A new line of attack?

Stephanie Tozer & Toby Boncey provide a master class in litigation under the new Electronic Communications Code

IN BRIEF

- Types of claim which may arise under the new code.
- The power to impose an agreement on a landowner without his consent.

On 28 December 2017, a new Electronic Communications Code, which can be found in Schedule 1 of the Digital Economy Act 2017, came into force. In simple terms, its purpose was to make it easier for operators to acquire and retain rights to use land needed to enable them to provide comprehensive networks. The operators to whom the code applies are listed on the Ofcom website. Most of them run telephone networks and/or provide broadband internet access.

A number of types of claim may arise under the code. This article focuses on two of the most significant types of litigation under the code which are likely to arise in the near future:

- litigation about apparatus which has been in situ since before 28 December 2017; and
- new agreements: the power to impose an agreement on a landowner without his consent.

Apparatus in situ before 28/12/2017

We assume that the apparatus was there by reason of an agreement which was in force on 28 December 2017, that no notices under the old code had been given, and the landowner now wants to remove the apparatus. In order to do so, he must consider two things:

- whether he can terminate the agreement; and
- if so, how he can enforce his right to remove the apparatus after the agreement has come to an end.

Termination

The new code applies to agreements in force on 28 December 2017 subject to transitional provisions set out in Schedule 2. The rules for terminating those agreements are complex. To work out what needs to be done the following questions need to be asked:

- Is the agreement a lease protected under the Landlord and Tenant Act 1954? If yes, the procedure in that Act needs to be followed to terminate the agreement. If litigation is required, this will take place in the county court and be subject to the same rules as any other contested 1954 Act claim.
- Is the agreement a lease contracted out of the Landlord and Tenant Act 1954, whose primary purpose was not to grant code rights? If yes, the agreement terminates in accordance with its contractual terms. However, there is nothing to prevent an operator seeking an order imposing fresh rights on the site provider (see below).

If the answer to both these questions is no, then the following code procedure (found in Schedule 2 paragraphs 6-7 and Part V) must be used to terminate the agreement. First, the site provider must serve a notice on the operator, using the template notice for paragraph 31(1) to be found on the Ofcom website via the link *bit.ly/2L7N8V3*.

- Where the contractual termination date is before 28 June 2019 the stated termination date must: (i) be after the date on which the agreement could be terminated under its contractual terms; (ii) be at least three months after the date the notice is given; and (iii) give the operator at least the same amount of notice as the length of the term unexpired as at 28 December 2017.
- Where the contractual termination date is after 28 June 2019 the stated termination date must: (i) be after the date on which the agreement could be terminated under its contractual terms; and (ii) be at least 18 months after the date the notice is given.

One (or more) of the following statutory grounds must be stated:

- substantial breaches;
- persistent delay in payment;
- the site provider intends to redevelop all or part of the land, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;
- the operator cannot satisfy the following test: (i) the prejudice caused to the defendant by the order is capable of being adequately compensated by money; (ii) the public benefit likely to result from the making of the order (bearing in mind in particular the public interest in access to a choice of high quality electronic communications services) outweighs the prejudice to the defendant; (iii) and the defendant does not intend to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.
- The first three grounds are likely to be interpreted in line with the similar grounds under section 30 of the Landlord and Tenant Act 1954.

The agreement will come to an end on the date stated unless the parties agree that the agreement should remain in force, or the operator:

- gives a counter-notice within three months (there is no prescribed template for this counter-notice); and
- applies for an order within three months of the date the counter-notice was

given. This application must be made to the Upper Tribunal. The forms and procedure to be adopted in the litigation are set out below.

If the ground is made out, the Upper Tribunal must order the code agreement to come to an end. Otherwise, it must order the continuation of the existing agreement or a new or varied agreement.

Enforcing removal

Once the agreement has terminated, the land owner must give a further notice to the operator, in the form specified on the Ofcom website for paragraph 40(2) notices, specifying a reasonable period for the apparatus to be removed, before he takes any steps to do so.

If agreement about how and when the apparatus is going to be removed has not been reached within 28 days, either party can make a further application to the Upper Tribunal, for an order that the operator must remove the apparatus and restore the land, or permitting the landowner to remove and sell the apparatus and recover the costs from the operator. The relevant forms and procedure are discussed below.

New agreements

New agreements: the power to impose an agreement on a landowner without his consent.

When can this be done?

The Upper Tribunal has power under paragraphs 20-25 of the code to impose an agreement where:

- the prejudice caused to the defendant by the order is capable of being adequately compensated by money;
- the public benefit likely to result from the making of the order (bearing in mind in particular the public interest in access to a choice of high quality electronic communications services) outweighs the prejudice to the defendant; and
- the defendant does not intend to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

How can it be done?

The operator must first give the potential defendant a notice in writing, setting out the code right, and all of the other terms of the agreement that the operator seeks, and stating that the operator seeks the person's agreement to those terms. The operator must use the standard form notice for paragraph 20(2), available on the Ofcom website.

The operator can apply for an order after 28 days (or earlier if the potential defendant gives a counter-notice opposing the operator's claim). Such an application must be made to the Upper Tribunal on the forms and adopting the procedures set out below.

> *"Tighter timetables than parties may be used to are to be expected"*

Consideration (& compensation)

At the hearing, there may be a debate about whether the above criteria for the making of an order are satisfied. In many cases, however, the debate will be about the terms of the imposed agreement, and in particular, the amount of consideration payable. The rules in relation to these matters can be found in paragraphs 23 and 24.

Under the old code, as a result of the decisions in *Mercury Communications Ltd v London and India Dock Investment Ltd* (1993) 69 P & CR 135 and *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd* [2002] EWCA Civ 720, [2002] All ER (D) 136 (May) operators generally accepted that it was appropriate to take into account the value to the operator in assessing what was fair and reasonable to pay, even though there were arguments that this was not necessary (and it has recently been held in Scotland that it was not: *SSE Telecommunications Ltd v Millar* [2018] SCA (CIV) 14). For an example in which one of the writers appeared, see *Brophy v Vodafone* [2018] RVR 55.

However, under the new code the consideration payable by an operator is based on the value to the owner, and on various assumptions, including that the site is not going to be used for the purposes of an electronic communications network and there are other sites which the operator could use. The precise legal effect of the statutory valuation assumptions remains to be settled by litigation. However, it appears that these assumptions favour operators, and are likely to result in a reduction, possibly a substantial reduction, in the consideration typically paid under the old code.

Upper Tribunal forms & procedure

Where we have indicated above that an application is to be made to the Upper Tribunal, the claimant cannot choose to commence elsewhere: Electronic Communications Code (Jurisdiction) Regulations 2017/1284, reg 4. The appropriate Chamber is the Lands Chamber: First-tier Tribunal and Upper Tribunal (Chambers)(Amendment No 2) Order 2017.

Form T370 or T371 should be used, available on the Upper Tribunal website at *bit.ly/2NI4IAz*. Neither form is entirely appropriate, and the writers understand that some revision to the forms, or a new form, may be in the pipe-line. For the time being, however, one of these forms should be used. The important thing is to include on the form all of the information listed in rule 28(3) of the Upper Tribunal (Lands Chamber) Rules 2010. This includes a statement of the matter on which a determination is sought and a summary of the reasons for seeking it. A full statement of case can be annexed. If a full statement of case is not annexed, the Tribunal might subsequently direct a statement of case: Upper Tribunal (Lands Chamber) Rules 2010 rule 29(3).

The response (in Form T372 or T373, available on the Upper Tribunal website) is due within one month of the notice of reference. It must contain the matters stated in Upper Tribunal (Lands Chamber) Rules 2010 rule 29(2), which include a summary of the contentions of the person making the response. As before, if a full statement of case is not annexed, the Tribunal might subsequently order one.

Although not the language on the forms, the parties should describe themselves as claimants and respondents.

The Upper Tribunal will list a case management conference (CMC) hearing within a few weeks of receiving the claimant's notice, typically on a Friday. The timetable for the following steps in the litigation, and the final hearing date, will generally be set at the CMC hearing. The Upper Tribunal aims to hold the final hearing within five months of receipt of the reference to enable a decision to be given within six months where this is necessary by reason of regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011. Tighter timetables than parties may be used to are therefore to be expected. Further, parties are required, by the Upper Tribunal (Lands Chamber) Practice Note on the Electronic Communications Code, to discuss directions before the application is made. **NLJ**

Stephanie Tozer & **Toby Boncey** are barristers at Falcon Chambers (*www.falcon-chambers.com*). They have both contributed to *The Electronic Communications Code and Property Law: Practice and Procedure*, available for pre-order via *bit.ly/2N5Z8qs*.