

The National Terms of Connection and DCP181

In 2015 the DCP181 Working Group asked Wragge and Co. the following questions:

1. Can terms contained in a bilateral contract be enforced against a third party? Is there a publicly available example of situations where this has occurred?
2. Would the proposal in DCP181, if approved by Ofgem, conflict with contract law?
3. Does contract law always apply given the NTC have been approved by Ofgem as being statutory in the absence of an agreement?
4. Could the NTC be varied to place an obligation on the connectee to advise any prospective buyer/new tenant if there is an existing bilateral or existing terms and to disclose them?
5. How could standard enquiries used on sales of premises (whether domestic or commercial) be extended to asking about connection agreements/terms? Is there a standard process among solicitors?
6. Under s16-s21 of the Electricity Act, can capacity agreed with (the first?) connectee transfer to a third party without any associated terms? Can a benefit be transferred in this way without associated burden?
7. Under s22 of the Electricity Act, does the vacation of premises by the connectee cause an agreement to fall away and so the entitlement to use of the connection terminates? Alternatively, can capacity agreed with the first connectee transfer to a third party without any associated terms?
8. Does the Act oblige the DNO to maintain the connection (the assets) or also its ability to be used (the capacity)? If the latter, what happens to associated agreements or terms under the Act?
9. How might customers vacating or entering premises be compelled to advise the DNO of this fact and in practice would it be effective/enforceable?
10. Are there any other factors the group needs to consider?

The answers to those questions are as follows:

1. Can terms contained in a bilateral contract be enforced against a third party? Is there a publicly available example of situations where this has occurred?

Yes. Terms in a bi-lateral contract can be enforced against a third party in two ways:

- a. By incorporating those terms into the contract made a third party; and
- b. Under the Contracts (Rights Of Third Parties) Act 1999.
- c. A party seeking to claim a benefit under an agreement, must submit to any burden imposed by it. The Benefit and burden principle. See para 6 below.

The National Rail Condition of Carriage is an example of the former.

2. Would the proposal in DCP181, if approved by Ofgem, conflict with contract law?

No.

3. Does contract law always apply given the NTC have been approved by Ofgem as being statutory in the absence of an agreement?

No. However, the Court may decide otherwise.

4. Could the NTC be varied to place an obligation on the connectee to advise any prospective buyer/new tenant if there is an existing bilateral or existing terms and to disclose them?

Yes.

Doing so is not practicable. Such an obligation does not form part of routine property conveyancing. Moreover, there is no immediate remedy if disclosure is not made. There is no reason for the outgoing owner/occupier or the incoming owner/occupier to give notice.

5. How could standard enquiries used on sales of premises (whether domestic or commercial) be extended to asking about connection agreements/terms? Is there a standard process among solicitors?

By incorporating in standard pre-contract enquiries a question in appropriate terms.

No. The use of pre-contract enquiries in a particular form is not mandatory.

Moreover, the content of standard form pre-contract enquiries changes over which

a DNO would have no influence. Even if incorporated there is no guarantee that the question would be answered usefully. Disclosure does not of itself bind the purchaser.

6. Under s16-s21 of the Electricity Act, can capacity agreed with (the first?) connectee transfer to a third party without any associated terms? Can a benefit be transferred in this way without associated burden?

No.

It is well established law that a benefit cannot be taken under a contract without also submitting to the burden.

So, where a customer has specified relevant premises, a connection date and a capacity requirement, does this create an obligation of indefinite duration on the DNO with no associated terms binding any subsequent connectee? As the DNO has the obligation to maintain the connection indefinitely, the second and subsequent connectee must submit to the associated burden.

see *Tito v Waddell (No. 2)* [1977] 1 Ch 106, at page 290.

The 'benefit and burden' principle was identified by Megarry V-C in that case, but has since been qualified. The leading case is the decision of the House of Lords in *Rhone v Stephens* [1994] 2 A.C. 310, where it was decided that the 'benefit and burden' principle did not mean that a party deriving any benefit from an instrument must accept any burden imposed by the same instrument, and that "the condition must be relevant to the exercise of the right".

It has since been held by the Court of Appeal, in *Thamesmead Town Ltd v Allotey* (2000) 79 P & CR 557, that there are two requirements for the enforceability of a covenant against a successor in title to the covenantor. The first is that the condition of discharging the burden must be relevant to the exercise of the right which enables the benefit to be obtained. The second is that the successors in title must have the opportunity to choose whether to take the benefit or, having taken it, to renounce it, even if only in theory, and thereby to escape the burden, and that the successors in title can be deprived of the benefit if they fail to assume the burden.

Taking these two points, where previous connection terms have been agreed, the first point is satisfied as the burden is clearly relevant to the exercise of the right. The second point is also satisfied because the customer has the opportunity to seek to alter the capacity, albeit that connection charges may apply.

See also *Davies v. Jones* [2009] EWCA Civ 1164 and *Goodman and others v. Elwood* [2013] EWCA Civ 110.

By stating this enduring nature of the previous connection terms on the face of the NTC, we are clarifying the application of an established common law principle.

7. Under s22 of the Electricity Act, does the vacation of premises by the connectee cause an agreement to fall away and so the entitlement to use of the connection terminates? Alternatively can capacity agreed with the first connectee transfer to a third party without any associated terms?

No. It does not cause it to fall away.

See answer to Q6.

8. Does the Act oblige the DNO to maintain the connection (the assets) or also its ability to be used (the capacity)? If the latter what happens to associated agreements or terms under the Act?

Yes: to repair/replace the electric lines and electrical plant required for continuity of supply (subject to the statutory exceptions in section 17 of the Act. Keeping in repair/replacing without any subsequent owner who has the benefit of the DNO's obligation (it is not confined to the person who sought the connection) being unable to rely upon the capacity associated with that original request is illogical. Had Parliament intended such an outcome, it would have made express provision to that effect.

Consider what would happen if there was no obligation to maintain capacity: on each change of owner or occupier the new owner or occupier would need to apply for capacity. Clearly this would be unworkable for the volume of domestic customers. So how does one determine to which customers such a mechanism should apply? Moreover, what might happen if the capacity that had been in use by the outgoing owner or occupier, the seemingly "released" capacity were to be re-allocated to other customers? How would the incomer be certain of the capacity that in part informed his decision to buy / occupy the property?

If that were the case, the DNO may have to consider whether it could allocate the seemingly "released" capacity to others, without first making enquiry of the new the customer as to whether it requires it. If it did not make such enquiry would it act negligently? How, when and to whom would it make enquiry?

9. How might customers vacating or entering premises be compelled to advise the DNO of this fact and in practice would it be effective/enforceable?

Such an obligation could be inserted into the NTC but it is not clear how it would be enforceable. Their existence is not exactly at the forefront of mind. Moreover, unlike notification to a local Council to stop collecting council tax by direct debit on vacating premises, there is no obvious motive for the outgoing or incoming owner or occupier to inform the DNO.

10. Are there any other factors the group needs to consider?

The incorporation by reference of previous terms via the NTC is the only sensible way forward.

We suggest the following changes need to occur to make this practical;

- A. Vary the NTC in Section 3 to obtain consent from the owner/occupier for the DNO to release existing terms to a solicitor or licensed conveyancer, on receipt of a written request stating that they are working on behalf of a prospective purchaser/tenant of the property. Also to state that the DNO's contact details are available on the connection terms website.
- B. Amend the words required in the supplier contract as follows;

National Terms of Connection

Your supplier is acting on behalf of your network operator to make an agreement with you. The agreement is that you and your network operator both accept the National Terms of Connection (NTC) and agree to keep to its conditions. **THE NTC PROVIDE THAT YOU WILL BE BOUND BY THE CONNECTION AGREEMENT MADE BY THE PREVIOUS OWNER OR OCCUPIER.** You will be bound from the time that you enter into this contract and it affects your legal rights. The NTC previous connection agreement is a legal agreement. It sets out rights and duties in relation to the connection at which your network operator delivers electricity to, or accepts electricity from, your home or business. If you want a copy of the Connection Agreement made by the previous owner or occupier or of the NTC or have any questions about it, please write to: Energy Networks Association, 6th Floor, Dean

Bradley House, 52 Horseferry Road, London SW1P 2AF: phone 0207 706 5137, or see the website at www.connectionterms.co.uk

C. Incorporate previous terms by reference **as previously discussed;**

Comment [WP1]: May need to add "Subject to Paragraph F" in paragraph E of the NTC.

F Existing connection agreement: This paragraph F applies in the event that there is an existing agreement governing the connection of the premises to the network (except for standard terms which have effect by virtue of statute or pursuant to a contract with an electricity supplier, or of which an electricity supplier procured acceptance). If the premises are domestic premises and you are party to the existing agreement, then the existing agreement will apply instead of section 2, 3 or 4. If the premises are not domestic premises, then the existing agreement will apply instead of section 2, 3 or 4 (whether or not you are party to the existing agreement). If an existing agreement applies to you and the premises in accordance with this paragraph F, you will have the benefit of the rights, and be bound by the obligations, under the existing agreement from the date that the National Terms of Connection apply to you and the premises, as if you had entered into the existing agreement with the network operator (until paragraph E above applies, or the existing agreement is terminated in accordance with its terms). Information about existing agreements can be obtained from the network operator. Contact details are available from the Energy Networks Association (telephone 0207 706 5137) or at www.connectionterms.co.uk