Getting telecoms apparatus moved to facilitate access for development - neighbouring landowners' rights

Evolution (Shinfield) LLP v BT [2019] UKUT 127 (LC)

This is one of a number of recent decisions of the Upper Tribunal, Lands Chamber, on the interpretation and application of the new Electronic Communications Code ("the Code"). It specifically concerns the impact of the new Code on apparatus already existing before it came into force. Its effect is that neighbouring landowners who want such apparatus moved to facilitate new access to their land, for development, will have to rely on their rights under paragraph 20 of the Old Code, retained under the transitional provisions, and will therefore ordinarily still be responsible for the operator's expenses, which are usually considerable. However, the case will also have potential implications both for the ability of operators to interfere with rights of access in the future, and the ability of neighbouring landowners to resist such interference.

Background

In 2011 BT installed some electronic communications apparatus on the edge of a footway near a village on the southern fringe of Reading. The apparatus comprised fibre optic cables housed in a cabinet, and associated ducts, cabling and joint boxes running beneath the footway. BT had installed this apparatus pursuant to street works rights. The apparatus did not impede access over the footpath, or affect the nearby roundabout.

In 2012 planning permission was granted for the development of a large site immediately to the west of the footpath and roundabout. Access to the development site was to be obtained over a new exit to be constructed over the footway. Implementation of the permission would require the relocation of the apparatus.

The claimants were a consortium of developers, who acquired a development site with the benefit of the planning permission. They made an application, under paragraph 40(6) of the Code, for an order under paragraph 44 requiring BT to remove its apparatus. This application was made pursuant to paragraph 38 of the Code, which gives neighbouring land have the right to require removal of electronic communications apparatus, provided certain conditions are satisfied, the first of which is that the apparatus interferes with or obstructs a means of access to or from the neighbouring land.

Before 28 December 2017 the claimant would have been entitled to seek an order for the removal of the apparatus pursuant to paragraph 20 of the old code, but the making of such an order would normally have required it to reimburse the operator for the costs of carrying out the order. The transitional provisions applying to the new Code preserve that old code right.

Nevertheless, the claimants sought an order pursuant to paragraph 38 of the new Code in the hope that in that way they would be able to avoid having to foot the bill for the relocation, which BT said would be almost £300,000. The question of quantum did not arise on the application, just the question of principle as to who should pay, which turned upon whether or not the claimant's interpretation of paragraph 38 was correct.

The Decision

The claimant argued that "a means of access" within the meaning of the first condition in paragraph 38 of the Code was not confined to an existing access which was in use when the apparatus was installed. On the Claimant's case, "means of" extended the concept "access" to a route which might be used at some point, and paragraph 38 so did not require there to be an existing access in order for it to apply.

The claimant contrasted paragraph 38 of the Code with paragraph 13, which provides that an operator may not exercise a code 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". The reference to

paragraph (h) of paragraph 3 is to the right “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)”. The claimant argued that, in contrast to paragraph 38, this was a clear reference to existing access arrangements.

The tribunal rejected the claimant’s argument, as a matter of construction, explaining that the reference in paragraph 38(2) of the Code to apparatus which “interferes with or obstructs a means of access to or from neighbouring land” struck the tribunal as referring to an existing means of access, rather than something potential.

The tribunal rejected the claimant’s purported contrast between paragraphs 13 and 38 of the Code, holding that they were intended to operate consistently with one another. The tribunal was much more impressed by the contrast between paragraphs 38 and 39 of the Code. Paragraph 39 is the one which contains a procedure by which a landowner or occupier can find out whether apparatus is on land pursuant to a Code right. In particular, it allows an owner or occupier of neighbouring land to require an operator to disclose whether the operator owns apparatus “that forms (or, but for the apparatus, would form) a means of access to the neighbouring land”. The tribunal said that this language was much more suggestive of a potential access than the language of paragraph 38, and that the contrast between paragraphs 38(2) and 39(2) was striking.

The tribunal also rejected the claimant’s construction of paragraph 38 as a matter of principle. If the claimant were right then it would contradict the general principles that a landowner is not liable to a neighbour for the consequences of the reasonable use of his own property, and that one of two neighbouring owners cannot insist on the other using that neighbouring land in such a way as to facilitate the development of his own land.

Also, the claimant’s interpretation would have create a parallel regime, inconsistent with the continuing application of paragraph 20 of the old Code to old apparatus.

The claimant’s alternative case, based upon alleged interference with a then-existing domestic accessway, failed on the facts, and is not of any general interest.

Greville Healey