

LAW REFORM: TEMPORARY POSSESSION OF LAND

THE LEGAL IMPLICATIONS

Barry Denyer-Green¹

Summary

In this paper I examine the legal rules relating to the taking of temporary possession of land by acquiring authorities and other authorised scheme promoters ("statutory undertakers").

This paper examines the legal effect of the exercise of a temporary possession power, whether temporary possession powers should apply to highway scheme, whether certain important primary legislation authorises powers of temporary possession, and problems of compensation entitlement. This examination makes suggestions for some areas of law reform, having regard to a need for certainty and practicality, and also fairness, and thus compliance with human rights.²

Law reform

In the field of compulsory acquisition, law reform is necessary where the law is uncertain as to its application, or there are practical difficulties in applying it to the intended purpose. There is also the question as to whether the existing legal rules, in their provision or non-provision for some circumstance, are 'fair'. Although the measurement of fairness is a difficult exercise, there are some essential propositions in the common law that

¹ Barrister, Falcon Chambers.

² The views expressed in this paper are my own, and are not that of the Compulsory Purchase Association. I acknowledge the helpful comments of Paul Astbury on the earlier draft of this paper.

provide useful benchmarks,³ and the relevant rights under the Convention of European Human Rights have application.⁴ Associated with these legal rules, and part of the same set of normative values, is the policy direction in ministerial guidance.⁵ I shall refer to these rules and guidance by the generic “the fairness principles”.

Background

There are a number of reasons why statutory undertakers may wish to take temporary possession of land in relation to the execution and maintenance of schemes. Apart from land, which will be compulsorily acquired for the permanent features of the scheme, land may also be required temporarily for construction compounds, the construction operations, landscaping, and land regrading, among other possibilities. Whilst temporary possession powers are quite usual in legislation concerned with railway schemes, there seems no reason why in principle such powers should not be available for other types of schemes.

The genesis of the modern compulsory purchase legislation is found in the 1845 legislation concerning railways. The Lands Clauses Consolidation Act 1845 contained powers of compulsory acquisition. In connection with new railways, provision was made in the Railways Clauses Consolidation Act 1845 for powers to take temporary possession of land within certain defined limits and for certain specified purposes, subject to the payment of

³ The two most significant: (1) parliament does not usually authorise a taking of private property without compensation (*Central Control Board v Cannon Brewery*[1919] AC 744); and (2) the principle of equivalence (as approved in *Director of Buildings and Lands v Shun Fung Ironworks* [1952] 2 AC 111).

⁴ S.3, Human Rights Act 1998 and European Convention of Human Rights, Articles 6 and 8, and First Protocol, Article 1.

⁵ Para 17, Circular 6/2004.

compensation.⁶ However, the exercise of such temporary possession powers, and the provisions relating to the payment of compensation, were subject to a number of requirements and limitations.⁷

Powers of temporary possession are not universally provided for in modern legislation, and where such powers are included, the comprehensive provisions found in the 1845 Act are not present⁸. However, one should start with the presumption that statutory undertakers may require temporary possession powers, depending on the requirements or any particular project or scheme.

The modern legislation

The Transport and Works Act 1992 contains powers to make orders (“T&WOs”) in relation to certain transport systems and inland waterways.⁹ Schedule 1 to the 1992 Act provides for matters that may be within such orders, including the acquisition of land,¹⁰ and the creation of rights over land,¹¹ in either case whether compulsorily or by agreement. Although the Act contains no express provisions relating to the temporary possession of land, the Secretary of State has power to prescribe model provisions for incorporation in any draft orders.¹² In respect of railways, the Transport and Works (Model Clauses for Railways and Tramways) Order 2006 makes provision for, inter alia, the temporary use of land for construction works and

⁶ Sections 32 and 43.

⁷ In certain cases an owner could offer alternative land: sections 35 and 37. An owner could compel the railway undertaker to purchase lands temporarily occupied: see section 42. Compensation for disturbance items are required to be paid within one month of entry and a rental occupation shall be paid half-yearly to the occupier, or to the owner, as the case may require: see section 43.

⁸ Railways Clauses Consolidation Act 1845.

⁹ Sections 1 and 3.

¹⁰ Para 3, Schedule 1.

¹¹ Para 4, Schedule 1.

for maintenance of works.¹³ The model clause relating to the temporary use of land for construction works provides for a minimum 14-day notice, a limit on the duration and possession of 12 months after completion of the works without agreement, an obligation to pay compensation for any loss or damage arising from the exercise of the powers, that the power of compulsory acquisition of land, conferred by the order, shall not apply in relation to land in respect of which temporary use is authorised, and that a statutory undertaker taking temporary possession shall not be required to acquire the land or any interest in it.¹⁴ However, many confirmed orders provide that, in addition to specifying land in respect of which only temporary possession powers are available, temporary possession can be taken in advance of the compulsory acquisition of land authorised to be taken permanently.¹⁵ Orders frequently provide for time limits within which powers of temporary possession may be exercised that are longer than the one-year, following completion of the works, provided for in the model clauses.¹⁶

Broadly similar provisions are found in primary legislation relating to railways, such as the Crossrail Act 2008,¹⁷ and the Channel Tunnel Rail Link Act 1996.¹⁸ Although in the latter case the powers to take land temporarily were limited to certain temporary purposes, and there was no power to take land temporarily in advance of its compulsory acquisition. The High Speed

¹² Section 8.

¹³ Article 3, and Schedule, clauses 24-25.

¹⁴ Model clause 24, Schedule 1 to the 2006 Order.

¹⁵ E.g. Nottingham Express Transit System Order 2009 (SI 2009/1300), Mersey Tram (Liverpool City Centre to Kirkby) Order 2005 (SI 2005/120), Docklands Light Railway (Woolwich Arsenal Extension) Order 2004 (SI 2004/757) and the Docklands Light Railway (Stratford International Extension) Order 2006 (SI 2006/2905), The Chiltern Railways (Bicester to Oxford Improvements) Order 2012 (SI 2012/2679).

¹⁶ *Ibid.*

¹⁷ Section 5 and Schedule 5.

Rail (London – West Midlands) Bill 2013 contains extensive provisions for the temporary possession and use of land, and such powers will enable temporary possession to be taken of land in advance of its permanent acquisition.¹⁹

A Development Consent Order (“DCO”), made under the provisions of the Planning Act 2008, may include provisions authorising the compulsory acquisition of land, subject to certain limitations and conditions.²⁰ The Act makes provision for the matters that may be included in a DCO.²¹ Such matters include acquisition powers, the creation of interests in or rights over land, and the payment of compensation.²² In that connection the Secretary of State may issue guidance about the making of a DCO which includes provisions authorising the compulsory acquisition of land.²³ The issued guidance, relating to procedures for compulsory acquisition, says nothing about the inclusion of provisions for temporary possession.²⁴ However the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 includes suggested provisions for the temporary use of land for carrying out, or maintaining, the authorised project.²⁵ These broadly follow the equivalent model clauses for the purposes of a T&WO. However, in respect of certain approved DCOs, the provisions relating to the temporary use of land for carrying out the authorised development include powers to take, not only land of which temporary possession alone may be taken, but also to take

¹⁸ Section 6 and Schedule 5.

¹⁹ Clause 14 and Schedule 15.

²⁰ Section 122.

²¹ Section 120 and Schedule 5, Part 1.

²² See paragraphs 1, 2 and 36, Part 1, Schedule 5. But the taking of temporary possession of land is not one of the matters listed.

²³ Section 124 and the Planning Act 2008.

²⁴ Department for Communities and Local Government, February 2010.

²⁵ Schedule 1, Model Clauses 28 and 29.

temporary possession in advance of the compulsory acquisition of land authorised to be taken permanently.²⁶

As to other general public legislation authorising compulsory acquisition, one does not find express provisions for temporary possession powers. The Highways Act 1980 contains powers to acquire land compulsorily, but says nothing about the temporary possession of land.²⁷ although the Act does include powers to create rights over land.²⁸

Notwithstanding the absence of any express power to take temporary possession of land in connection with the compulsory acquisition of land for highway purposes, highway authorities seek to get round the absence of a temporary possession power in a number of ways.²⁹

The powers to compulsorily acquire land under the Town and Country Planning Act 1990 make no express provision for the acquisition of a right to take land for temporary purposes only.³⁰

As to the general legislation relating to the making of compulsory purchase orders, the Acquisition of Land Act 1981 provides for the procedure for the authorisation of a CPO, but does not otherwise address the extent of the powers that may be authorised. The Compulsory Purchase Act 1965 and the

²⁶ E.g. The Able Marine Energy Park Development Consent Order 2014, Article 40. In the case of the Hinckley Point C (Nuclear Generating Station) Order 2013, the powers to take temporary possession are limited only to the land specified for that purpose: see Article 33.

²⁷ Sections 239, 240, 241, 242 and 246.

²⁸ See section 250.

²⁹ Thus, under the Metropolitan Borough of Stockport (Hazel Grove (A6) to Manchester Airport A555 Classified Road) Compulsory Purchase Order 2013, a number of plots are identified for compulsory acquisition, notwithstanding that the acquiring authority has indicated that the land is only required for temporary purposes only.

³⁰ See section 226.

Compulsory Purchase (Vesting Declarations) Act 1981 contain procedures for the acquisition of land once a CPO has been confirmed. But neither Act addresses the extent of the powers that may be authorised. The Land Compensation Act 1961 contains the Compensation Code. Whilst it may have application to the determination of compensation for the exercise of temporary possession powers where it is expressly provided for,³¹ it falls to be applied where any land is "acquired compulsorily",³² and compensation is to be assessed in accordance with certain rules "in respect of any compulsory acquisition".³³

The problems identified

I will examine a number of problems in relation to the temporary possession powers.

- (1) What is the legal effect of the exercise of a power of temporary possession.
- (2) Whether there should be such powers in connection with highway schemes.
- (3) Whether the inclusion of such powers in a T&WO or a DCO is outwith the enabling enactments.
- (4) Whether the inclusion of temporary possession powers for the land that may also be permanently acquired can satisfy the fairness principles.
- (5) What is meant by the obligation to pay "compensation" where so provided for?

³¹ Eg, para 24(5)-(6), Transport and Works (Model Clauses for Railways and Tramways) Order 2006, as applied in the Chiltern Railways (Bicester to Oxford Improvements) Order 2012, article 29(5)-(6).

³² S.1.

³³ S.5.

What is the legal effect of the exercise of temporary possession powers?

Entry onto land of another person without consent or legal authority is a trespass.³⁴ On the exercise of a temporary possession power, notice of that is usually required to be served on the owners and occupiers.³⁵ No notice to treat is required to be served as the statutory undertaker will not be treating for any interest; it does not need a tenancy, and it will acquire no interest in land. No title is taken or becomes vested. The exercise of a lawful temporary possession power authorises provides the defence of justification for an act that would otherwise be a trespass.³⁶

An important consequence, of the exercise of the temporary possession power, is that where the relevant land is subject to a tenancy, the tenancy is not terminated, as might be the case where a notice of entry is served under the Compulsory Purchase Act 1965.³⁷ The obligations of the landlord and tenant ordinarily continue; the tenant to pay rent, and the landlord to perform any landlord obligations. It is true that the doctrine of frustration is capable of applying to a tenancy, and, if applied, this would excuse the performance of the parties' obligations, but the doctrine's application is both limited and uncertain.³⁸ In considering whether frustration arises, the terms of the tenancy must be considered, and a comparison made between the likely

³⁴ *Unlawful Interference with Land*, Elvin & Karas, 2nd ed, para 1-046.

³⁵ Eg, para 28(2) of the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.

³⁶ Elvin & Karas, *ibid*, para 1-057.

³⁷ S.22.

³⁸ Notice of an intended compulsory acquisition of land did not allow a purchaser to invoke the doctrine of frustration, as justification for refusing to complete a purchase, in *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1996] 3 WLR 583, as the seller could still provide vacant possession; in *National Carriers Ltd v Panalpina Northern Ltd* [1981] AC 675 the House of Lords accepted that the doctrine was capable of applying to leases, but the relationship between the length of the term and the duration of the temporary obstruction of the access precluded frustration in that case.

period of temporary possession and the term under the tenancy.³⁹ In the case, say, of an annual agricultural tenancy, where part only of a holding is the subject of temporary possession, the doctrine is unlikely to apply. But it may apply where the whole or a substantial part of the demise is taken for a period approaching or exceeding the term of the lease.

In the case of orders made under 1992 and 2008 Acts, the model provisions provide that an undertaker may enter and take temporary possession of specified land, for specified purposes, and may remove any buildings and vegetation from that land, and construct temporary works.⁴⁰ These powers omit two important safeguards found in the 1845 legislation. First, that an owner may, by counternotice, object on the basis that some other contiguous or nearby land of his would be more fitting for the purpose.⁴¹ Second, that an owner can require the statutory undertaker to purchase land temporarily occupied.⁴² There are obvious objections to the inclusion of the first safeguard on the basis that where land is to be taken only for the purpose of the construction activity, it may be impossible to accommodate alternatives, if at all, in the construction design or programme. There is far less objection to the second safeguard in those cases where temporary possession is taken of land, upon which the scheme works are constructed, and which plainly will be permanently acquired at some stage.

³⁹ In *National Carriers Ltd v Panalpina Northern Ltd* [1981] AC 675 no frustration arose where a road was closed for 20 months and the lease term was 10 years.

⁴⁰ Transport and Works (Model Clauses for Railways and Tramways) Order 2006, Schedule 1, para 24(1) and ...

⁴¹ S.35, Railways Clauses Consolidation Act 1845.

⁴² S.42, *ibid.*

Whether there should be temporary possession powers for highway schemes

I appreciate that many highway schemes will be subject to DCOs; but there will be schemes outside the scope of the Planning Act 2008. There is very little evidence, other than anecdotal, and my personal experience, as to the need for temporary possession powers in connection with highway schemes. The practical problems of constructing roads and bridges are little different from constructing the equivalent for railways. Space may be required for contractors' compounds and for the erection of structures. Cuttings and embankments may require temporary or permanent spoil heaps and land grading. In the past highway authorities, or their contractors, frequently negotiated for the use of additional land for temporary purposes.⁴³ That practice is now less common as road contractors have become more involved in furthering the compulsory purchase orders, and seek to avoid the ransom sums that might otherwise be payable.

It is known that the highways authorities, relying on the powers of permanent acquisition under the Highways Act 1980, include land required only temporarily as land to be taken permanently. There are two objections to this. First, that an authority might fail to justify the use of permanent acquisition powers for a temporary purpose only.⁴⁴ Second, that it could be compelled to acquire land that it does not require permanently.

⁴³ Difficult questions of betterment set-off then arose where a claimant-owner obtained a lucrative contract to provide land temporarily.

⁴⁴ Para 17, Circular 6/2004 - *compelling case in the public interest*

Subject to the other safeguards considered in this paper, there is no reason why the Highways Act 1980 should not be amended to include a temporary possession power.

Whether temporary possession powers can be lawfully included in T&WO and DCOs?

Both the Transport and Works Act 1992 and the Planning Act 2008 make provision for the subject matter of the respective orders.⁴⁵ Whilst the acquisition of land, compulsorily or by agreement, is a matter that may be the subject of the respective orders, the compulsory taking of temporary possession for construction and/or maintenance is not expressly so included. That omission provokes a number of questions.⁴⁶

First, whether the inclusion of a power to take temporary possession in the respective orders falls within the powers of “compulsory acquisition of land”. As the 1845 legislation contained powers for both the compulsory acquisition of land, and the taking of temporary possession for certain purposes, that raises the possibility that the legislature distinguishes between those two powers.⁴⁷ The prescribed model clauses, relating to the temporary use of land for construction or maintenance of works, require the service of notice before taking temporary possession, and refer neither to a Notice to Treat or

⁴⁵ Section 5 of, and Schedule 1 to, the 1992 Act and section 120 of, and Schedule 5, Part 1 to, the 2008 Act.

⁴⁶ Some of the points raised in this section may also have resonance in relation to other primary legislation authorising compulsory acquisition.

⁴⁷ Section 10 of the Defence Act 1842 authorised the appropriate authorities to treat for the absolute sale of land, or the grant of any lease, or “*for such period as the exigency of the public service shall require*” and for powers of compulsion: see sections 10 and 19. The Emergency Powers (Defence) Act 1939, which provided for the Defence Regulations also made a distinction between the taking of possession of any property and the acquisition of any property (other than land): see section 1(2)(b). Sections 1 and 2 of the Compensation (Defence) Act 1939 makes provision for compensation where possession of any land has been taken, but distinguishes the requisition or acquisition of land: see section 1.

a General Vesting Declaration, to which the provisions of the 1965 or 1981 Acts would otherwise apply, and where such steps either state that land is sought to be acquired, or is vested, respectively. On their terms, no interest is sought to be acquired under the model clauses; what is purported to be authorised is possession only. What is authorised is the taking of temporary possession for specified purposes; it amounts to no more than legal justification for what would otherwise amount to a trespass. The acquisition procedures of the 1965 Act are generally incorporated into T&WO and DCO's. The 1965 Act defines "land" as that defined in the Act authorising the acquisition.⁴⁸ Where possession is taken under the model clauses, no interest or title is acquired, and no legal interest or title vests in the undertaker. It therefore seems unlikely that the grant of a power of compulsory acquisition of land can be construed as including a power to take temporary possession of land.

Second, the matters that may be included in the respective orders include the creation of rights over land.⁴⁹ Would the temporary possession powers and the model clauses fall within the expression "rights over land"? In each case the model clauses deal separately with the power of temporary possession and the power to acquire new rights; this again rather suggests that the Secretary of State, at least, does not consider that the statutory power to create rights over land includes the right to take temporary possession of land. The meaning of "rights over land" needs to be considered in relation to other primary legislation. The acquisition, by way of the creation of new rights over land, as provided for in the Local Government (Miscellaneous Provisions) Act 1976⁵⁰ and the Highways Act 1980⁵¹ is generally understood

⁴⁸ S.1(3).

⁴⁹ 1992 Act, Schedule 1, para 4 and 2008 Act, Schedule 5, Part 1, para 2.

⁵⁰ Section 13.

as providing for the creation of rights in the nature of easements.⁵² A right to acquire land does not include a right to acquire, by creation, new rights over land, in the absence of express powers.⁵³

Where, rights are compulsorily acquired under the 1976 or 1980 Acts, the 1965 Act applies with modifications, including the requirement to serve a Notice to Treat.⁵⁴ Consistently with such arrangements, the model clauses apply the 1965 Act with modifications necessary to make it apply to the compulsory acquisition of a right, by the creation of a new right, as it would apply to the compulsory acquisition of land.⁵⁵

It is therefore difficult to construe the power to acquire a right over land as including a power of temporary possession.

Third, the matters for which the respective orders can make provision include compensation.⁵⁶ In the case of the model clauses for T&WO, provision is made simply for the payment of compensation, without any reference to the exercise of any identified power. The existence of a compensation provision in a statute can be relevant to the construction of its provisions relating to the taking of, or the interference with, rights.⁵⁷ But, having regard to the

⁵¹ Section 250.

⁵² For the necessity for such a power: see Sovmots Investments Limited v Secretary of State for the Environment [1979] AC 144.

⁵³ See also Pinchin v London and Blackwall Railway Co (1854) 5 De GM&G 851 and Hill v Midland Railway Co (1882) 21 Ch D 143.

⁵⁴ Eg., see s.13(3) of the 1976 Act.

⁵⁵ Transport and Works (Model Clauses for Railways and Tramways) Order 2006, Schedule 8, para 3.

⁵⁶ The 1992 Act, Schedule 1, para 11 and the 2008 Act, Schedule 5, para 36.

⁵⁷ The existence of a compensation obligation, in a manorial custom, a local law, was relevant to the right to let down the surface of land in relation to mining in *Excors of John Hargreaves Ltd v Burnley Corpn* [1936] 3 All ER 959, 968. Although in *New Sharlston Collieries Co Ltd v Westmoreland (Earl)* [1904] 2 Ch 443n HL, the existence of a

extensive list of matters for which orders may make provision, and where any number of them could well give rise to losses or damage for which compensation ought to be provided, the non-specificity of the expression "compensation" is understandable, and does not assist in the extension of matters for which orders may provide, and which are not expressly stated. To put the matter the other way round, the absence of a compensation provision raises the presumption that Parliament does not authorise a taking of or interference with property rights,⁵⁸ but its non-specified inclusion does not raise a presumption that any interference with property is authorised. Further, the existence of a non-specific compensation provision would most probably negate a contention of a breach of Convention Rights.

I conclude that the existence of the compensation obligation is helpful in interpreting the enactments as including the power of temporary possession, but is not conclusive.

Fourth, in the case of T&WOs, the Secretary of State has power to prescribe model provisions for incorporation in any draft orders.⁵⁹ Is this sufficient authority to prescribe a clause authorising temporary possession? I think that a delegated power is unlikely, on its own, to authorise a compulsory power to interfere with property.

Fifth, whilst subordinate legislation might contain provisions that are not authorised by the enabling legislation, the subordinate legislation retains legal effect until quashed by a judicial act.⁶⁰

compensation provision in a conveyance was not inconsistent with an obligation not to let down the surface.

⁵⁸ *Central Control Board v Cannon Brewery* [1919] AC 744.

⁵⁹ Section 8.

⁶⁰ See the authorities cited at *de Smith's Judicial Review*, 7th ed, para3-011.

I conclude that there is, at the least, doubt whether orders made under the 1992 and 2008 Acts may include a power to take temporary possession of land; such orders could be vulnerable to judicial challenge.

Taking temporary possession in advance of permanent acquisition

Some T&WO and DCOs authorise temporary possession of land that is also authorised to be taken permanently. This is also intended under the High Speed Rail (London-West Midlands) Bill. Paul Astbury identifies some of the practical difficulties, no early valuation date for assessment of compensation for the permanent acquisition, and no early entitlement to an advance payment under the Land Compensation Act 1973,⁶¹ as would enable relocation. Whilst one can see the financial advantage to the statutory undertaker, in limiting early capital payments, and addressing any uncertainty about the precise limits of the finished scheme, the disadvantages to a claimant could be very significant where deprived of the means to relocate where relocation is inevitable.

Under some of the T&WOs, the temporary possession power is exercisable in respect of land authorised to be permanently required.⁶² It appears that the temporary possession power has been used before, and sometimes some considerable time before, any notice to treat is served or a general vesting declaration made. As possession taken under the temporary possession power is not the taking of possession following a notice of entry under section 11 of

⁶¹ S.52.

⁶² E.g. Nottingham Express Transit System Order 2009 (SI 2009/1300), Mersey Tram (Liverpool City Centre to Kirkby) Order 2005 (SI 2005/120), Docklands Light Railway (Woolwich Arsenal Extension) Order 2004 (SI 2004/757) and the Docklands Light Railway (Stratford International Extension) Order 2006 (SI 2006/2905), The Chiltern Railways (Bicester to Oxford Improvements) Order 2012 (SI 2012/2679).

the 1965 Act, such a taking of possession does not fix the valuation date, or the liability to pay compensation, under any later notice to treat or GVD. Nor will any obligation to make an advance payment of compensation for the permanent acquisition arise.⁶³ Indeed, save for any time limit in the enabling power, there appears to be neither a need nor any incentive on a statutory undertaker to serve any notice to treat. The consequences of all this is that the affected owner or occupier, losing possession of land, and denied any advance payment, is left with the uncertainty of not knowing how much land will be permanently required, and is not provided with the financial means to acquire substitute land. The application of the mitigation duty to find substitute land becomes very uncertain, and the compensation obligation on the statutory undertaker will become more onerous.

The potential disadvantages are so significant as to raise a possible breach of Article I of the First Protocol of the European Convention, on the ground of disproportionality, or of Article 8, interference with a home. An inadequate provision for compensation could either result in the legislation being interpreted more favourably to the claimant, and/or an award of compensation,⁶⁴ or a declaration of incompatibility.⁶⁵ There is the related issue as to whether the inclusion of the temporary possession power will satisfy that part of the fairness principles expressed in ministerial guidance.⁶⁶

It would be preferable to introduce limits on the use of a temporary power of possession in respect of land to be taken permanently. Such limits could

⁶³ S.52, Land Compensation Act 1973.

⁶⁴ Eg, as in *Andrews v Reading BC* [2006] RVR 56, where compensation was awarded under Article 8 of the European Convention.

⁶⁵ S.4, Human Rights Act 1998; although the Upper Tribunal (Lands Chamber) may not have jurisdiction to make such a declaration.

⁶⁶ Para 17, Circular 6/2004.

either be in terms of time limits or topographical limits. There could be a time limit of 12 months within which a notice to treat is served or a general vesting declaration made.

Compensation

What is meant by the obligation to pay “compensation”, where so provided? Under the 1845 legislation the compensation provided that for disturbance items compensation was required to be paid within one month of entry and a rental occupation shall be paid half-yearly to the occupier, or to the owner, as the case may require.⁶⁷ The modern legislation goes no further than providing an obligation to pay "compensation ... for any loss (or damage)".⁶⁸ This formulation of the compensation entitlement is also found in the Town and Country Planning Act 1990,⁶⁹ and has been held to include the loss of the profits that were reasonably expected to have been earned from the subject land.⁷⁰ Subject to the application of the relevant principles of causation, remoteness and mitigation, the principles for the assessment of compensation for disturbance and other losses under the Compensation Code would seem to apply by analogy.⁷¹

There seems no reason why the compensation obligations in connection with temporary powers should not require the payment of rental occupation sum half-yearly, by analogy with the obligation to make advance payments where possession is taken in advance of permanent acquisition.

⁶⁷ S.43 Railways Clauses Consolidation Act 1845.

⁶⁸ Eg, para 1(4), Schedule 5, Crossrail Act 2008; Transport and Works (Model Clauses for Railways and Tramways) Order 2006, Schedule 1, para 24(5).

⁶⁹ See s.107(1)(b), in the case of the revocation of a planning permission.

⁷⁰ See *Hobbs (Quarries) Ltd v Somerset CC* (1975) 30 P&CR 286.

The real problems arise where the land is tenanted. A difficulty could arise where a tenant stops paying rent. If the statutory undertaker contends that there is no basis for that failure, perhaps because the doctrine of frustration does not apply, the landlord may be left only with a rent action against his tenant, and no entitlement to claim compensation.⁷² If the tenant continues to pay the rent, an element of double-counting might arise if he claims that rent and loss of profits. There could also be difficulties if the relevant lease provides for a rent review by reference to a valuation date during the period of temporary possession. The valuation is likely to reflect the real world of lack of entitlement to possession, and the rent could be fixed on that basis until the next rent review. Whilst there seems no reason why the landlord should not be compensated for the consequential depreciation in value of his interest, there is no valuation date for the assessment of the temporary possession compensation. There is no reason why the landlord should not be compensated for the depreciation in rental value on the basis determined in *Wildtree Hotels Ltd v Harrow LBC*.⁷³ But it be arguable that the tenant may gain a benefit, a lower rent for a period of time, and therefore higher profits, which would be attributable to the scheme, and brought into account in any disturbance claim.

Conclusions

The following matters put themselves forward as candidates for law reform:

1. That there should be a general power of temporary possession capable of application in connection with highway schemes;

⁷¹ Rule (6), s.5, Land Compensation Act 1961 and *Director of Buildings and Lands v Shun Fung Ironworks* [1952] 2 AC 111.

⁷² For a different aspect of the problems of acquiring a leasehold interest, see *Richard Parsons Ltd v Bristol City Council* (2007) 47 EF 174.

⁷³ [2001] 2 AC 1.

2. That any doubt about the inclusion of a power of temporary possession in T&WO and DCOs should be settled by amendments to the appropriate legislation;
3. That there should be limits on the taking of temporary possession of land in advance of its permanent acquisition;
4. That where temporary possession is taken, compensation for the use of land should be payable half-yearly.