EE v MacDonald:

The Latest in a Flurry of Code Cases

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1. Can an operator obtain code rights to pass over a third party's land in order to access a landlocked mast site in order to carry out works of construction? This was the question for the Scottish Lands Chamber in *EE v MacDonald.*

The Code

2. Under paragraph 3 of the Code, a menu of code rights is provided to operators, who can select from them *a la carte*. Those code rights are:

> *(a) to install electronic communications apparatus on, under or over the land,*
>
> *(b) to keep installed electronic communications apparatus which is on, under or over the land,*
>
> *(c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,*
>
> *(d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,*
>
> *(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,*
>
> *(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,*
>
> *(g) to connect to a power supply,*

(h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or

(i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus.

3. Code rights (d) – (f), the "*or elsewhere"* rights, expressly contemplate that third party land might be used in connection with other land which is hosting apparatus. However nowhere in (d) – (f) does it say in terms that third party land can be used solely for access purposes. The word "access" is used in (h). It is not used in connection with any of the other code rights however, though it is clearly implicit in relation to all of the activities that the code rights authorise, as each of them requires access in order to be effective.

4. That is supported by paragraph 13 of the Code, which provides (under the heading "Access to Land") that:

(1) This paragraph applies to an operator by whom any of the following rights is exercisable in relation to land—

(a) a code right within paragraph (a) to (g) or (i) of paragraph 3;
(b) a right under Part 8 (street works rights);
(c) a right under Part 9 (tidal water rights);
(d) a right under paragraph 74 (power to fly lines).

(2) The operator may not exercise the right so as to interfere with or obstruct any means of access to or from any other land unless, in accordance with this code, the occupier of the other land has conferred or is otherwise bound by a code right within paragraph (h) of paragraph 3.

(3) A reference in this code to a means of access to or from land includes a means of access to or from land that is provided for use in emergencies.

(4) This paragraph does not require a person to whom sub-paragraph (5) applies to agree to the exercise of any code right on land other than the land mentioned in that sub-paragraph.

(5) This sub-paragraph applies to a person who is the occupier of, or owns an interest in, land which is—

(a) a street in England and Wales or Northern Ireland,
(b) a road in Scotland, or

(c) tidal water or lands within the meaning of Part 9 of this code.

5. But can an operator access land not in order to do anything on it other than to pass over it to get materials for the construction of a mast site onto adjacent property? Before we get to that question, it is worth noting two other points on which we have a reasoned opinion from the Lands Tribunal.

Two Useful Points From MacDonald

6. Two points that were in issue before the Lands Tribunal were: whether the notices seeking paragraph 26 rights were valid because they did not specify a maximum term length, and whether the "six month rule" applied to the access right sought.

7. As to the "term length" point, Mr MacDonald argued that in failing to specify the period of the interim rights sought, the notice offended paragraph 11 of the Code (under which a code agreement is required to state a term length in order to be a valid code agreement) and paragraph 23(7) (under which the same rule is applied to imposed "agreements"). The Lands Tribunal however took the view that these conditions attached only to the agreement once entered into or imposed. The Tribunal did not take the view that this was a validity requirement for the notice itself, as required by paragraphs 20 or 26. This seems to be in line with the pragmatic approach taken by the Upper Tribunal (Lands Chamber) in England and Wales: see e.g. *Cornerstone Telecommunications Infrastructure Ltd v Keast* [2019] UKUT 116 (LC). The Tribunals are showing every sign of not being interested in the Code becoming encrusted with technicalities as to notices that have bedevilled and frustrated other areas of law.

8. On the "six month rule", regulation 3 of the the Electronic and Wireless Telegraphy Regulations 2011 states that:

> (1) This regulation applies where –
> (a) a person authorised to provide public electronic communications networks applies to a competent authority for the granting of rights to install facilities on, over or under public or private property for the purposes of such a network,
> (b) a person authorised to provide electronic communications networks other than to the public applies to a competent authority for the granting of rights to

> install facilities on, over or under public property for the purposes of such a network, or
> (c) a person applies to OFCOM for a direction applying the electronic communications code in the person's case.
> (2) Except in cases of expropriation, the competent authority must make its decision within 6 months of receiving the completed application.

9. The Upper Tribunal in England and Wales takes the view that this provision is engaged when rights are sought to install apparatus for the first time. It is probably also engaged when additional installation rights are sought. It is probably not engaged when all that is sought is to maintain the physical *status quo,* albeit that a new agreement is sought to preserve that position. Regulation 3 applies to the Upper Tribunal by reason of paragraph 97 of the Code.

10. In *MacDonald,* the Lands Tribunal said that given that the Regulations were applied to disputes under the Code, the fact that the word "facilities" was used in the Regulations was "neither here nor there". It applied to apparatus, which was the same thing as facilities. The term "facilities", it should be noted, is derived from the underlying European legislation, and has simply been replicated into the Regulations (see Article 2(e) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("Framework Directive"); on the obligation to decide matters quickly see Article 11). The Lands Tribunal is, it is suggested, correct in the approach it took in that regard. The Lands Tribunal also noted that the time limit was inapplicable where there was "expropriation", but the Tribunal noted that the nature of the application was not expropriatory. The Lands Tribunal derived additional comfort from the decision of the Upper Tribunal in *EE v London Borough of Islington* [2018] UKUT 361 (LC) to the same effect.

The Main Point in MacDonald

11. The main point in *MacDonald* was whether the right sought could be claimed at all. It is not an express "*or elsewhere*" right to pass over land to get to a cell site to carry out works. So how can it be claimed?

12. The site provider argued (as had been argued in *Keast* and in *Cornerstone Telecommunications Infrastructure Limited v The University of London* at first instance [2018] UKUT 356 (LC); upheld on appeal [2019] EWCA Civ 2075) that the Tribunal should have one eye to the law of compulsory purchase and the well-known case of *R (Sainsbury's) v Wolverhampton City Council* [2011] 1 AC 437, which is to the effect that statutes that affect private property rights have to be construed strictly, a principle that find expression in the Code under paragraph 23, which directs the Tribunal to make provision to minimise damage to the site provider.

13. Although the *Wolverhampton* principle is acknowledged by the cases, the approach taken has been to construe the words of the Code so as to give effect to its overt purpose.

14. Lewison LJ described the background to the Code in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755:

> *"[2] Until the enactment of the Code, an operator of electronic communications equipment was entitled to acquire rights under Schedule 2 to the Telecommunications Act 1984. There was wide dissatisfaction with that code for a number of reasons. First, it was complex and extremely difficult to understand. Second, it was outdated. Third, there was evidence of concern that it was making the rollout of electronic communications equipment more difficult. These three features were noted by the Law Commission in its report (The Electronic Communications Code Law Com Report 336 paras 1.9 to 1.11). Both in its consultation paper and in its final report the Law Commission took the view that reform could not be achieved simply by amendment. Instead, it took the view that:*
> *"... the advantages of this review will only be felt if the revised Code is drafted from a "clean sheet of paper"; there is no point in merely amending the 2003 Code."*
>
> *[3] It was part of the government's strategy to achieve widespread coverage of the country by imposing obligations on operators by way of licence conditions. The government also intended to reform the electronic communications code to help operators to extend their networks, to make mast-sharing easier and infrastructure deployment and maintenance cheaper. Following the Law Commission's report, the code now in force was introduced by the Digital Economy Act 2017, which inserted section 106 and Schedule 3A to the Communications Act 2003."*

15. The Court of Appeal agreed with that in *University of London*, saying at paragraph [8]:

> *"One of the avowed purposes of the Code was to reduce the price payable by operators for the acquisition of code rights. That was done by requiring the consideration for any such rights to be assessed in a "no network" world. Landowners stand to receive much less for the conferring of rights under the Code. They therefore prefer to operate outside the Code where they can. That is the commercial consideration underlying this appeal."*

16. The Court of Appeal (as the Upper Tribunal was below) is therefore astute to the fact that arguments that seek to take essential operations of operators outside the Code are likely to be motivated by commercial considerations, that is, to avoid paragraph 24 consideration levels.

17. The general thread running though the cases has therefore been to apply the policy of the Code, once discerned, and to construe it in order to give effect to, rather than frustrate, that policy. That is not to say that it has been one-way traffic in the cases, of course; rather, it is a question of discerning the limits of what that policy requires.

18. With those sorts of considerations in mind, the Lands Tribunal in *MacDonald* turned to paragraph 3(d) of the Code, and considered whether the act of transportation of apparatus across land to bring it to other land fell within that code right. In *Univeristy of London* the Court of Appeal had of course accepted that this code right was apt to embrace access to a site for a multi-skilled visit, a multi-disciplinary site survey, even though it was not referred to in express terms.

19. The Lands Tribunal said:

> *33. It is surprising that the code rights do not include an express right to take access over land in order to install telecommunications apparatus on other land. In the absence of such a right, this case turns on whether code right 3(d) can and should be interpreted as capable of giving such a right. The para 3(d) right is one to carry out "any works" on the land in respect of which the application for code rights is made in connection with the installation of electronic telecommunications apparatus on, under or over that land or elsewhere.*
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> *34. As has been recorded above, the Court of Appeal in England, in the University of London case considered that the words "in connection with" encompassed something wider than the work of installation itself. The transportation of equipment and of the apparatus itself to the installation site is […] clearly work "in connection" with the installation of the apparatus: it is necessary for that purpose. That being so, the question becomes whether the*

fact that the land over which access is to be taken is in other ownership makes any difference.

20. Did it make a difference? The Lands Tribunal noted that where all of the land was in the same title, code right 3(a) would be deployed to obtain a bundle of rights including an access right to effect the installation (and thereafter). It was only because of the division of title that access needed to be considered in isolation under 3(d). The Lands Tribunal noted that access was obviously necessary to give code rights effect.

21. The Lands Tribunal was persuaded that code right 3(d) could be used to effect access, for two reasons:

    a. <u>The Code should be approached purposively as a matter if construction</u>: At paragraph [36] the Lands Tribunal said:

> "*[There is a] need to give a purposeful interpretation to the Code. It should be interpreted in a way which makes it work. That stems from the undisputed purpose of the code, which is the improvement of electronic communications throughout the country (see para 21(4) of the Code and 47 of the Court of Appeal's judgment in the University of London case). To uphold [the Site Provider's] challenge would be to thwart that purpose*."

    b. <u>The Code should be interpreted to avoid absurdity</u>: such consequences should be avoided (see at paragraph [37]):

> *"[i]t would lead to the absurd consequences which [the operator] described. It would mean there was a right to take access to inspect apparatus on other land but no right to take access to install it. It would mean that operators would could get a code right to create an access over the land but not a right to use an existing access. It would mean that they would be incentivised (indeed compelled) to carry out unnecessary work to a perfectly adequate access route just so as to be able to get a code right to use it. And it would give third party owners a power of ransom over the development. On that last point we endorse entirely what was said by the Deputy President of the Upper Tribunal in the University of London case (at para [77] of the UT's decision), about operators not having to negotiate access rights of entry outside the Code and being held to ransom as a result when all the while the purpose was to allow them to install equipment for a consideration which has to leave out of account the fact that the rights are being acquired for the purpose of an electronic communications network (para 24(3)(a)). There is such*

> *a fundamental antithesis between the purpose of the Code and such a ransom position as makes [the Site Provider's] interpretation quite untenable.*"

22. It is well-established that the literal meaning of a statute should not be applied if it leads to absurd results. Lord Donovan stated in *Mangin v IR Commr* [1971] AC 739 (Privy Council) at p. 746:

> *"[…] the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."*

23. In that regard, the argument of Mr MacDonald had the same structural difficulty as the argument of the University of London: once it is accepted that invasive inspections amount to "works", and that the making up of a physical right of way is also "works", why is it not acceptable for an operator to seek lesser, non-invasive rights? It cannot be the policy of Parliament that an operator must be compelled to undertake wasteful works detrimental to the site provider as a device purely for triggering jurisdiction. To put it another way, the greater must embrace the lesser.

24. The emerging code jurisprudence is therefore one that seeks to avoid ransom, and to give effect to the policy behind the Code. We are beginning to see an emerging consensus in the cases. How far that goes in the future, remains to be seen.