1.2 To elaborate, the Applicant distinguishes between the two separate powers sought under article 9: • Article 9(1), which would permit the Applicant to temporarily alter the layout of, or carry out any works in, a street specified in column (1) of Schedule 3 (streets subject to temporary alteration of layout), in the manner specified in column (2). The Applicant emphasises that this power is inherently limited by virtue of: (i) it being restricted to a fixed list of streets in a schedule – in fact, a single street in this case, (ii) the alterations being temporary in nature; and (iii) the requirement that the Applicant must restore any street which has been temporarily altered, to the reasonable satisfaction of the highway authority. • Article 9(2), which would permit the Applicant, for the purposes of constructing and maintaining the authorised development, to alter the layout of any street (and carry out ancillary works within that street) whether or not within the Order limits, and the layout of any street having a junction with such a street. The Applicant emphasises that this power is inherently limited by virtue of: (i) its exercise requiring the consent of the street authority, (ii) the fact it can only be exercised for the purposes of constructing or maintaining the proposed replacement pipeline; and (iii) the requirement that the Applicant must restore any street temporarily altered to the reasonable satisfaction of the street authority. 1.3 The Applicant distinguishes between the two separate powers sought under article 10: • Article 10(1) permits the Applicant, for the purpose of the authorised development, to enter upon the streets specified in column (1) of Schedule 4 (streets subject to street works) which

ExQ1	Question:	Applicant response to Question:
		are within the Order limits and undertake works within those streets. The Applicant emphasises that this power is inherently limited by virtue of: (i) it being restricted to a fixed list of streets in a schedule, and (ii) the fact it can only be exercised for the purposes of the proposed pipeline. • Article 10(2) permits the Applicant, for the purposes of the authorised development, to perform the same variety of street works to streets whether or not within the Order limits. The Applicant emphasises that this power is inherently limited by virtue of: (i) the street authority's consent being needed for the exercise of the power, and (ii) the fact it can only be exercised for the purposes of the proposed replacement pipeline. 1.4 Whilst the powers detailed at article 9(2)(a)-(i) and article 10(1)(a)-(k) do not limit the scope of those general powers, these are illustrative of the kind of street works that would be completed under the powers. These are not out of the ordinary and find grounding in the Highways Act 1980 and the New Roads and Street Works Act 1991. 1.5 The powers under articles 9 and 10 are therefore limited by the drafting of the articles and are not unreasonable or disproportionate, in the Applicant's view. 1.6 The Applicant would emphasise that linear projects that cross multiple and complex boundaries (from streets, to private and government-owned properties, to councils' jurisdictions etc.) require flexibility if their implementation is to be successful, timely and efficient. The longer the distance such a linear project stretches, the more room there is for unforeseen legal and practical complexities to arise. Such complexities, without the necessary powers to adapt to them (subject always to the limitations expressed within the drafting of the DCO), could seriously delay or prevent the project from being delivered. This can be contrasted with a project which is located within a single plot of land, or across multiple plots of proximate land. In such instances, the defined area is relatively certain from the early stages and the powers in question are not necessarily required as there is less scope for unforeseen circumstances. 1.7 This is made more complex by the fact that the Applicant's pipeline would be located underground. This creates a large degree of uncertainty as, notwithstanding the detailed

ExQ1	Question:	Applicant response to Question:
		investigations undertaken to date, it is not possible to confirm with precision at this stage where other apparatus may be located underground, until detailed design and/or the construction phase begins. The Applicant, therefore, requires these flexible powers in relation to streets under articles 9 and 10 in order to be able to respond in an agile manner to the full range of issues which may arise during construction.
DCO.1.12	Justify the need to modify the 1991 Act other than for reasons of precedent as set out in the EM [AS-061].	1.1 The modifications to the New Roads and Street Works Act 1991 (the 1991 Act) made at article 11(3) of the draft DCO (**Document Reference 3.1 (3)**) are required because: a. The street authority's power to give directions as to the timing of street works (s56 of the 1991 Act) will be subsumed and detailed under the Construction Traffic Management Plan, which will in turn be enforced through Schedule 2, paragraph 7(2) of the draft DCO. The power under section 56 therefore becomes unnecessary. Needless overlap of consents and the potential to delay the delivery of the proposed replacement pipeline would result if the discretion is retained. The linear and linked nature of the project means that it is important for the Applicant to be able integrate its street works as part of its overall construction schedule with a high degree of certainty in order to allow for quick and efficient installation. b. The street authority's power to give directions as to the placing of apparatus in alternative streets under section 56(A) would not be appropriate in this case, since the route of the replacement pipeline is constrained by the Order Limits and lateral limits of deviation in article 6 of the draft DCO, and so it may simply not be possible for the Applicant to comply with such a direction. 1.2 The street authority's power to restrict the execution of street works following substantial road works (sections 58 and 58A and Schedule 3A of the 1991 Act) would be inappropriate if applied in the context of this nationally significant infrastructure project, since it may restrict the Applicant's ability, potentially for lengthy periods of time, to execute works in streets in respect of which a restriction has been imposed by the street authority. If it were required to comply with restrictions imposed by the street authority under these provisions of the 1991 Act, the Applicant

ExQ1	Question:	Applicant response to Question:
		is concerned that its ability to integrate its street works as part of the overall construction schedule in an efficient manner may be compromised. 1.3 The Applicant emphasises that the remaining provisions of the 1991 Act have not been modified under the draft DCO. 1.4 Article 11(4) and article 11(5) do not make modifications to the 1991 Act *per se*. Instead, these articles apply the 1991 Act in circumstances where it would not necessarily apply: in relation to temporary stopping up, alteration or diversions of a street. Such works do not form part of the definition of 'street works' under the 1991 Act (s48(3)), meaning the Act would not otherwise apply. Article 11(4) and article 11(5) ensure that it does.
DCO.1.13	The ExA is concerned that the Article as worded would allow for unprecedented and unrestricted access to private roads. Justify the need for such wide powers and explain whether this Article ought to be tied into a phasing plan such that the powers in the Article would not be used for any longer than necessary.	1.1 The Applicant already has the power to take temporary possession of all land within the Order Limits under articles 29 and 30. The power in article 13 would allow the Applicant merely to share private vehicular accesses with other users rather than going through the process of taking temporary possession and then re-allowing the existing users to have access. 1.2 The Applicant recognises, however, that the power would theoretically endure beyond the construction of the pipeline, and so it has amended article 13 so that the power in respect of any particular private road may only be exercised for as long as the temporary possession powers in articles 29 and 30 can be exercised for the same land. Article 13(4) now reads as follows: *'(4) The undertaker may only use a private road under paragraph (1) for such time as the power to take temporary possession of the land upon which it is located under either article 29 (temporary use of land for carrying out the authorised development) and article 30 (temporary use of land for maintaining the authorised development) is capable of being exercised under those articles in relation to that land.'*

ExQ1	Question:	Applicant response to Question:
DCO.1.14	Paragraph 6.70 of the EM [AS-061] states that the consent of the street authority is required to form and layout of means of access and Paragraph 6.71 states that Article 14(2) contains a deemed consent provision. Article 14 contains no subparagraph (2) of the DCO does not contain any requirement for consent from the street authority. Respond and amend.	1.1 The Applicant can confirm that appropriate modifications have been made to article 14 of the draft DCO (**Document Reference 3.1 (3)**). Article 14 now contains three paragraphs as follows: ***Access to works*** *14—(1) The undertaker may, for the purposes of the authorised development and subject to paragraph (2), with the consent of the street authority (such consent not to be unreasonably withheld or delayed), form and lay out such means of access (permanent or temporary) or improve existing means of access, at such locations with the Order limits as the undertaker reasonably requires for the purposes of the authorised development.* *(2) The agreement of the street authority is not required for the formulation, laying out or improvement of a new or existing means of access described in Schedule 1 (authorised development).* *(3) If the street authority which has received an application for consent under paragraph (1) fails to notify the undertaker of its decision before the end of the 28-day period beginning with the date on which the application was made, it is deemed to have granted consent.* 1.2 Paragraph (1) confirms that the Applicant may, for the purposes of the authorised development and subject to paragraph (2), form and lay out means of access (permanent or temporary) or improve existing means of access, at such locations within the Order limits as the Applicant reasonably requires. The power in paragraph (1) is subject to obtaining the consent of the street authority. 1.3 Paragraph (2) confirms that the requirement for consent under paragraph (1) does not apply to the construction of those temporary accesses for which consent is sought under Schedule 1 of the draft DCO **(Document Reference 3.1 (3)**). In effect, therefore, the power in paragraph (1) is included to provide an appropriate degree of flexibility should the need for a further access only becomes apparent at a later stage in the implementation of the authorised development.

ExQ1	Question:	Applicant response to Question:
		1.4 Paragraph (3) provides that, where a street authority receives an application for consent to construct an additional access under paragraph (1), it will be deemed to have granted consent to that application where it fails to notify the Applicant of its decision within 28 days beginning with the date on which the application was made. This deemed consent provision provides a balance between providing certainty that this nationally significant infrastructure project can be implemented by the Applicant in a timely manner and ensuring that the relevant street authority has sufficient time to consider and respond to an application for consent. 1.5 The drafting of this article now aligns more closely with the approach taken in other articles in Part 3 of the draft DCO (see for example articles 9 (power to alter layout of streets), 10 (street works) and 12 (temporary stopping up of streets) of the draft DCO. 1.6 The Applicant can also confirm that all necessary amendments have been made to the Explanatory Memorandum submitted at Deadline 2 (**Document Reference 3.2 (3)**) to reflect the changes made to article 14 of the draft DCO (**Document Reference 3.1 (3)**).
DCO.1.17	The ExA considers inadequate justification has been advanced in the EM [AS-061] for the need for this provision. Provide this justification.	1.1 Sub-paragraph (8) of article 19 (authority to survey and investigate land) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of warrant) where entry onto land for surveys under the article is refused. 1.2 Whilst the Applicant would always try to obtain voluntary access to land, the use of section 13 is justified where the landowner refuses access and thereby delays the carrying out of surveys. In a number of cases, these surveys will inform the detailed replacement pipeline route within the limits of deviation as well as the plans, schemes and strategies which are required to be approved under Schedule 2 (Requirements) prior to the commencement of the authorised development. Article 19(8) is therefore ultimately justified by the need to avoid unreasonable delays in the implementation of this nationally significant infrastructure project. The wording is precedented in made DCOs (see, for example, article 16(6) of the Silvertown Tunnel Order 2018 and article 20(6) of the Port of Tilbury (Expansion) Order 2019).

ExQ1	Question:	Applicant response to Question:
DCO.1.18	The ExA wants to be assured that this Article would not enable the creation of undefined new rights or restrictive covenants and must ensure that either a Schedule detailing each of these rights or restrictions is included in the draft DCO, or the description of each right and restriction is clearly set out in the BoR [AS-011]. Provide this reassurance or amend accordingly.	1.1 Under article 22(1) of the draft DCO (**Document Reference 3.1 (3)**), the Applicant may only acquire compulsorily the rights and impose the restrictions over the Order land which are described in the Book of Reference (BoR) (**Additional Submission** AS-011) and shown on the Land Plans (**Additional Submissions** AS-042, AS-043, AS-044 **and** AS-045). These are the permanent class 2 rights and restrictions defined at paragraph 8(b) in the Introduction to the BoR and relate to a 6.3-metre wide strip of land within which the replacement pipeline would be located. The Applicant has given careful consideration to the drafting of these rights and restrictions, which broadly reflect those which the Applicant would seek to secure by way of private treaty. 1.2 The plots of land in respect of which the Applicant is seeking to acquire class 2 rights are clearly set out in column 4 in Part 1 of the BoR. The Applicant is only seeking class 2 rights over those plots which are listed in Part 1 of the BoR. In turn, and as noted, the extent of these rights and restrictions is clearly defined at paragraph 8(b) in the Introduction to the BoR. 1.3 The Applicant therefore considers that the ExA can be sufficiently assured that this article would not enable the creation of undefined new rights or restrictions over land. 1.4 For completeness, the approach of referring across to the rights and restrictions described in the BoR is a common approach in long linear schemes of this nature and is adopted in order to reduce the volume and complexity of the draft DCO (see, for example, the National Grid (Richborough Connection Project) Development Consent Order 2017).

ExQ1	Question:	Applicant response to Question:
DCO.1.19	Paragraph 6.113 of the EM [AS-061] states that Article 24(10) is included to ensure that any existing rights owned by the Applicant (Esso) in, on, under or over the Order land are not discharged by this Article. However, Article 24(10) refers to rights of the "undertaker" and not Esso. The ExA is not clear how this provision is intended to work if the benefit of the Order were transferred in accordance with Article 8(2) which provides that references to the undertaker in the Order include references to a transferee or lessee. Respond.	1.1 The Applicant considers that this provision is sufficiently clear. 1.2 If the Applicant effected a transfer of the power to acquire rights in land to another party under article 8 of the draft DCO (**Document Reference 3.1 (3)**), then that party would theoretically also have the benefit of the protection afforded by article 24(10). However, the Applicant is intending to exercise the powers of compulsory acquisition itself. The Applicant therefore considers that it is clear that the reference to 'the undertaker' in article 24(10) means Esso. For clarity, however, the Applicant has changed the references to 'Esso' in paragraph 6.113 of the Explanatory Memorandum to read 'the undertaker' in the revised version of the Explanatory Memorandum submitted at Deadline 2 (**Document Reference 3.2 (3)**).
DCO.1.20	The ExA considers that this provision has not been adequately justified or indeed what it is	1.1 In answer to i) and ii), article 24(11) of the draft DCO (**Document Reference 3.1 (3)**) clarifies that the protection afforded to the land (including rights in land) and apparatus of statutory undertakers pursuant to sections 127 and 138 of the Planning Act 2008 (the 2008 Act) would apply to the land (and rights in land) acquired by the Applicant, or to works forming part of the authorised

ExQ1	Question:	Applicant response to Question:
	seeking to achieve. The ExA considers inadequate justification has been advanced as to how the provision in this Article is permissible in accordance with s120(5) of the Planning Act 2008. i) Provide evidence in the form of legal submissions regarding the lawfulness of including this provision in the draft DCO [AS-059] including the intention of the provision and justification for it. ii) Explain its effect and how it is intended to work in practice. iii) Consider the need to amend the Acquisition of Land Act and/or Part 11 of the TCPA1990 (the definition of a Statutory Undertaker for the purpose of s.127 and s.138 are derived from this	development, notwithstanding that the Applicant is not a statutory undertaker within the meaning of those provisions. 1.2 This drafting means that, if and to the extent that a future DCO application were promoted in relation to land located within the Order limits associated with this application and that application sought to include provision authorising the acquisition of land (or rights in land) acquired by the Applicant in connection with the replacement pipeline, or sought to extinguish the Applicant's rights in respect of the replacement pipeline, or sought to remove the replacement pipeline, the Secretary of State determining that future DCO application would need to be satisfied that the tests in sections 127 and 138 of the 2008 Act were met. For example, in applying the tests in section 127 of the 2008 Act, the Secretary of State would need to be satisfied that, as regards any proposal by another promoter to acquire land in respect of which the Applicant holds the benefit of rights in connection with the replacement pipeline, the land can be acquired and not replaced without serious detriment to the carrying on of the Applicant's undertaking (i.e. the operation and maintenance of the replacement pipeline) or the land can be replaced by other land without serious detriment to the Applicant's undertaking (see sections 127(2) and (3) of the 2008 Act). 1.3 As noted, the Applicant is not a statutory undertaker for the purposes of the 2008 Act. The reason that it is considered appropriate to extend the protection of sections 127 and 138 of the 2008 Act to the replacement pipeline is the critical nature of this asset and that the land rights which would, if the DCO is made, be enjoyed by the Applicant would not of themselves protect against the risk that a future DCO application may seek to acquire land or rights in land in which the replacement pipeline is located, to the serious detriment of the operation and maintenance of the replacement pipeline. The risk of interface with future DCO proposals is made greater by the length of the proposed replacement pipeline route, which underscores the Applicant's view that the heightened protection afforded to the assets of statutory undertakers is necessary in this case. The project is nationally significant both in legal terms under the Planning Act 2008 and also according to the ordinary meaning of the phrase. The Applicant therefore considers that the application of sections

ExQ1	Question:	Applicant response to Question:
	legislation) to enable the undertaker to be treated as a statutory undertaker for the purpose of s.127 and s.138 of the Planning Act 2008.	127 and 138 to the replacement pipeline is a proportionate means of pursuing the legitimate aim of protecting this critical and nationally significant infrastructure. 1.4 Article 24(11) is a provision relating to, or to matters ancillary to, the development for which consent is granted for the purposes of section 120(3) of the 2008 Act. For those purposes, section 120(4) and paragraph 10 of Schedule 5 of the 2008 Act confirm that an Order granting development consent may make provision for '*the protection of the property or interests of any person*' (emphasis added). By applying sections 127 and 138 of the 2008 Act to the land and rights authorised to be acquired and the works authorised to be constructed pursuant to the draft DCO, the Applicant seeks in the drafting of the Order to make provision for the protection of its property (the replacement pipeline) and interests (namely the land interests and rights to be acquired for the construction and maintenance of the replacement pipeline). 1.5 Article 24(11) is also within the ambit of the matters which may be provided for by an Order granting development consent under section 120(5)(a) of the 2008 Act. That section provides that '*an Order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order*.' (emphasis added). The draft DCO seeks to apply sections 127 and 138 of the 2008 Act (which fall within the definition of 'statutory provision' under section 120(6) of the 2008 Act) which relates to a matter for which provision is sought to be made by the draft DCO, namely to protect the interests and rights in land to be acquired and the works to be constructed by the Applicant pursuant to the draft DCO. 1.6 In the alternative, article 24(11) is a provision which the Secretary of State can be satisfied is necessary to give full effect to other provisions of the draft DCO, under section 120(5)(c) of the 2008 Act, namely to give full effect to the Applicant's powers to maintain the authorised development and the exercise of the interests and rights in respect of the replacement pipeline which are described in the Book of Reference (**Additional Submission AS-011**) and which are authorised to be acquired pursuant to Part 5 of the draft DCO (**Document Reference 3.1 (3)**). 1.7 In answer to iii), the Applicant does not consider that it is necessary or desirable to amend these provisions, as it is expressly not the Applicant's intention that it should become or be deemed to become a statutory undertaker for the purposes of this DCO or otherwise. The Applicant is

ExQ1	Question:	Applicant response to Question:
		seeking, for the reasons set out in the response to question (i), to apply the protections afforded to the assets and interests/rights of statutory undertakers to this draft DCO, noting the critical nature of this nationally significant infrastructure project. 1.8 Noting the ExA's comments regarding the clarity in the drafting of this provision, the Applicant has proposed some minor modifications to the provision in the revised draft DCO submitted at Deadline 2 in the examination timetable (**Document Reference 3.1 (3**)). This provision now reads as follows: '*(11) Where another nationally significant infrastructure project is proposed to be constructed by a person other than the undertaker on, over or under the Order land:* *(a) sections 127(2) to (6) (statutory undertakers' land) of the 2008 Act shall be capable of applying to land (as defined by section 235(1) of the 2008 Act) acquired by the undertaker, whether compulsorily or by agreement, for the purposes of the authorised development as if* *(i) the reference to statutory undertakers in section 127(8) of the 2008 Act included the undertaker; and* *(ii) the use of the land or holding of an interest in the land for the purposes of the authorised development amounted to the carrying on of a statutory undertaking for the purposes of section 127(1)(c) of the 2008 Act; and* *(b) section 138(4) (extinguishment of rights, and removal of apparatus, of statutory undertakers etc.) of the 2008 Act shall apply as if:* *(i) the rights acquired by the undertaker under this Order (whether compulsorily or by agreement) were a relevant right for the purposes of sections 138(1) and (2) of the 2008 Act;* *(ii) the Works authorised to be constructed by this Order were relevant apparatus for the purposes of sections 138(1) and (3) of the 2008 Act; and*

ExQ1	Question:	Applicant response to Question:
		(iii) the reference to statutory undertakers in section 138(4A) of the 2008 Act include the undertaker, but not in either case for any other purpose whatsoever.'
DCO.1.21	While the ExA accepts the purpose of the Article, the words "to take" should be removed as no power exists for any party to take Crown Land. Remove this wording.	1.1 The Applicant does not consider that an amendment to this article is necessary. The words 'to take' relate to the powers to take temporary possession of land in articles 29 and 30 of the draft DCO (**Document Reference 3.1 (3)**), rather than the permanent acquisition/taking of Crown land, which would be unlawful. The Applicant notes that the words 'to take' appear in the same form in article 56 (Crown rights) of the recently made Port of Tilbury (Expansion) Order 2019.
DCO.1.22	The ExA considers that neither the EM, nor the BoR, adequately set out the plots in question which fall under this Article or what powers are sought over them. It is also unclear which of these plots the Applicant is seeking CA for freehold land. Provide this clarity.	1.1 As defined in article 32(3), for the purposes of article 32 of the draft DCO (**Document Reference 3.1 (3)**), the special category land means the land identified as forming part of a common, open space, or fuel or field allotment in the Book of Reference (**Additional Submission** AS-011) and on the plan entitled Special Category Land Plans (**Additional Submission** AS-049**,** AS-050 **and** AS-051) (article 32(3)). This definition mirrors the provisions of sections 131 and 132 of the 2008 Act. 1.2 As required by Regulation 7(1)(e) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (the 2009 Regulations), as amended, Part 5 of the Book of Reference lists the plots of land which fall into a special category, i.e. which form part of a common, open space, National Trust or fuel or field allotment (per the definition in section 2(1) of the 2009 Regulations). The plots of land in Part 5 of the Book of Reference described as any of these in the right-hand column are therefore the plots to which article 32 of the draft DCO applies (in fact this is all of the parcels in Part 5 except for those on page 3074 of the book of reference, which are National Trust land).

ExQ1	Question:	Applicant response to Question:
		1.3 The classes of interest and/or right which the Applicant is seeking over the plots listed in Part 5 are clearly set out in column 4 of Part 1 of the Book of Reference. In turn, the classes of interest and/or right being sought are clearly defined at paragraph 8 in the Introduction to the Book of Reference. 1.4 Class 1 relates to the acquisition of all estates and interests in land (i.e. the Compulsory Acquisition (CA) of freehold land). Read together, Parts 1 and 5 of the Book of Reference confirm that the Applicant is seeking the CA of freehold land in respect of a single plot along the route of the replacement pipeline – plot 917 – which comprises 199 square metres of Pasture Land south of Bourley Road, Church Crookham. Note however that pursuant to the answer to Question CA.1.7, this plot is being removed from the scope of freehold CA as it is also Crown Land to which section 135 of the 2008 Act applies. This means that freehold ownership is not being sought for any of the plots of special category land. A minor change has therefore been made to article 32(3) of the draft DCO (**Document Reference 3.1 (3)**) to remove the reference to "article 20 (compulsory acquisition of land)" from the definition of "Order rights" for the purposes of that article. Sub-section (3) of article 32 therefore reads: *(3) In this article—* *"Order rights" means rights and powers exercisable over the special category land by the undertaker under article 22 (compulsory acquisition of rights) and article 29 (temporary use of land for carrying out the authorised development); and* *"the special category land" means the land identified as forming part of a common, open space, or fuel or field allotment in the book of reference and on the plan entitled "special category land plans".* 1.5 The Applicant therefore considers that it is sufficiently clear which plots of land form part of special category land to which the power in article 32 of the draft DCO applies and that it is also clear

ExQ1	Question:	Applicant response to Question:
		that the Applicant is not seeking CA powers for freehold land for any plots of special category land.
DCO.1.23	The Article seeks to disapply the provisions of the Neighbourhood Planning Act 2017 (2017 Act) in respect to Articles 29 (temporary use of land for carrying out the authorised development) and 30 (temporary use of land for maintaining the authorised development). The Applicant's position as set out in the EM [AS-061] that the disapplication is necessary for certainty given the absence of regulations providing any detail is noted. However, the Government's overall approach is understood namely to provide protections for those affected by the use of temporary possession	1.1 The Applicant is of the view that it is not currently possible to understand or reflect accurately the temporary possession provisions as intended by the Government in respect of Development Consent Orders (DCOs). The Applicant stands by its rationale for the disapplication of the provisions relating to temporary possession in the Neighbourhood Planning Act 2017 which received Royal Asset over two years ago. This rationale being that these provisions have not yet come into force, nor have any regulations required to provide more detail on the operation of the regime been made (or even consulted on), including any transitional provisions. There appears to be a lack of certainty about the Government's intention as to whether they will ever be brought into force. Accordingly, there is no understanding of how these provisions could apply, or indeed if they would apply, to the authorised development. The Applicant is preserving the current position during this uncertain period. 1.2 The Applicant would also note that there are already protections afforded to those affected by the use of temporary possession powers by the existing regime, which has been included in numerous DCOs made to date and is followed in this one. In particular, under article 29 of the draft DCO (**Document Reference 3.1 (3)**) the Applicant is not permitted to remain in temporary possession of land for longer than one year after completion of the part of the proposed development to which the possession of the land relates without the landowner's agreement. 1.3 Should the provisions relating to temporary possession in the Neighbourhood Planning Act 2017 come into force prior to the making of the Order (and in the absence of any transitional arrangements to the contrary), then the Applicant would comply with the provisions as required.

ExQ1	Question:	Applicant response to Question:
	powers. The ExA is concerned that the provisions within the 2017 Act which, amongst other things, specify an absolute period of temporary possession, have not been adequately justified to be dis-applied. i) Provide this justification; or ii) Amend accordingly.	
DCO.1.24	This Article cannot include a provision to disapply the provisions under the Water Resources Act 1991, the Environmental Permitting Regulations 2016 and the local legislation and byelaws without the express consent of the relevant consenting body (i.e. the EA the relevant drainage boards and the relevant local authorities).	1.1 Consent is needed for some, but not all, of the disapplications listed. An explanation of which need consent and update on obtaining such consent is provided as follows. 1.2 Section 120(5)(a) of the 2008 Act provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order. Under s150(1) of the 2008 Act, provision for the removal of *prescribed consents* may only be included in the Order where the consenting body has consented to that inclusion. A list of the consents which fall within the ambit of section 150(1) – and in relation to which the consent of the relevant body is therefore required for disapplication – is provided in Schedule 2 of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 (the IP(IPMPP) Regs). 1.3 Of the provisions which the Applicant is seeking disapplication of under article 35(1) of the draft DCO (**Document Reference 3.1 (3)**), only (a) Schedule 25 (byelaw-making powers of the Authority) to the Water Resources Act 1991, (b) regulation 12 (requirement for an environmental permit) of the 2016 Regulations in respect of a flood risk activity and (c) section 23 (prohibition on obstructions etc. in watercourses) of the Land Drainage Act 1991 are included in Part 1 of

ExQ1	Question:	Applicant response to Question:
	Provide an update as to obtaining that consent.	Schedule 2 to the IP(IPMPP) Regs. The Applicant is aware that consent from the relevant consenting body is required in relation to the removal of these consents. In order to provide certainty that the project can proceed in a timely manner, the approach which the Applicant has taken is to disapply the requirement for consent from these bodies in the draft DCO and to instead seek to reach agreement with those bodies regarding the terms upon which any requirement for consent is to be disapplied. 1.4 These matters are subject to ongoing discussions between the Applicant and the relevant consenting bodies, including the Environment Agency, and the Applicant is confident that such an agreement will be reached before the end of the examination. If agreement is not reached, then the disapplication of these consents will be removed from the draft DCO. 1.5 There is no requirement for express consent for the disapplication of the other provisions, local legislation and byelaws set out in article 35(1)(d) to (o) of the draft DCO, as these are not prescribed consents which are subject to s150(1) of the 2008 Act.
DCO.1.25	Other than the Applicant's assertion in the EM [AS-061] of precedent being set in the Crossrail Act, the ExA is not clear adequate justification has been advanced for the need for the provision and why the interred period is set at 100 years. i) Provide this justification; or ii) Amend accordingly.	1.1 The justification for article 36(2)(a) of the draft DCO (**Document Reference 3.1 (3)**) is underscored by the Applicant's desire to avoid delay in the delivery of this nationally significant infrastructure project, which may otherwise occur if there was a need to comply with the lengthy notice requirements for the removal of human remains in article 36 in all cases. 1.2 Article 36(12) only provides an exemption from the notice requirements under article 36 where the Applicant is satisfied that the remains were interred more than 100 years ago, and that no relative or personal representative of the deceased is likely to object to the removal of the remains in accordance with the article. This effectively replicates the approach adopted in practice by the Secretary of State in the context of conventional applications for a licence to remove buried human remains in England and Wales under section 25 of the Burial Act 1857. In this regard, the Applicant notes the following extracts of a Supplementary Memorandum by the Rt Hon Paul Boateng MP, Minister of State, Home Office to the Select Committee on Environment, Transport and Regional Affairs in February 2001:

ExQ1	Question:	Applicant response to Question:
		'… where the relatives or descendants cannot be traced, or where the remains are over 100 years old and objections are unlikely, it is our practice to issue a licence to enable the work to proceed. This is because the work will have received prior authorisation or because it may be needed in the interests of safety or conservation, and the balance lies with proceeding with the work.' 1.3 The Applicant does not therefore consider that there is a need to modify this provision.
DCO.1.26	Explain the permitted development rights in the TCPA1990 that would be made available to the Proposed Development under this provision.	1.1 This provision ensures that the permitted development rights, which apply in respect of development in, on, over or under operational land by statutory undertakers pursuant to Parts 8, 13 and 15 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, will continue to be available in relation to land in respect of which those undertakers' apparatus and equipment may be relocated/diverted under the powers conferred by the draft DCO (**Document Reference 3.1 (3)**). The Applicant considers that the provision does not therefore make new permitted development rights available but ensures that statutory undertakers' existing rights continue to be available to them.
DCO.1.27	The ExA is concerned by the provisions in this Article. The powers conveyed in this Article could potentially enable amendments to be made to the authorised development without application under the PA2008, thus circumventing the statutory process.	1.1 The Applicant believes it is necessary to include this provision to ensure it is clear that where it needs to obtain any other planning permission relating to the project, the implementation of that planning permission will not constitute a breach of the terms of this Order. This article has become standard for recently consented Development Consent Orders (DCOs) (see, for example, article 8 of the Tees Combined Cycle Power Plant Order 2019). 1.2 The DCO process provides for two types of development to be consented: the Nationally Significant Infrastructure Project itself, which can only be consented by way of a DCO, and associated development required to support the construction or operation of the principal development, or to mitigate its impacts. It is possible for works of associated development to be consented through alternative regimes such as the Town and Country Planning Act 1990. If planning permission for such associated development is obtained, then compliance with that

ExQ1	Question:	Applicant response to Question:
	i) Justify the inclusion of this Article; or ii) Amend or remove accordingly.	planning permission is not taken to be a breach of the terms of the DCO if all the rest of the terms are complied with. 1.3 Provided that all requirements and other provisions of the DCO are complied with, because DCOs are 'permissive', i.e. they are not required to be implemented or fully implemented, it would be possible not to construct part of the associated development authorised by the DCO and instead construct something that was separately given planning permission under the Town and Country Planning Act 1990.
DCO.1.28	The ExA considers the Article is incomplete. The ExA considers that where it is known that specific hedgerows need to be removed, they should be listed in a Schedule and this Article should be amended to refer to the Schedule. Furthermore, an additional paragraph should also be added to this Article to the effect that any other hedgerows should only be removed once the prior consent of the local planning authority has been obtained.	1.1 The Applicant does not agree that this article is incomplete. It is not incomplete in the legal sense, and the Applicant also considers that the additional protection suggested is not necessary. 1.2 Article 41(3) distinguishes between the removal of hedgerows that are defined as 'important hedgerows' under the Hedgerow Regulations 1997 (the 1997 Regulations) and those which are not. The specific important hedgerows which may be removed are identified in a separate Schedule (see Schedule 10 of the draft DCO (**Document Reference 3.1 (3)**) and powers for their removal are sought under article 41(3)(b) of the draft DCO. There is a substantial precedent for this approach (see, for example, the East Anglia ONE Offshore Windfarm Order 2014, the Progress Power (Gas Fired Power Station) Order 2015 and the Thorpe Marsh Gas Pipeline Order 2017). 1.3 Noting the greater level of protection afforded to important hedgerows under the 1997 Regulations, the Applicant also considers that it is beneficial to distinguish between important and other hedgerows in this way. For example, under regulation 5(2) of the 1997 Regulations, a local planning authority may, unless the exceptions in regulation 6 apply, serve a hedgerow retention notice in respect of an important hedgerow, specifying that works to that hedgerow may not be carried out. By setting out the important hedgerows which may be removed in a separate schedule, and confirming that the power under paragraph (3) removes the need for further approvals under the 1997 Regulations (see article 41(4) of the draft DCO (**Document Reference 3.1 (3)**), the drafting adopted therefore clarifies beyond doubt that works to important hedgerows

ExQ1	Question:	Applicant response to Question:
	Respond, and amend accordingly.	are authorised by the draft DCO and that no retention notice may subsequently be served by the local planning authority in respect of those hedgerows. 1.4 Powers to remove all other hedgerows within the Order Limits, whose removal may be required for the purposes of carrying out the authorised development, are sought under article 41(3)(a) of the draft DCO. 1.5 One of the fundamental aims of the Planning Act 2008 (the 2008 Act) regime is to be a one-stop shop for consents where this is permitted by law. The powers conferred by article 41 are permitted by law, specifically sections 120(3) and (4) together with paragraph 13 of Schedule 5 of the 2008 Act. This provides the rationale for article 41(4) of the draft DCO (**Document Reference 3.1 (3)**), which confirms that the power to remove hedgerows under subparagraph (3) removes any obligation to secure further consent(s) under the 1997 Regulations. To add consent requirements for the removal of all hedgerows as suggested would therefore defeat this purpose of the 2008 Act regime. 1.6 To impose further consent requirements would also be contrary to the principle enshrined in the 1997 Regulations themselves, which is to say that the requirement for consent is disposed with in circumstances where the removal of a hedgerow is required for carrying out development for which planning permission has been granted or deemed to have been granted (regulation 6(1)(e)). In the Applicant's view, this should apply in like manner to development which is authorised by a DCO. This is because the consequence of a requirement for development consent is to remove the need for planning permission to be obtained in relation to the development (section 33(1)(a) of the 2008 Act) but not to limit in scope the activities which would otherwise permissible if the development had been authorised by a planning permission granted under the Town and Country Planning Act 1990. In the Applicant's view, it is entirely reasonable to infer that the exception from the requirement for consent under regulation 6(1)(e) of the 1997 Regulations should apply to development under a DCO as it would to development under a planning permission (or deemed permission).

ExQ1	Question:	Applicant response to Question:
		1.7 The Applicant does not therefore consider that it is necessary to provide for the prior consent of the local planning authority to be obtained before these hedgerows can be removed. 1.8 As drafted, article 41(3)(a) is also sufficiently limited both in geographic extent, to hedgerows which are located within the Order Limits, and in substance, to the removal of hedgerows which are required to carry out the authorised development. The provision is also subject to paragraph (2), which confirms that the Applicant must not cause unnecessary damage to any hedgerows in the exercise of this power. It would also be subject to commitment O1 of the Register of Environmental Actions and Commitments (REAC) in Chapter 16 of the Environmental Statement (ES) (**Application Document APP-056**), which confirms that the Applicant would only utilise a 10m width when crossing through field boundaries which include hedgerows, thus limiting the extent of the impact on hedgerows in carrying out the authorised development. Any hedgerows removed would also be reinstated to a similar style and quality to those that were removed, with landowner agreement (see commitment G93 of the REAC in Chapter 16 of the ES (**Application Document APP-056**)).
DCO.1.29	The ExA notes the Applicant's assertion in the ES [APP-044] that the decommissioning of the existing pipeline is controlled under a previous consent and in the Planning Statement [APP-132] reference is made to decommissioning being undertaken under the Pipelines Act 1962. However, nothing in this Order would prevent the	1.1 In response to i), the decommissioning of the existing pipeline would be carried out in accordance with the requirements of the Pipeline Safety Regulations. No additional planning consents or land rights are considered necessary to undertake this work and it is not included in the scope of the SLP Project. 1.2 The original pipeline was laid under the Pipe-Lines Act 1962 (the '1962 Act') under a pipeline authorisation dated 6 December 1968 (the 'Existing Authorisation'). It should be noted that a consent under the 1962 Act was required to construct the existing pipeline. A consent is not required to operate or maintain the pipeline. The Existing Authorisation was granted to the Applicant under s1(1) of the 1962 Act. 1.3 When a pipeline is abandoned it is decommissioned. There is no requirement in the Existing Authorisation or the 1962 Act regarding the manner or timing of decommissioning. Under the terms of the Existing Authorisation, the original construction of the pipeline could (and did) have deemed planning permission under section 5(1) of the 1962 Act. Any later works would need

ExQ1	Question:	Applicant response to Question:
	Applicant from failing to do so, and the ExA is concerned that a scenario exists where both the existing and proposed pipelines could operate in unison, and in that circumstance the SoS cannot be certain of the full environmental effects. i) Provide details of how decommissioning would be carried out under the Pipelines Act 1962. ii) Justify the current approach. iii) Should the draft DCO include a Requirement which prevents the existing pipeline from operating once the proposed pipeline has been commissioned? If so: iv) Insert a Requirement which prevents the pipeline from operating until the existing pipeline	planning permission unless excluded by section 5(2) of the 1962 Act. The Applicant considers that to the extent decommissioning is development that requires planning permission, this work falls under section 5(2) of the 1962 Act and it is deemed not to be development for planning purposes. This is the approach that was adopted and accepted by the local planning authorities during the replacement of the first 10km of the existing pipeline and the subsequent decommissioning of the existing line in the early 2000s. This is also the approach that has been adopted by the Applicant in relation to its wider pipeline network. 1.4 The relevant legislation regarding the manner of decommissioning is the Pipeline Safety Regulations 1996 that provide at Regulation 14: '*Decommissioning* *14.— (1) The operator shall ensure that a pipeline which has ceased to be used for the conveyance of any fluid is left in a safe condition.* *(2) The operator of a pipeline shall ensure that work done in discharge of the duty contained in paragraph (1) is performed safely*.' 1.5 The relevant HSE guidance (A guide to the Pipelines Safety Regulations 1996) also provides as follows: 64 *'Pipelines should be decommissioned in a manner so as not to become a source of danger. Once a pipeline has come to the end of its useful life, it should be either dismantled and removed or left in a safe condition. Consideration should be given to the physical separation and isolation of the pipeline. It may be necessary to purge or clean the pipeline; due consideration should be given to the hazardous properties of any fluid conveyed in the pipeline or introduced during the decommissioning.* *65 Depending on the physical dimensions of an onshore pipeline and its location, under the general provisions of the HSW Act, it may be necessary to consider the risk of the pipeline corroding and causing subsidence or acting as a channel for water or gases.* …

ExQ1	Question:	Applicant response to Question:
	has been decommissioned or ceases operating. N.B – There is an overlap between this question and questions GQ.1.1 and CA.1.17 and you may therefore wish to provide a combined response to these questions.	*67 Work done in carrying out the final decommissioning of a pipeline should be done in a safe and controlled manner*.' 1.6 Accepted practice for onshore oil industry pipelines is that abandoned pipelines are typically isolated, purged and cleaned of their former hydrocarbon contents and are then usually filled with an inert cement grout. The pipeline is, therefore, left in situ in a safe condition and the presence of the grout means that even if the outer steel case corrodes over time, no void space is left that could become a channel for water or gasses or cause surface subsidence (in compliance with the regulations and guidance cited above). This is the same process that was followed when the initial 10km of the existing pipeline was replaced in the early 2000s. 1.7 Once the replacement pipeline is fully commissioned, the Applicant would decommission the existing pipeline in accordance with the requirements of the Pipeline Safety Regulations and in accordance with good industry practice. The existing line would be purged and cleaned of its former contents into tankage at West London Terminal (WLT) for safe disposal. This process is typically achieved by displacing the product in the pipeline with nitrogen to leave the pipeline in an inert and safe condition. 1.8 Once inert and safe, the existing pipeline would be isolated by disconnecting it from the existing pipeline infrastructure at Boorley Green and WLT. A strategy would then be developed to fill the decommissioned pipeline with grout. As the pipeline is already in a safe and inert condition, subsequent grouting can take place over an extended period of time and can be executed in several phases. There is no requirement that grouting is undertaken as a single stage or immediately. Any excavation works associated with grouting would be assessed in line with all relevant regulatory requirements, as is currently the case for all maintenance works in respect of the Applicant's pipelines. The access points at which grout would be injected into the pipeline would be similar in scale to standard pipeline maintenance excavation and their location would be dependent upon topography, site sensitivity and the selected technology. Grouting is preferable to removing the pipeline completely, which would entail extensive and unnecessary construction activity and would introduce avoidable risk in working near existing services and the

ExQ1	Question:	Applicant response to Question:
		gas main laid alongside the existing pipeline. Any related above ground infrastructure that is not being used in connection with the replacement pipeline would be removed and the land restored. 1.9 In response to ii), the existing pipeline is not specifically included within the Order Limits or the scope of the SLP DCO application. Whilst the existing pipeline may incidentally fall within part of the Order Limits for the SLP project, this is not always the case and frequently the replacement pipeline diverts away from the path of the existing pipeline. 1.10 The decommissioning of the existing pipeline would be carried out in accordance with the requirements of the Pipeline Safety Regulations and in accordance with good industry practice. Because of the way the replacement pipeline ties in part way along the existing pipeline route, it is impossible to operate both pipelines concurrently and once the replacement pipeline is commissioned, the existing pipeline cannot be operated and would be decommissioned. No additional development consents or land rights are required to undertake this work and it is not included in the scope of the SLP Project. The need for other consents such as environmental permits or species protection licences would be fully assessed and sought as necessary. This is not anticipated to be problematic and it is the basis on which the Applicant has operated and maintained its pipelines for the last 60 years. 1.11 In response to iii), the Applicant does not consider this is necessary. 1.12 In response to iv), it is a physical impossibility for the Applicant to operate both lines concurrently. The section of the existing pipeline that will be abandoned will be physically disconnected prior to welding in the new replacement pipeline section. There will be no pathway for fuel to enter the abandoned section of the existing pipeline. Therefore, both pipelines cannot be operated concurrently.

ExQ1	Question:	Applicant response to Question:
DCO.1.30	The ExA is concerned by this Requirement as it considers there is a lack of clarity in how it is worded and how it would operate in practice. To the Applicant: i) Explain how this Requirement would function when dealing with multiple authorities. ii) Explain whether it is the intention for all stages or Work Nos to be approved before development commences, or just individual stages and Work Nos with individual host authorities. iii) If the former, explain when and how these stages will be identified. iv) If the latter, explain whether this approach differs with the definition of "commence" in Part 1	1.1 In answer to i), to allow for parts of the project to proceed at different times, the requirement enables it to be divided into stages. Each stage will relate to land in one or occasionally more local authorities, and each local authority will receive the written scheme for each stage where any part of it includes land in that authority's area. 1.2 In answer to ii), the requirement means that all stages and Work Nos must be notified to the relevant planning authorities before any development commences (note that the requirement does not involve approval). 1.3 In answer to iii), the project will not necessary have reached the identification of project stages until after the examination as it is linked to contractor specifications and appointments. The Applicant intends to identify such stages prior to the commencement of the works and as such has put forward this Requirement to secure that commitment. 1.4 iv) is not applicable.

ExQ1	Question:	Applicant response to Question:
	Article 1 of the draft DCO [AS-059] or that all stages and all relevant Requirements must be approved by all host authorities prior to commencement (except in the circumstances outlined). To the Host Local Authorities and National Park Authority: i) Comment on the effectiveness of this Requirement.	
DCO.1.31	The ExA is concerned that this Requirement is vague. For the Applicant: i) Justify the appropriateness of the stated Work Nos to be "in general accordance" with "indicative layout drawings".	1.1 In answer to i), the indicative layout drawings provide an illustration of the typical layout of the valve compounds, above ground installations, temporary construction compounds and temporary logistics and construction materials storage hubs. The Applicant considers that it is appropriate that it is constrained with regard to the location of the compound, but not as to the precise layout within that area. As such, the Applicant considers that an obligation to carry out these works in general accordance with the indicative drawings is appropriate. For example, the exact layout of a logistic hub or construction compound may vary between sites in order to account for local factors such as access points, ground conditions and the nature of the local installation work being supported. The term 'indicative layout drawings' is what they are called; it would not affect the requirement if their name was changed (e.g. calling them 'layout drawings' instead would not make any difference).

ExQ1	Question:	Applicant response to Question:
	ii) Explain how this Requirement relates to the proposed Limits of Deviation. iii) Provide accurate and precise wording.	1.2 The concept of construction in 'general accordance' with drawings has been accepted in respect of other nationally significant infrastructure projects (see, for example, the National Grid (Hinkley Point C Connection Project) Order 2016), and the Applicant does not consider that there is a need for any change to the wording of this Requirement. 1.3 In answer to ii), the limits of deviation in article 6 of the draft DCO (**Document Reference 3.1 (3)**) would also apply to the valve compounds comprised in Works Nos. 2B to 2G (inclusive) and 2I to 2O (inclusive). This means that the final location of these valve compounds must be within the lateral and vertical limits of deviation which are described in article 6(1)(a) and 6(1)(d) of the draft DCO. The remaining works referred to in Requirement 4 are not subject to the limits of deviation in article 6 of the draft DCO, since the majority of these are temporary works. However, the indicative location and maximum dimensions of these works is as described in Schedule 1 (authorised development) of the draft DCO and shown on the Works Plans (**Additional Submissions AS-046, AS-047 and AS-048**). 1.4 In answer to iii), as noted, the Applicant does not consider that there is a need to change the wording of this Requirement. The current wording has been chosen carefully, to ensure that the Applicant has the necessary flexibility to determine the precise layout of these works.
DCO.1.32	i) Comment on whether the CoCP, which is defined in Article 1 of the draft DCO, cannot be changed in the manner allowed for by the Requirement once the Secretary of State has approved it because it is a certified document as	1.1 In answer to i), the Applicant does not consider that the fact of certification by the Secretary of State would preclude changes to the Code of Construction Practice (CoCP) (**Document Reference 6.4 Appendix 16.1 (2)**) in the manner allowed for by Requirement 5. The approach to the drafting of this Requirement has been used in other made Orders, where changes to the plans, schemes and strategies secured by the Requirements is envisaged notwithstanding their certification by the Secretary of State. 1.2 In answer to ii), the Applicant does not consider that it would. No changes to the CoCP certified by the Secretary of State can be unilaterally imposed by the Applicant, as they are subject to the consent of the relevant planning authority under Requirement 5. 1.3 The wording of the Requirement is important, since it allows for the possibility (if required) of changes in legislation, guidance or best practice to be reflected in the CoCP or a change to be

ExQ1	Question:	Applicant response to Question:
	defined in Schedule 11 of the draft DCO. ii) Explain whether the tailpiece allows for an unlimited and unchecked amendments to the CoCP.	made that is specific to a particular relevant planning authority. The Applicant considers that this is appropriate and beneficial as it ensures that the CoCP can be kept up to date.
DCO.1.33	Requirement 6 of the draft DCO [AS-059] states that the Construction Environmental Management Plan (CEMP) must be substantially in accordance with the Outline CEMP. However, the Outline CEMP [APP-129] contains scant and in some cases no details regarding the plans and measures set out in Requirement 6(2)(d). The ExA is concerned that in discharging the Requirement, relevant planning authorities would be determining information and evidence which is not before the	1.1 The Applicant does not agree that there would be scope for the CEMP to depart significantly from the Outline CEMP (**Application Document APP-129**). This would breach Requirement 6(2), which provides that '*the CEMP must be substantially in accordance with the outline CEMP'*. The CEMP must also reflect the mitigation measures set out in the Register of Environmental Actions and Commitments (Requirement 6(2)(a)), which would be before the Secretary of State in making its decision on the application, and contain the other specific information listed in subparagraphs (2)(b), (c) and (d) of Requirement 6. Together, these requirements impose appropriate checks upon the content of any CEMP which is submitted for the approval of the relevant planning authority. 1.2 The Applicant considers that the drafting of Requirement 6 strikes an appropriate balance between the need for certainty at this stage, as regards the broad forms of mitigation which the Applicant would be required to deliver as part of any CEMP (hence the Applicant has submitted an Outline CEMP as part of the application and secured this under Requirement 6), and the need for flexibility in determining the more detailed, stage specific measures which would be implemented. In many cases, however, the nature of the measures required to be implemented in any given location will only be fully understood at the detailed design stage. 1.3 The drafting of Requirement 6 therefore enables the Applicant to base any CEMP upon the facts prevailing on the ground when the replacement pipeline is constructed, which may be very different to those prevailing today, and to the specific location and alignment of the works. 1.4 This is also a very long, linear scheme. The implementation of a measure in one location may be inappropriate in another. There is no one size fits all solution which is capable of universal

ExQ1	Question:	Applicant response to Question:
	Secretary of State, and subsequently the CEMP will be a substantial departure from the Outline CEMP. To the Applicant: i) Respond and justify the current approach. To All Relevant Planning Authorities: ii) Comment on the above.	adoption across the length of the replacement pipeline route. Instead, there is a need for any CEMP to recognise the varying nature of the landscape through which the replacement pipeline would cross. As drafted, Requirement 6 meets this objective, enabling the Applicant to propose tailored solutions depending upon the constraints which are likely to be encountered in any given location. 1.5 It is also correct and appropriate in the Applicant's view that the relevant planning authority, which is uniquely placed to consider and understand local impacts and appropriate mitigation, should be the determining authority in relation to any CEMP submitted for approval under Requirement 6. 1.6 As far as the Applicant is aware, the approach to the drafting of Requirement 6 – specifically the approval of a CEMP for each stage of the authorised development and for that CEMP to be based upon an Outline CEMP – is precedented in previous DCOs (see for example Requirement 5 (construction environmental management plan) of The Thorpe Marsh Gas Pipeline Order 2016).
DCO.1.34	Requirement 6(2)(d)(vi) makes provision for a Community Engagement Plan to form part of the CEMP. The ExA places considerable importance on the need for such a plan to ensure effective engagement with the local community prior to and during construction. However, the ExA considers that a Community Engagement	1.1 The Applicant does not consider that this is strictly necessary. 1.2 The Community Engagement Plan forms part of the CEMP and must therefore be approved before the commencement of any stage of the authorised development under Requirement 6. The Applicant considers that this drafting provides sufficient legal certainty that the plan will be delivered and does not consider that this certainty would be enhanced by the formulation of a separate Requirement. It should also be noted that under Requirement 6(2)(c) the CEMP is also required to contain details of local community liaison responsibilities.

ExQ1	Question:	Applicant response to Question:
	Plan or Local Liaison Officer should form a separate Requirement in draft DCO. Respond.	
DCO.1.35	Requirement 8(3) of the draft DCO [AS-059] states that any hedgerow or tree planting which is removed, uprooted, destroyed, dies or becomes seriously damaged or defective within a three-year period must be replaced. Comment on the adequacy of the Requirement and on the time period allowed for reinstatement and management.	1.1 The Royal Horticultural Society (RHS) states that: *'In most cases, trees and shrubs will establish well, with no problems as long as root health, weather, soil conditions and the aftercare provided are favourable.* *If one or more of these factors are unfavourable, trees and shrubs may fail to establish, often within the first two years after planting.'* (RHS, 2019, *Trees and shrubs: establishment problems,* Available from: https://www.rhs.org.uk/advice/profile?pid=261.) 1.2 In the event of the uprooting or damage of planting due to vandalism, this is most likely to occur early during establishment, when plants have undeveloped root systems and are therefore more prone to being pulled out of the ground and less resilient to other forms of damage. 1.3 DCO Requirement 8(3) is therefore considered adequate, as it is likely that plants that are defective or failing would have generally failed or showed signs of failure within the three-year aftercare period.
DCO.1.36	i) Justify the time period of 28 days for determination of a Requirement, which the ExA is concerned is unreasonably short.	1.1 In response to i), the Applicant has modelled the process set out in Requirement 18 on the deemed consent provisions found elsewhere in the draft DCO (**Document Reference 3.1 (3)**). A 28-day period for approval and deemed consent (rather than deemed approval) is precedented in a number of Orders, see for example the National Grid (Hinkley Point C Connection Project) Order 2016 (article 12). It should also be noted that, where it receives an application for approval under the Requirements, a relevant authority can request further information from the Applicant

ExQ1	Question:	Applicant response to Question:
	ii) Justify the approach that consent is deemed to have been given should the relevant authority not determine an application within its required period, as opposed to consent not have been given.	under Part 2 of Schedule 2 of the draft DCO, the effect of which is to extend the date upon which deemed consent takes effect. 1.2 In response to ii), such a process is considered necessary to enable the Applicant to exercise its powers and undertake works in an efficient and expeditious manner without undue delays from third parties, and to give full effect to the power to carry out the proposed development, as provided for under section 120(5) of the 2008 Act.
DCO.1.37	To the Applicant: i) Justify the time period of two business days from receipt of the application that the relevant planning authority has for requesting further information, which the ExA is concerned is unreasonably short. To All Relevant Planning Authorities: ii) Comment on the above.	1.1 The Applicant recognises that concerns have been raised by interested parties regarding the timing requirements in paragraph 20(2) of Schedule 2 and can confirm that the reference to 2 business days in paragraph 20(2) has now been amended to 5 business days in the revised draft DCO submitted at deadline 2 (**Document Reference 3.1(3)**).

ExQ1	Question:	Applicant response to Question:
DCO.1.39	i) Provide an update as to the acceptability of the Protective Provisions contained in Schedule 9 of the draft DCO [AS-059]. To the Environment Agency: ii) Provide a copy of the model Protective Provisions that is proposed for Schedule 11.	1.1 The Applicant believes the protective provisions offered in Schedule 9 of the draft DCO (**Document Reference 3.1 (3)**) to be acceptable as they provide appropriate protection, are based on precedents and would be the default in the absence of agreement with any of the parties. 1.2 A number of the statutory undertakers who would be covered by Part 1 (for the protection of electricity, gas, water and sewerage undertakers) of Schedule 9 (protective provisions) in the absence of agreement have indicated a preference for alternative wording to be used to that included in the draft DCO. The response to Written Question CA.1.3 includes an update on the status of negotiations with these bodies. 1.3 The Applicant is not aware of any concerns regarding the provisions contained in Part 2 (for the protection of operators of electronic communications code networks) of Schedule 9 (protective provisions) and has not received any requests to negotiate alternative provisions. 1.4 The Applicant is in discussion with Network Rail regarding the protective provisions in Part 3 (protection for railway interests) of the draft DCO. The response to Written Question CA.1.3 includes an update on the status of those negotiations.
DCO.1.40	The ExA considers the following should be added to the list of certified documents in Schedule 11 of the draft DCO [AS-059]: □ Guide to the Application (of updated documents).	1.1 The Guide to the Application is not referenced in the DCO and therefore it is not clear why such a guide (which has no legislative relevance and is not required to legally interpret and implement the DCO) should be certified. 1.2 Please see response to Question BIO.1.1 and LV.1.1 for the reason why the Applicant does not consider it appropriate to provide an Outline Landscape and Ecology Management Plan at this stage of the project. 1.3 Please see response to Question TT.1.1 for the reason why the Applicant does not consider it appropriate to provide an Outline Construction Traffic Management Plan at this stage of the project.

ExQ1	Question:	Applicant response to Question:
	□ Outline Landscape and Ecology Management Plan (if to be provided). □ Outline Construction Traffic Management Plan (if to be provided). □ Outline Surface and Foul Sewage Drainage System (if to be provided). □ Outline Written Scheme of Investigation (if to be provided). Amend the draft DCO accordingly.	1.4 Please see response to Question FR.1.1 for the reason why the Applicant does not consider it appropriate to provide an Outline Surface and Foul Sewage Drainage System at this stage of the project. 1.5 Please see response to Question HE.1.1 for the reason why the Applicant does not consider it appropriate to provide an Outline Written Scheme of Investigation at this stage of the project. 1.6 Having regard to the above, the Applicant does not consider that any amendments to the draft DCO (**Document Reference 3.1 (3)**) are necessary.

2 References

Royal Horticultural Society (2019). Trees and shrubs: establishment problems. Available at: https://www.rhs.org.uk/advice/profile?pid=261

3 Appendices

Appendix DCO.1.2.1: BPP (Farringdon Road) Ltd v Crossrail Ltd UKUT 0356(LC)

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0356 (LC)
UTLC Case Number: LCA/21/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – COSTS – temporary possession under Crossrail Act 2008 – whether Tribunal has power to award costs in reference – s.4, Land Compensation Act 1961 – rule 10, Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

BPP (FARRINGDON ROAD) LIMITED

Claimant

and

CROSSRAIL LIMITED

Compensating Authority

Re: Caxton House, Farringdon Road, London EC1

Before: Martin Rodger QC, Deputy President and Peter McCrea FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
4 June 2015

Robin Purchas QC and *Rebecca Clutten*, instructed by Bircham Dyson Bell LLP, for the claimant
Michael Barnes QC and *Eian Caws*, instructed by Ashurst LLP, made submissions in writing for the compensating authority

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The following cases are referred to in this decision:

English Property Corporation v Royal Borough of Kingston-Upon-Thames (1998) 77 P. & C.R. 1
Purfleet Farms Ltd v Secretary of State of Transport [2003] 1 P. & C.R. 20
Emslie & Simpson Limited v Aberdeen District Council [1995] RVR 159
Padfield v Eastern Electricity Board (1971) 24 P. & C.R. 423
West Midlands Joint Electricity Authority v Pitt [1932] 2 KB 1
Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1
re Penny and South Eastern Rly Co 1857 7 E & B 660, 669
Dickinson v Network Rail [2014] UKUT 372 (LC)
Johnston v TAG Farnborough Airport Ltd [2014] JPL 367
Hills (Patents) Ltd v University College Hospital Board of Governors [1956] 1 QB 90
Pye (Oxford) Ltd v Graham [2003] 1 AC 419

Introduction

1. Does the Lands Chamber of the Upper Tribunal have power to award costs in a reference for compensation for the taking of temporary possession of land under the Crossrail Act 2008? If it does not, may the costs incurred in such a reference form part of the compensation payable to the owner of land which has been taken temporarily under the powers conferred by the Act?

2. Those issues arise for consideration following the Tribunal's decision on 27 April 2015 refusing to strike out this reference by the claimant, BPP (Farringdon Road) Limited, for compensation for the taking of temporary possession of the basement of Caxton House, a building in Farringdon Road, London EC1. The parties agree that, if the Tribunal has power to award costs, the costs of the application should be paid by Crossrail Ltd, the compensating authority, to the claimant. They do not agree whether the Tribunal has such a power, nor whether the Tribunal will be able to make an award of costs in favour of either party at the conclusion of the reference.

3. The claimant anticipates that the costs it will incur in the reference will exceed £1.1m, and we have no reason to doubt that those of Crossrail will be of a similar order. The issue is therefore of considerable importance to the parties, but it is also of importance to others to know the scope of the Tribunal's jurisdiction in relation to costs under rule 10 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, as amended with effect from 1st July 2013 by the Tribunal Procedure (Amendment No.3) Rules 2013.

4. Both parties have made full written submissions which, in the claimant's case, have been amplified by further oral representations.

The proceedings

5. The relevant background was sketched by the Tribunal in its decision of 27 April. By an agreement entered into between the claimant and the Secretary of State for Transport on 2 August 2007 the Secretary of State became entitled to take temporary possession of the basement of Caxton House for use as a working site in connection with the Crossrail project. The Secretary of State subsequently nominated Crossrail Ltd as the undertaker of that project.

6. It was initially agreed that compensation would be payable to the claimant in respect of the temporary possession of the site as if that temporary possession had been acquired compulsorily under Schedule 5 to the Crossrail Bill which was then passing through Parliament. The Bill provided for the nominated undertaker to pay compensation to the owners and occupiers of land of which possession was taken under paragraph 1(4) of Schedule 5 "for any loss that they may suffer by reason of the exercise

in relation to the land of the powers conferred by this paragraph." As enacted, the Crossrail Act 2008 is to the same effect. The right to compensation conferred by paragraph 1(4) is supplemented by paragraph 1(5) of Schedule 5 which states that:

> "Any dispute as to a person's entitlement to compensation under sub-paragraph (4), or as to the amount of compensation, shall be determined under and in accordance with Part 1 of the Land Compensation Act 1961".

7. Temporary possession of the basement of Caxton House was taken by Crossrail on 6 January 2010 for use as a working site. It is anticipated that possession will be returned to the claimant in 2018.

8. In this reference the claimant claims £29.75m in compensation for the exercise by Crossrail of its statutory power "to enter upon and take possession of" the basement of Caxton House. In a second reference, which is to be heard at the same time as this reference, the claimant also claims compensation for the permanent acquisition of part of the site of Caxton House. The parties agree that the Tribunal has power to award costs in that second reference because it is "proceedings for compensation for compulsory purchase" falling within rule 10(6)(a) of the Rules. Whether the Tribunal has power to award costs in this reference for temporary possession depends on the effect of the adoption of Part I of the Land Compensation Act 1961 as the basis for the determination of disputes over compensation under the Crossrail Act 2008, and on whether the reference can properly be regarded as either "proceedings for compensation for compulsory purchase", or as "proceedings for injurious affection of land" falling within rule 10(6)(b) of the Rules.

The Tribunal's power to award costs

9. The Tribunal has full power to award costs, subject to restrictions imposed by its procedure rules and, in cases to which it applies, to the effect of section 4 of the Land Compensation Act 1961. The source of the jurisdiction is section 29, Tribunals Courts and Enforcement Act 2007, which provides so far as is relevant that:

> "(1) The costs of and incidental to –
>
> (a) [First-tier Tribunal]
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules".

10. The relevant Tribunal Procedure Rules are the 2010 Rules (as amended), and in particular rule 10. Prior to its amendment with effect from 1 July 2013 rule 10(1) confirmed the breadth of the power to award costs, saying simply that "the Tribunal may

make an order for costs on an application or on its own initiative". This power was curtailed only in the case of appeals from leasehold valuation tribunals by rule 10(7).

11. In its amended form rule 10 adopts a very different approach. An order for costs may now only be made in certain defined circumstances. The relevant parts of rule 10 for present purposes provide as follows:

> "(1) The Tribunal may make an order for costs on an application or on its own initiative.
>
> (2) Any order under paragraph (1)—
>
> (a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);
>
> (b) must, in a case to which section 4 of the 1961 Act applies, be in accordance with the provisions of that section.
>
> (3) The Tribunal may in any proceedings make an order for costs—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and for costs incurred in applying for an order for such costs;
>
> (b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; or
>
> (c) [reimbursement of tribunal fees].
>
> (4) Except in proceedings to which paragraph (5) or (6) apply, the Tribunal may—
>
> (a) with the consent of the parties, or
>
> (b) where there is a disparity of interest or resources between the parties, direct that an order for costs may be made in the proceedings against one or more of the parties in respect of costs incurred following such a direction.
>
> (5) The Tribunal may make an order for costs in judicial review proceedings.
>
> (6) The Tribunal may make an order for costs in proceedings—
>
> (a) for compensation for compulsory purchase;
>
> (b) for injurious affection of land;
>
> (c) under section 84 of the Law of Property Act 1925 (discharge or modification of restrictive covenants affecting land);
>
> (d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales.

(7) Subject to paragraph (3), in proceedings to which paragraph (6) applies, the Tribunal may direct that no order for costs may be made against one or more specified parties in respect of costs subsequently incurred."

12. It is also appropriate to refer to the overriding objective of the Rules, which as rules 2(1)-(2) explain, is to enable the Tribunal to deal with cases fairly and justly, which includes dealing with cases in ways which are proportionate to their importance, the complexity of the issues, the anticipated costs and the resources of the parties. Rule 2(3) requires that the Tribunal must seek to give effect to the overriding objective when it interprets any rule or practice direction.

13. The 1961 Act referred to in rule 10(2)(b) of the Rules is, of course, the Land Compensation Act 1961, Part 1 of which is applied to disputed claims for compensation under the Crossrail Act 2008 by paragraph 1(5) of Schedule 5 to that Act. Part 1 of the 1961 Act is titled "determination of questions of disputed compensation" and deals with matters of procedure, including costs. Of the original four sections only sections 1 and 4 now survive subsequent repeals.

14. Section 1 of the 1961 Act provides as follows:

"1 **Tribunal for assessing compensation in respect of land compulsorily acquired.**

Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily, any question of disputed compensation and, where any part of the land to be acquired is subject to a lease which comprises land not acquired, any question as to the apportionment of the rent payable under the lease, shall be referred to the Lands Tribunal and shall be determined by the Tribunal in accordance with the following provisions of this Act."

"Land" is defined in section 39(1) of the 1961 Act as including "any interest or right in or over land."

15. Section 4 of the 1961 Act has been amended to take account of the Tribunal's general power to award costs under the 2007 Act. As amended, and so far as is relevant, it provides:

"4. **Costs**

(A1) In any proceedings on a question referred to the Upper Tribunal under section 1 of this Act

(a) the following subsections apply in addition to section 29 of the Tribunals, Courts and Enforcement Act 2007 (costs or expenses) and provisions in Tribunal Procedure Rules relating to costs; and

(b) to the extent that the following subsections conflict with that section or those provisions, that section or those provisions do not apply.

(1) Where either—

(a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Upper Tribunal to that claimant does not exceed the sum offered; or

(b) the Upper Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section;

the Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Upper Tribunal the notice should have been delivered.

(2) The notice mentioned in subsection (1) of this section must state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated.

(3) Where a claimant has delivered a notice as required by paragraph (b) of subsection (1) of this section and has made an unconditional offer in writing to accept any sum as compensation, then, if the sum awarded to him by the Upper Tribunal is equal to or exceeds that sum, the Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the acquiring authority to bear their own costs and pay the costs of the claimant so far as they were incurred after his offer was made."

16. Subsections (1) to (3) therefore require the Tribunal to make an award of costs in the terms provided in each of three circumstances unless there are special reasons not to do so. Where the acquiring authority has made an unconditional offer of settlement which the Tribunal's award does not exceed, or where the claimant has failed to give adequate details of the amount claimed to enable the acquiring authority to make an offer, in the absence of special reasons the claimant will be ordered to bear its own costs and to pay the costs of the acquiring authority incurred after the offer was made or after notice of the claim should have been delivered. Where the claimant has given notice of the claim and has made an offer of its own specifying the sum which it is prepared to accept in compensation, which offer has not been accepted by the acquiring authority, but which is equalled or exceeded by the award subsequently made by the Tribunal, the acquiring authority will be ordered to bear their own costs and to pay the claimant's costs.

17. A number of matters should be noted concerning section 4 of the 1961 Act.

18. The first is that section 4 provides a free-standing jurisdiction to award costs in the cases to which it apples. Subsection 4(A1)(a) states expressly that the remainder of the section applies in addition to section 29 of the 2007 Act and the Rules.

19. Secondly, to the extent that there is any conflict between the provisions of section 4 and those of section 29 or the Rules, the latter provisions are disapplied by section 4(A1)(b). The potential for conflict may exist because rule 10(2)(a) restricts the circumstances in which the Tribunal may make an order for costs to those referred to in paragraphs (3) to (6) of rule 10. If section 4 of the 1961 Act applied to proceedings which were not of a type described in rule 10(6), and was engaged in such a way that it was appropriate for the Tribunal to make an order for costs, the Tribunal would not be prevented from doing so by rule 10(2)(a) which in those circumstances would be disapplied by section 4(A1)(b) of the 1961 Act. Rule 10(2)(b) also requires that in a case to which section 4 applies any order for costs under rule 10(1) must be in accordance with the section. In order to determine whether (in the absence of circumstances falling within rule 10(3) or (4)) the Tribunal has jurisdiction to make an order for the payment of costs it is therefore necessary first to consider whether the proceedings in question fall within rule 10(6), and if they do not, then to consider whether the Tribunal is nonetheless required by section 4 of the 1961 Act to make an order for costs.

20. Thirdly, although section 4 contemplates that, in cases to which it applies, a claimant may make an offer identifying the compensation which will be accepted, in practice such offers are very rare. Prior to the coming into force of the new rule 10 there was no particular incentive for such an offer to be made. When the Tribunal's jurisdiction to award costs rested on section 29 of the 2007 Act, or before that on section 3(5) of the Lands Tribunal Act 1949, unconstrained in either case by the rules in their current form, the practice was to allow the claimant its costs whether or not it had made an offer unless the acquiring authority could rely on section 4(1) of the 1961 Act. Provided the reference was conducted reasonably (and advanced only claims for which there was a statutory basis) a claimant who made no offer but who recovered more in compensation than the acquiring authority was prepared to offer, could still expect to recover the costs incurred in securing that compensation. In *English Property Corporation v Royal Borough of Kingston-Upon-Thames* (1998) 77 P. & C.R. 1 the Court of Appeal upheld a decision of the Lands Tribunal which took as its starting point the proposition that the costs of determining disputed compensation should fall on the acquiring authority to whose use of compulsory powers the need to determine that compensation was attributable. In *Purfleet Farms Ltd v Secretary of State of Transport* [2003] 1 P. & C.R. 20 the Court of Appeal again endorsed that practice, which it found to be consistent with the approach taken in Scotland. Chadwick LJ explained at paragraph 42:

> "But, where there has been no offer or where the amount of the award exceeds the amount of the offer, then (again, *prima facie*) "the expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands

> compulsorily by the acquiring authority", as the Lord President observed in *Emslie & Simpson Limited v Aberdeen District Council* [1995] RVR 159, at page 164. In such a case the refusal to allow the claimant some part of his costs of the reference must be justified by a finding that the costs to be disallowed have not been incurred as part of the reasonable and necessary expense of pursuing the reference."

Continuing in paragraph 43:

> "It follows that the fact that the claimant has not been awarded as much as he was seeking by way of compensation – or that the award is nearer (even much nearer) to the amount that the acquiring authority had offered than to the amount sought – cannot, of itself, be a reason for depriving the claimant of his costs of the reference."

21. Finally, although section 1 of the 1961 Act (and thus Part 1 as a whole) is couched in terms of the compulsory acquisition of interests in land, Part 1 is very commonly adopted as supplying sufficient machinery for the resolution of disputes over compensation for the temporary possession and use of land. Paragraphs 1(4) and 1(5) of Schedule 5 to the Crossrail Act 2008 are in the model form derived from the Transport and Works (Model Clauses for Railways and Tramways) Order 2006, and in substantially the same form they appear in similar primary and secondary legislation authorising temporary possession (for example the Channel Tunnel Rail Link Act 1996).

22. It is convenient to deal at this stage with the application of section 4 of the 1961 Act to this reference, a matter on which the parties disagreed.

Does section 4 apply to this reference?

23. In their written submissions on behalf of Crossrail, Mr Barnes QC and Mr Caws contended that section 4 of the 1961 Act had no application to this reference. They gave two reasons. First, because in the present case no interest in land is to be acquired by Crossrail, but rather it has taken temporary possession of Caxton House, to which section 4 does not apply at all. Secondly, they submit that it would be strange if there were a power to award costs in a claim for temporary possession under the Crossrail Act, as they put it, "because of some side wind arising from the particular provisions of that Act, which does not apply or may not apply in other cases where temporary possession is taken". The purpose of paragraph 1(5) of Schedule 5 to the Crossrail Act is to confer on the Tribunal jurisdiction to determine claims for compensation for the taking of temporary possession. Its purpose is not to apply any other provision of the 1961 Act, and in particular it is not to apply section 4.

24. At first sight the expression "acquiring authority" used in section 4 is not particularly apt to refer to a statutory undertaker exercising rights of temporary possession. The definition of the expression in section 39(1) of the 1961 Act is also drafted with compulsory acquisition in mind (the acquiring authority "in relation to an

interest in land, means the person or body of persons by whom the interest is, or is proposed to be, acquired").

25. Nevertheless, the definitions in section 39(1) are stated to apply "except where the context otherwise requires" and when sections 1 and 4 of the 1961 Act supply machinery for the resolution of disputes over compensation for the exercise of rights of temporary possession, the context clearly requires that "acquiring authority" be understood to mean the nominated undertaker who is obliged to pay that compensation. In this case the "land" in question comprises rights over land, namely the right to use and temporarily possess the basement of Caxton House as a working site, which is conferred by paragraph 1(1) of Schedule 5 to the Crossrail Act. Crossrail is the acquiring authority in relation to that land. The same broad approach to the statutory language was taken by the Lands Tribunal in *Padfield v Eastern Electricity Board* (1971) 24 P. & C.R. 423 (a case concerning compensation payable for the retention of electricity lines over the land of the claimant) and by the Court of Appeal in *West Midlands Joint Electricity Authority v Pitt* [1932] 2 KB 1 (a wayleave case under the Acquisition of Land (Assessment of Compensation) Act 1919).

26. Moreover, paragraph 1(5) of Schedule 5 to the 2008 Act expressly provides for determination of such disputes "under and in accordance with Part 1" of the 1961 Act. It is obvious that the whole of Part 1 of the 1961 Act is intended to be applicable and that, in particular, the section 4 costs regime is to apply to the resolution of disputes arising out of the exercise of the power of temporary possession. Given its derivation from the Transport and Works Order we do not consider the manner of incorporation of section 4 either to be improbable or aptly to be described as being achieved by "a side wind" arising from the Crossrail Act alone, as Mr Barnes and Mr Caws suggested.

27. We are therefore satisfied that the costs regime provided by section 4 of the 1961 Act is available to the parties to this reference. It functions independently of the Tribunal's Rules and the restrictions imposed by rule 10(2)(a) do not apply to it. It does not, however, give the Tribunal an unrestricted jurisdiction in relation to costs. In particular, if it provides the only basis on which costs may be awarded in this reference, section 4 does not permit the Tribunal to adopt the practice approved by the Court of Appeal in *Purfleet Farms Ltd v Secretary of State of Transport* of awarding a successful claimant its costs unless the acquiring authority achieves a more favourable outcome than it had previously offered. Section 4 was not inconsistent with the Tribunal's former practice, but it was not the basis of that practice; the power to award costs which underpinned the practice was found in section 29 of the 2007 Act, and before that in section 3(5) of the Lands Tribunal Act 1949.

28. Section 29 of the 2007 Act has effect subject to the Tribunal's Rules. If, in its amended form, rule 10 no longer permits costs to be awarded in a claim for compensation for the temporary possession of land, the Tribunal's only relevant costs power in this case will derive from section 4 of the 1961 Act. In those circumstances when considering whether an award of costs could be made in favour of a claimant it would be necessary to apply section 4 in accordance with its terms and, specifically,

in accordance with section 4(3). To be entitled to an award of costs a claimant would first have had to have made an unconditional offer in writing to accept a sum as compensation which the Tribunal's award of compensation subsequently exceeded. We therefore turn now to the question whether this reference falls within any of the categories of proceedings in rule 10(6) so as to confer a much wider jurisdiction in relation to costs.

Does rule 10(6)(b) apply to this reference?

29. Mr Robin Purchas QC, who appeared on behalf of the claimant with Ms Rebecca Clutten, submitted that the costs of proceedings for the recovery of compensation for loss suffered by reason of the exercise by Crossrail of its powers to enter upon and take possession of and use the basement of Caxton House as a working site for the purpose of constructing the Crossrail works, were costs incurred either "in proceedings…for injurious affection of land" falling within rule 10(6)(b) or "in proceedings … for compensation for compulsory purchase" within rule 10(6)(a). Mr Purchas placed greater emphasis in his submissions on the first of these alternatives, injurious affection.

30. The term "proceedings…for injurious affection of land" is not used elsewhere and "injurious affection" is not defined for the purpose of the compensation legislation as a whole.

31. Section 7 of the Compulsory Purchase Act 1965 (which is derived from section 63 of the Lands Clauses Consolidation Act 1845) provides for the payment of compensation to the owners of land compulsorily acquired for damage sustained by them by reason of the severance of the lands taken from other land belonging to them, "or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act". Damage caused to land by its severance from other land can therefore be seen to be included within the concept of injurious affection. Where no land of a claimant has been compulsorily acquired section 10 of the 1965 Act (like section 68 of the 1845 Act) confers a right to compensation for injurious affection suffered by the claimant's land not held with land compulsorily acquired.

32. The meaning of "injurious affection", as used in section 10 of the 1965 Act, was considered by the House of Lords in *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1 to which we were referred by both parties. Lord Hoffmann, giving the leading speech, said at paragraph 2:

> 'The term "injuriously affected" connotes "*injuria*", that is to say, damage which would have been wrongful but for the protection afforded by the statutory powers. In *re Penny and South Eastern Rly Co* 1857 7 E & B 660, 669 Lord Campbell said: "unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed." In practice this means that a

> claimant has to show that but for the statute he would have had an action in damages for public or private nuisance."

Lord Hoffmann continued, at paragraph 4:

> "Compensation is payable only for damage to the plaintiff's land or interest in land. He is not entitled to any compensation for loss caused to him in a personal capacity."

33. For Crossrail Mr Barnes QC submitted that the root meaning of the expression "injurious affection" is injury to land, and it was used in that sense in sections 63 and 68 of the Lands Clauses Consolidation Act 1845 and their modern equivalents, section 7 and 10 of the Compulsory Purchase Act 1965. This meaning is specific and technical. It is obvious that a technical expression used in delegated legislation (such as procedural rules) should be given the same meaning as the same expression used in the primary legislation which confers power on the Tribunal to determine issues in accordance with those rules. Those responsible for drafting the rules cannot have intended to use a familiar expression in some novel sense. It follows, Mr Barnes submitted, that where the expression "injurious affection" is used in the Tribunal's Rules to identify a category of proceedings it must be taken to relate to the entitlement to compensation for what the relevant statutes describe in terms as injurious affection.

34. Mr Barnes also identified the essential nature and characteristics of all claims for compensation for injurious affection. The "*injuria*" or damage was, in every case caused by activity taking place outside the land which was damaged and not by the effect of things done on the land itself or by the taking of possession of that land. Thus in section 7 of the 1965 Act the distinction is drawn between compensation for the value of the land acquired, the first limb, and severance or some other form of injurious affection to the retained land of the landowner whose other land has been acquired. Under section 10 of the 1965 Act compensation is payable for injurious affection where no land is taken, and the same distinction is maintained between compensation in respect of any land, or any interest in land which has been taken and in respect of any land, or any interest in land, which has been injuriously affected by the execution of the works.

35. Mr Barnes therefore advanced an alternative submission. If, contrary to his primary submission, rule 10(6)(b) is not restricted to compensation claims identified in terms as claims for "injurious affection" in the relevant statute, it must nevertheless be confined to claims having the essential nature of injurious affection, i.e. claims for damage to land where no interest in the land in question is acquired and possession of that land is not taken. Mr Barnes gave as an example a claim under Part 1 of the Land Compensation Act 1973 for compensation for the depreciation of the value of an interest in land caused by public works outside that land. In such a case no interest in the land affected is acquired and possession is not taken of that land, and the claim for compensation might be said to share the essential attributes of cases where injurious affection is expressly mentioned as the basis of compensation.

36. It was simply impossible, Mr Barnes suggested, to read the expression "injurious affection" in rule 10(6)(b) as meaning damage to land which arises in any circumstances and without any limitations. Had it been intended to include all forms of damage to land a specific technical expression with historic provenance and a well understood meaning would not have been employed. Used in such an imprecise sense there would be no logical boundaries to the meaning of injurious affection other than that land is harmed in some way. Claims which would never be referred to as being for injurious affection, such as a claim under the Coal Mining Subsidence Act 1991 initiated by a damage notice after there had been mining subsidence would come within rule 10(6)(b) since obviously the removal of support by mining has an adverse effect on land. Mr Barnes even suggested that a claim for the discharge or modification of a restrictive covenant under s.84 of the Law of Property Act 1925 would be capable of falling within the scope of injurious affection if harm to land was the only necessary requirement. If that were correct the power to award costs in such cases would be conferred by rule 10(6)(b) so that rule 10(6)(c) would be redundant.

37. Mr Purchas invited us to adopt a much broader approach to the scope of rule 10(6)(b). He submitted that it was consistent with Lord Hoffmann's formulation in *Wildtree Hotels* that injurious affection of land should be understood to connote damage to land or to an interest in land as a result of what would otherwise be wrongful interference with that land or interest. When asked to comment on the significance of Lord Hoffmann's reference to public or private nuisance Mr Purchas acknowledged that there was a distinction between wrongful interference with the enjoyment of land by activities conducted on other land, which would be classified as the tort of nuisance, and wrongful interference by activities on the affected land itself, which would be trespass. There were nonetheless examples of nuisance causing a physical encroachment on neighbouring land (as where the eaves of a house are constructed over a boundary, causing rainwater to be cast on to the neighbouring land) where nuisance closely resembled trespass, and Lord Hoffmann cannot be taken to have intended to exclude such cases.

38. Mr Purchas submitted that section 10(1) of the 1965 Act covers rights affecting land with which there is interference which would otherwise be unlawful but which does not involve the acquisition of land or an interest in land. In the case of entry onto land and its use for authorised works without the acquisition of a permanent right in the land, he suggested there would *prima facie* be a claim under section 10 for injurious affection which would appear to fall within rule 10(6)(b).

39. Mr Purchas referred to the wide range of statutes which provide for compensation for injurious affection of land through the exercise of statutory powers and where disputed compensation is to be determined by the Tribunal (including for the revocation of planning permission under section 117, Town and Country Planning Act 1990, for injury caused by the exercise of operators rights under paragraph 16 of Schedule 2 to the Telecommunications Act 1984, for mining subsidence under the Coal Mining Subsidence Act 1991, or for stopping up of a means of access under section 126 of the Highways Act 1980). The basis of compensation in these different contexts is variously described including as deprecation in value, loss and damage and disturbance. Where rule 10(6)(b) refers to injurious affection of land it ought, Mr

Purchas suggested, to be read as including all such claims. There was no principled basis on which the expression 'proceedings for injurious affection of land' could be limited to statutory provisions which expressly refer to 'injurious affection', such as section 10 of the 1965 Act. Moreover, there would be great practical difficulty in adopting a precise technical interpretation of the expression as applying only where it was used in terms in the relevant statute, since claims for injurious affection were often combined with claims for other heads of loss.

40. Reference was also made to Part 1 of the Land Compensation Act 1973 (LCA 1973), which provides for the payment of compensation for depreciation in the value of land caused by public works, which has recently been considered by the Tribunal in *Dickinson v Network Rail* [2014] UKUT 372 (LC), and subsequently in *Johnston v TAG Farnborough Airport Ltd* [2014] JPL 367. In both of these cases, however, it had been agreed that rule 10(6)(b) was engaged and the Tribunal had not been asked to make a decision on the point now in issue. Nonetheless, Mr Purchas submitted, the Tribunal must have been satisfied that the absence of a reference, in terms, to injurious affection, was not an obstacle to the exercise of its costs jurisdiction in those cases and that Part 1 claims were properly within the scope of rule 10(6)(b).

41. Prominent in Mr Purchas's argument were the reports of the bodies whose deliberations gave rise to the amendment to the Rules. These had been referred to by the Tribunal (The President, Sir Keith Lindblom) in *Dickinson v Network Rail* and properly form part of the material to which reference could be made as an aid to the interpretation of the Rules. Mr Barnes acknowledged that the legislative background and explanatory material relating to delegated legislation may be used as an aid to its meaning but submitted that this was only possible where there was a genuine ambiguity in the meaning of the expression in the delegated legislation and where it is clear from the materials relied on that one possible meaning is to be preferred to another. We agree that reference to such material is unlikely to be necessary or useful if either of those requirements is not satisfied.

42. In December 2011 the Costs Review Group published a report to the Senior President of Tribunals on "Costs in Tribunals". The CRG Report deals principally with the question of the extent to which the principle of costs-shifting should operate in tribunals (i.e. the power to order one party to pay another party's costs of preparing and presenting a case). In considering the costs regimes of different tribunals the CRG Report proceeded on the basis that "the underlying principle of the tribunals – at least where the issue in question relates to relations between the citizen and the State - is that there should be no costs-shifting absent unreasonable conduct and that departure from that principle should only occur if a clear case for it is made out" (see paragraph 31).

43. At paragraph 85 of the CRG Report the Group categorised the large number of first instance jurisdictions of the Lands Chamber under six headings, of which the first two were:

> " a. Compensation for the compulsory purchase of land.

> b. Compensation where land is adversely affected by the exercise of statutory powers (e.g. through noise arising from a new road or a new runway at an airport, mining subsidence, the laying of pipelines, the revocation of planning permission)."

The remaining four jurisdictions were: blight notice and purchase notice cases, land valuation issues in tax appeals, the discharge or modification of restrictive covenants (category e), and finally, references by consent. Having discussed the operation of section 4 of the Land Compensation Act 1961 and the Tribunal's simplified procedure in which no costs are awarded, the CRG Report went on at paragraph 90 to recommend "a standard no-cost regime in all jurisdictions other than categories a and e, qualified by provisions allowing for an award of costs in the case of unreasonable conduct and subject to a power for the tribunal to order that costs-shifting should apply in an individual case – either two-way (e.g. because of complexity or the amount in issue) or one-way (e.g. because of imbalance between the parties in terms of resources or the significance of the outcome, for instance where … the claim is essentially a test case". This recommendation, if implemented, would have removed the Tribunal's general power to award costs in cases of injurious affection, which would appear to fall into the CRG Report's category (b), but would have left open the possibility of its exercise on a case by case basis.

44. The recommendations of the CRG Report were considered by the Tribunal Procedure Committee, the body that makes rules governing the procedure of tribunals, which published a consultation report of its own in 2012. In paragraph 48 of its report the TPC said that it intended to reduce the existing scope of the Tribunal's power to make two-way costs shifting awards. It considered that its proposals were consistent with the recommendations in the CRG Report. Nevertheless in paragraph 96 of its report the TPC referred specifically to proceedings for compensation for injurious affection, stating its own view that:

> "… there is no reason to exclude such proceedings from two-way costs shifting. They presently form part of the UTLC's first instance jurisdiction, and the TPC is not aware of any reason to change the present costs regime as applied to such cases."

45. The TPC consultation report included two versions of draft rules intended, as it had said in paragraph 48, to be consistent with the recommendations in the CRG Report. The final conclusions of the TPC were contained in its *Replies from the Tribunals Procedure Committee* (June 2013). At paragraph 6.39 it referred again to proceedings for compensation for injurious affection of land, and stated:

> "It appeared to [the Committee that there was no reason to exclude such proceedings from two-way costs shifting. They presently form part of the [Lands Chamber's] first instance jurisdiction and [the Committee] was not aware of any reason to change the present costs regime as applied to such cases."

46. Although we have considered this material carefully we have not found it of great assistance in determining the quite specific question of whether a claim for compensation for the taking of temporary possession of land should be regarded as "proceedings (a) for compensation for compulsory purchase [or] (b) for injurious affection of land." In particular we do not think it can be assumed, as Mr Purchas submitted, that the categorisation of certain types of proceedings in rule 10(6) was taken directly from the categories identified by the CRG in paragraph 85 of its Report. The term "injurious affection" may have been intended by the TPC to cover the same ground as the much more general language of the CRG's category (b) ("compensation where land is adversely affected by the exercise of statutory powers"), but we cannot say with any assurance that it was not intended to be narrower. It is particularly difficult to treat "injurious affection" as used in rule 10(6) simply as shorthand for the CRG's category (b) when it is remembered that the CRG's proposal was for category (b) not to be included within the scope of the Tribunal's general costs power. The TPC departed from that proposal in the case of injurious affection and we therefore believe it would be unsafe to draw conclusions about the scope of that derogation by reference to the different language in which the original proposal was framed.

47. On the other hand we do draw some general assistance from the material relied on by Mr Purchas. The underlying principle of the CRG Report was that in citizen -v- state tribunals there should generally be no costs-shifting unless there was a clear case for an exception. The TPC was satisfied that there was such a case both in claims for compensation for compulsory purchase and injurious affection (based presumably on the value and specialist nature of such claims, and the need for proper compensation to include costs) and there was felt to be no reason to change the existing approach. There was no further discussion of the intended boundaries of the exception. The absence of such discussion or of any justification for a wholesale change in the former practice is surprising if (subject to the narrow exceptions in rule 10(3) and (4)) the intention was to remove the Tribunal's power to award costs in proceedings involving substantial claims for compensation for the exercise of statutory powers other than in the fields of compulsory purchase and injurious affection strictly so called.

48. Having summarised the rival submissions at considerable length we can state our conclusions more briefly.

49. We do not accept Mr Purchas's argument that injurious affection should be given a meaning wide enough to connote any damage to land or to an interest in land as a result of what would otherwise be wrongful interference with that land or interest. Had that been the intention we can see no reason why the rule should employ the well understood expression "injurious affection" rather than some much broader term free of the misleading weight of statutory provenance.

50. On the other hand, while we agree with Mr Barnes that "injurious affection" should be used in a manner consistent with its usage in the compensation statutes, we do not consider that rule 10(6)(b) can be taken to refer exclusively to proceedings in which the statutory right to compensation refers expressly to "injurious affection" or its cognate terms.

51. To confine rule 10(6)(b) effectively to claims under section 10 of the 1965 Act (claims under section 7 would be covered by rule 10(6)(a)) would be to leave outside its scope claims under Part I of the Land Compensation Act 1973. Part I of the 1973 Act confers a right to compensation for depreciation of the value of interests in land caused by the use of highways, aerodromes and other public works. The expression "injurious affection" is not used at all in Part I but the depreciation in value for which compensation is payable is nevertheless depreciation consequent on the injurious effect of the works in question. The same public works as are within the scope of Part I (defined in section 1(3)) are also within the scope of Part II (section 20(12)) which confers powers on local authorities to take certain steps, such as insulation against noise, under the general heading "mitigation of injurious effect of public works". We can see no reason for drawing a distinction, for the purpose of conferring a power to award costs, between injurious affection arising in very similar circumstances simply because that expression is used in one statute but not in another.

52. It would have been possible for the drafters of the Rules to include a comprehensive list of all the Tribunal's statutory jurisdictions intended to come within rule 10(6). Had the intention been to confine rule 10(6)(b) to proceedings for injurious affection under sections 7 and 10 of the 1965 Act and their equivalents in the 1845 Act that could readily have been done (as it was in section 44 of the Land Compensation Act 1973). Had it been intended to include all forms of compensation for injurious affection, whether described as such or not, the rule would have become unwieldy and would require regular review as new statutory powers for specific public works are created. We consider the former intention would have been unprincipled and arbitrary, whereas the latter is coherent and boundaried.

53. We therefore consider that "injurious affection" in rule 10(6)(b) should be given a wider meaning which does not depend on the use of that expression in the statute giving rise to the claim for compensation. Without exhaustively defining the scope of sub-paragraph (b), we are substantially in agreement with Mr Barnes' alternative submission, and we consider that injurious affection generally connotes damage to land which would have been wrongful but for the existence of statutory powers. Moreover, it generally connotes damage to land caused by activity conducted elsewhere. We do not consider that it is apt to describe activity which, but for statutory authority, would amount to trespass. As Lord Hoffmann explained in *Wildtree Hotels:*

> "In practice … a claimant has to show that but for the statute he would have had an action in damages for public or private nuisance."

While that cannot be taken to be an exhaustive statement for the purpose of construing the Tribunal's Rules it does identify the essence of injurious affection and we would expect that claims for compensation which share those characteristics would fall within the scope of rule 10(6)(b).

54. It follows that we do not consider that a claim for compensation for loss suffered as a result of the exercise of a power to enter upon and take possession of land is properly described as a claim in proceedings for injurious affection of land. The loss

which has been sustained is not consequent on damage to land, but is the result of the claimant being kept out of its land for the duration of Crossrail's works. Rule 10(6)(b) gives the Tribunal no power to award costs in such proceedings.

55. The Claimant's alternative case is that costs may be awarded in this reference because it involves "proceedings for compensation for compulsory purchase" within the scope of rule 10(6)(a). We now turn to that argument.

Does rule 10(6)(a) apply to this reference?

56. The claimant's submissions on this aspect of the dispute focused on paragraph 1(5) of Schedule 5 to the Crossrail Act 2008 which provides that any dispute over entitlement to compensation payable under paragraph 1(4) where possession of land is taken under for use a working site "shall be determined under and in accordance with Part I of the Land Compensation Act 1961".

57. Section 1 of Part I of the 1961 Act has already been set out in paragraph 14 above. It is concerned with the resolution of claims for disputed compensation "where by or under any statute … land is authorised to be acquired compulsorily." As also previously noted, "land" for this purpose is defined as including "any interest or right in or over land".

58. Mr Purchas submitted that a reference to determine the compensation for loss suffered by the taking of temporary possession under the power conferred by paragraph 1 of Schedule 5 to the 2008 Act is therefore treated as a reference for compensation for land acquired compulsorily. He recognised that no interest had been acquired by Crossrail in the basement of Caxton House, but in substance the power exercised by Crossrail was a power of compulsory acquisition of a right to possess and use the land for the authorised works. The proceedings in which compensation for the exercise of that power was claimed were properly regarded as proceedings for compensation for compulsory purchase.

59. The contrast between sub-paragraph (a) and (b) in rule 10(6) was also relied on. The latter referred specifically to injurious affection "of land", whereas the former made no reference to land. This was consistent, Mr Purchas suggested, with there being a wider meaning to the phrase "compulsory purchase" which included the exercise by compulsion of a power to possess land for a temporary period in return for a payment of compensation.

60. Mr Purchas therefore invited us to apply a broad interpretation to the expression 'proceedings for compensation for compulsory purchase' so as to include proceedings which concern the exercise of a statutory power compulsorily to acquire the right of the possession and use of land.

61. Mr Barnes was dismissive of these arguments describing them as "desperate" and "without substantial justification". In his submission compulsory purchase is the permanent acquisition by compulsory process of a proprietary corporeal interest in land or of an existing or newly created proprietary incorporeal right over land. No such interest or right has been acquired which is relevant to this reference. The Crossrail Act 2008 draws the clear distinction between a compulsory purchase under section 6 and a right to take temporary possession under section 5 and Schedule 5. The land to which the respective rights related was precisely specified. The right to acquire land was vested in the Secretary of State by section 6, whereas the right to take temporary possession was for the nominated undertaker. In short, the use of the power to take temporary possession under Schedule 5 is not a compulsory purchase but is the use of different powers.

62. Mr Barnes emphasised that the right exercised by Crossrail was a right to take possession only for a limited period. The exercise of the right was neither permanent nor did it involve the taking or acquisition of any interest in land. It could not be described as compulsory purchase.

63. Although Mr Purchas placed rule 10(6)(a) in the second rank of his argument, and despite Mr Barnes' submissions to the contrary, we are satisfied that this reference can properly be regarded as involving proceedings for compensation for compulsory purchase. As a matter of ordinary language Crossrail has exercised a power compulsorily to acquire a right over the claimant's land for which it is liable to pay compensation; it has purchased that right for the duration of its requirement for the land as a working site (which will exceed 8 years).

64. That the temporary possession in this case is for so prolonged a period is not in itself relevant, and much shorter periods ought to be treated in the same way for the purpose of the Tribunal's power to award costs. Of more significance than the duration of the right in any individual case is the nature of the right. Paragraph 1(1) of Schedule 5 to the 2008 Act authorises Crossrail to enter upon and take possession of the land. Possession is the physical, single and exclusive control of land. It is more than occupation, as Denning LJ pointed out in *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90:

> "Possession in law is, of course, single and exclusive, but occupation may be shared with others or had on behalf of others."

In *Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 Lord Hope of Craighead explained:

> "The general rule, which English law has derived from the Roman law, is that only one person can be in possession at any one time. Exclusivity is of the essence of possession."

Thus, although we agree with Mr Barnes that the right to take possession of land does not create a freehold or leasehold title to the land or vest any such interest in Crossrail, it nonetheless confers control of the land and we do not consider that the duration of

that right justifies the conceptual distinction between temporary possession and permanent acquisition which Mr Barnes relies on.

65. Nor do we consider that clues to the proper interpretation of rule 10(6) are to be found in the manner in which the draftsman of the 2008 Act has distinguished between temporary possession and permanent acquisition. Rule 10(6) is clearly intended as a classification of different types of proceedings in the Tribunal, which has numerous statutory jurisdictions many of which share common features. No attempt has been made comprehensively to list those jurisdictions in the rule, which suggests to us that the classification was intended to be broad rather than narrow. No reason of policy can be detected for distinguishing, for the purpose of the jurisdiction to award costs, between the taking of possession for a temporary period rather than permanently. In the same way no principled justification can be seen for distinguishing between different types of what can broadly be described as injurious affection. No such justification was attempted by the CRG or the TPC in their reports, the effect of which was that in the fields of compulsory purchase and injurious affection the former costs regime should be retained. We agree with Mr Purchas that an interpretation of rule 10(6) which required a fragmented and arbitrary division between and within proceedings generally concerned with the same subject matter is impossible to justify.

66. We therefore consider that the reference in rule 10(6)(a) to proceedings for compensation for compulsory purchase is wide enough to include proceedings for compensation where temporary possession is taken of land under statutory powers.

67. These conclusions make it unnecessary for us to consider the third ground on which Mr Purchas maintained an entitlement to the costs of the application to strike out the temporary possession reference. That alternative argument was that the costs incurred should fall within the scope of the claimant's losses suffered by reason of the exercise by Crossrail of its powers under paragraph 1 of Schedule 5 to the 2008 Act. In any event, as Mr Barnes pointed out, if the claimant wishes to include the costs of the reference as part of the compensation to which it is entitled it should plead that as an additional head of loss which can be considered at an appropriate time.

68. In their letter to the Tribunal of 25 May 2015 Ashurst, Crossrail's solicitors, confirmed that, should the Tribunal find that it has power to make an award of costs in relation to the reference, then it was agreed that the costs of the application to strike out the reference should be paid by Crossrail to the claimant. We are satisfied for the reasons given that the Tribunal has the necessary jurisdiction, and we so order.

Martin Rodger QC
Deputy President
18 June 2015

P D McCrea FRICS
Member