SOME THINGS YOU *MIGHT* NOT KNOW ABOUT THE ELECTRONIC COMMUNICATIONS CODE, BUT WERE TOO BUSY TO ASK

A Talk To Dickinson Dees
Thursday, 15 July 2010

INTRODUCTION

1. The Electronic Communications Code ("the Code") appears in Schedule 2 to the Telecommunications Act 1984. It is a free-standing Code which gives a peculiar form of security of tenure to "operators", that is, licensed providers of electronic communications services. Operators attain this status by means of a direction made under section 106 of the Communications Act 2003.[1] They must exercise their rights under the Code in compliance with the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2553 of 2003).[2] There are number of problems facing anyone trying to apply or advise on the Code.

2. The first problem is that it operates completely separately from, and in addition to, other forms of statutory security of tenure. This causes headaches, as we will see below. The second problem is that it is badly drafted. In GEO Networks v Bridgewater Canal Company [2010] EWHC 548 (Ch), Lewison J had the following to say about it (at paragraph [7]):

> The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says that the code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as "the electronic communications code" in "this Chapter", the amendments made by the 2003 Act did not include changing the title to Schedule 2,

[1] OFCOM maintain a list of operators for these purposes, at http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/register-persons-power
[2] As amended by further Regulations, SI 584 of 2009.

so that in Schedule 2 itself it is still called "The Telecommunications Code". I have simply called it the Code.

3. To make things worse, thirdly, there are next to no cases which deal with the Code, and there is little of any use in Hansard. Finally, and fourthly, there is little literature about the Code.

4. The main case which considers the Code is now the Bridgewater Canal case,[3] but even that does not give many of the answers that practitioners need. It does, however, give a good synopsis of the overall structure of the Code. In short, the Code provides for what can be called a "general regime" (§§2 – 7 and 20 – 21) for regulating rights of operators against ordinary landowners. We will look at the general regime later on. There are also parallel "special regimes" for particular kinds of landowners, which are in §§9 – 12 (which relate to street works, flying lines, tidal waters and linear obstacles respectively. The Bridgewater Case was about §12). The special regimes are excluded from the general regime (see §2(9)). As the special regimes seem to arise only comparatively rarely, we will focus on the general regime in this paper.

5. As a matter of general interest, the only other decision I know of which deals with the Code is Petursson v Hutchison 3G [2005] EWHC 920 (TCC). It deals with §17 (objections to overhead apparatus). The Claimants formerly lived and worked in premises next to a pub called the "Little Sauce Factory" (in Worcester), and 3G had some antennae on the roof. Although they had moved away from the pub by the date of trial, they still wanted the apparatus removed. Not a promising start. Having failed to resist the planning application to stop the apparatus being installed (on grounds of health), when it became operational they complained of health problems, which were reportedly many and varied (see paragraph [17] of the Judgment). The Claimants also alleged that their cocker spaniel, Floppy, suffered ill-effects, including loss of appetite, waking in the middle of the night, howling, going into hibernation mode and avoiding certain rooms in the house. They kept a detailed diary in Danish. Some of them took to wearing foil hats around the house (at [44]). Regrettably, the Claimants' disclosure revealed that recorded symptoms

[3] Permission to appeal to the Court of Appeal has been granted.

had started before the apparatus was actually switched on. The Judge found that, in the circumstances, while the Claimants symptoms were genuinely experienced, they were (absent proper medical evidence) psychosomatic. At any rate, the Claimants had no standing under the Code as they no longer lived there. The Claim was dismissed.

THE GENERAL REGIME

6. The general regime governs the rights of operators to get onto another's land in the first place, and sets out the rights which they have once they are on there. In short, operators enjoy a great deal of protection, and landowners and occupiers who are after some income from a mast must be made aware of the pitfalls. I will focus on §§2 and 5 in what follows, though §§3 (agreements for obstructing access) and 4 (exercise of rights and compensation) should not be overlooked. §27(2) provides that the Code shall be "without prejudice to any rights or liabilities arising under any agreement to which the operator is party", save in respect of §§8(5) and 21. There is no other provision for contracting out of those paragraphs; although sometimes it is said that the strictures of the Code can be circumvented by obtaining a consensual possession order *in advance* of entering into the written agreement, it is rather difficult to see how this would work in light of the rights of operators to stay on land even against the wishes of the landowner: see §5 (discussed below).

VOLUNTARY AND INVOLUNTARY RIGHTS FOR OPERATORS

7. Under the Code, an operator can get onto land in one of two ways: voluntarily, and compulsorily. The "voluntary" route is under §2. The "agreement in writing" of an occupier of land for the time being (not, note, the freehold or leasehold owner) is required for an operator to exercise a right to carry out works of installation, maintenance, adjustment, repair or alteration of electronic communications equipment, to keep that equipment installed, and to enter the land to inspect the equipment.

8. The "involuntary" route is as set out in §5. Under this provision (which allows for dispensation with any agreement required under §§2 or 3), the operator can, upon service of a notice, effectively override the need for an agreement to be entered into. If the notice

expires (after 28 days) without an agreement being entered into, then the operator can go to Court for his order. The Court will grant the right required provided that (a) it can be compensated in money or (b) if not, if the Code "human right" of persons to access an electronic communications network outweighs the disbenefit to the affected party. The Court can determine the best way to exercise that right. It can fix terms under §7, including the right for the payment of consideration and compensation to the affected party.

9. The cases establish that the measure of consideration does not include a ransom payment: Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd [2002] EWCA Civ 720, endorsing Mercury Communications Ltd v London and Indian Dock Investments Ltd (1993) 69 P&CR 135 (a decision of HHJ Hague QC). Both decisions were referred to with approval in the Bridgewater Canal case.[4]

THE "GETTING POSSESSION" PROBLEM

10. Under the Code, there is a form of security of tenure. This is contained in two provisions, §§20 and 21.

11. §20 effectively allows a person with an interest in land to require the alteration of equipment. It is important to note that there is no requirement at all that the person requiring that alteration has any right to require it under the agreement with the operator, or that the agreement has already come to an end.

12. What has this got to do with taking possession? The answer is that "alteration" is defined as including "removal": see §1(2). The right can only be exercised if the person seeking removal plans an "improvement" to the land in question, which is defined in §20(9) as including a "development and change of use". A notice procedure is prescribed. If the person seeking removal is in receipt of a counter-notice from the operator, then the alteration is only to be made if the Court makes an order to that effect. The Court will

[4] It is expected that the Supreme Court will have something to say on this issue in the pending appeal in Bocardo SA v Star Energy (decision expected soon).

only do so if the alteration is necessary and if it will not substantially interfere with the service provision by the occupier (§20(4)). The Court must be satisfied that the operator is able to make the alteration (§20(5)).

13. §20 must be approached with some caution, however. Obviously, there is the question of proving a development which requires removal of the apparatus. However, it can also be expensive: an operator can have his expenses covered: §20(8). What amounts are involved in this appears to fluctuate quite wildly from case to case. Finally, and oddly, there is a gap in the Code. Assume that an operator is occupying a site under an agreement for a term of seven years. Assume that, mid-term, the occupier of the site wishes to redevelop, and serves a notice under §20. Assume that the occupier succeeds in establishing that total removal is necessary to allow the development to go ahead, and that the apparatus is removed from the site. What happens to the underlying right? Is it also brought to an end automatically? Is the agreement thereby repudiated or frustrated?[5] Does the operator remain on the hook contractually for payment of fees/rent under the agreement, even though he is no longer on-site? Does he retain the right to go back onto the site immediately if his right still subsists? Furthermore, it will be recalled that the so-called "contracting out" provision of the Code, §27, states that the Code is "without prejudice" to the rights and liabilities arising under any agreement, except for paragraphs of the Code which do not include §20. However, §20 operates "notwithstanding the terms of any agreement binding on" the person seeking removal. Does this mean that a §20 notice will, or will not, override the requirements of a contractual redevelopment break clause?

14. Then we have §21. This allows a person "who is for the time being entitled to require the removal of the operator's electronic communications apparatus" to serve a notice asking them to leave. The counter-notice should state whether the operator

[5] This is how some explain the operation of the right to manage under Part II of the Commonhold and Leasehold Reform Act 2002 as it applies to contracts entered into before the RTM was exercised. Frustration is, however, unarguable if the alleged frustrating event is reasonable foreseeable. If the underlying written agreement is a lease, then repudiation and frustration will be more difficult to argue: see National Carriers v Panalpina [1981] AC 675; Reichmann v Beveridge [2006] EWCA Civ 1659 (not actually about repudiation, but casting serious doubt on its availability in lease cases).

considers the giver of the notice to have been entitled to give it, and also what steps the operator proposes to take to secure its rights against the giver of the notice.[6] If the operator gives a counter-notice, then removal is impermissible without a Court order: §21(6). The Court has to be satisfied that the operator is not serious about securing rights and has not been dragging its feet, or that the proposed steps are futile. The mere fact that a notice can be served under §20 does not mean that there is an entitlement to serve under §21: see §21(12).

15. The Code, then, contains some reasonably clear notice provisions, though we do not know how a Court will view them in practice. Therefore, if one has a genuine licence or a lease which has been contracted out of the Landlord and Tenant Act 1954, Part II, then "all" one has to do is activate either of those provisions. The response of the operator will almost certainly be to serve a counter-notice and fight tooth and nail, but no operator has, to date, taken the matter to any reported hearing.

16. The real problem – and the way in which operators tend to kick cases into the long grass (often their primary commercial goal) – comes with the interface between the Code and the 1954 Act. The two simply do not fit together. This occurs when the parties have entered into a written agreement whereby the operator is granted a lease. In those circumstances, it is considered that the operator can argue that it is a business tenant occupying, via its apparatus, for the purposes of a business. While there is no case on telecoms operators, in Northern Electric plc v Addison [1997] 2 EGLR 111, the proposition that an electricity sub-station came within the Act appears to have been common ground between the parties, and was not questioned either by the Judge at first instance, or by the Court of Appeal.

17. Of course, the problem can be dealt with by contracting-out, however experience tells us that landlords do not do this nearly as often as they should, either because they feel they do not have the bargaining position to negotiate this, or because (more likely) they see that the agreement is called a "site access agreement" or similar, and do not

[6] For example by seeking compulsory rights under §5.

consider that it might be a lease in substance despite its labelling, and fall within the 1954 Act.[7] At that point we are in the realm of the lease/licence distinction familiar to all: see Street v Mountford [1985] AC 409. It should be added that, relatively recently, the Court of Appeal (in Clear Channel v Manchester CC [2006] 1 EGLR 27) have indicated that in the commercial context, regard should be had to the label which two well advised commercial parties negotiating at arms' length decided to attach to their agreement, and that the Court should not be quick to find that a party who agreed a licence can, later on, claim that they in fact have a lease. I will not go into that issue here; the essential characteristics of a lease, and the formalities necessary to create a valid lease or agreement to lease, are a separate topic.

18. Let us focus on the problems created by the conflict between the Code and the 1954 Act. Under the 1954 Act, tenancies are continued beyond their contractual term under section 24 until (for example) a valid landlord's notice is served seeking possession and citing a recognised ground under section 30. For practical purposes, the grounds which are encountered tend to be grounds (f) (development) or (g) (own occupation). In order to succeed, the landlord must prove his intention at the time of the hearing,[8] and must intend to take occupation or redevelop when the tenancy comes to an end, or at a reasonable time thereafter.[9]

19. The problem is usually stated as follows: under §21, no notice for removal can be served until the person giving the notice is "entitled" to do so. He can, it is sometimes said, only be entitled if there is no further right which is legally binding upon him. For reasons stated below, that may be too narrow and unworkable a reading of §21.[10]

20. However, taking that argument as a starting point, one can easily see how the problem arises. In our posited case there *is* a legally binding, 1954 Act protected, lease in

[7] It must not be forgotten that an agreement conferring exclusive possession for an uncertain term can nonetheless be a lease if it is possible to infer a periodic tenancy from payments made: see Prudential Insurance Co v London Residuary Body [1992] 2 AC 288.
[8] Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20.
[9] And see also the saving section, 31(2), relevant to ground (f) only.
[10] Though it is not without support in the Code: see §21(9), on deemed lawfulness of use.

place. The landlord therefore has to determine it in order to invoke his Code rights. He can only determine the lease on one of the statutory grounds (unless one of the preserved common law methods applies to him). If he serves a section 25 notice, then he has to wait for that to expire. If the tenant makes an application to Court, then the tenancy is continued until the application is finally disposed of (s 64). This means that, until the date of final disposal, there is still a legally binding right imposed upon him which prevents him from serving a §21 notice. This means that, at the date of trial of the 1954 Act issue, the landlord will not be able to show, and will never be able to show, that he can go into occupation, or can redevelop, because there is a subsisting Code-protected occupier on-site. He is snookered. The legislation forms a perfect circle.

21. The only way in which this circle could be broken is by the Court to allow a "reasonable time", as it does under ground (g) (see Hilton Jewellers Ltd v Hilton International Hotels Ltd [1990] 1 EGLR 112), and for that reasonable time to allow steps to be taken under the Code. However, this is unsatisfactory. The Code can take a long time to operate. There is no certainty at all that the landlord will succeed under the Code, as the operator might still be able to persuade a Court to make an order under §5, for the involuntary, that is to say compulsory, acquisition of rights to remain. However, even leaving the *legal* difficulties to one side, a landlord also has to be careful factually when serving a section 25 notice. If, for example, under ground (f) all the landlord wished to do is get the operator's apparatus off-site (as opposed to, say, demolishing and redeveloping to a greater height a building on-site on which the apparatus is located), then that might not satisfy (f) in any event.

22. Procedurally, it is therefore much more desirable for the Court to deal with the Code and the 1954 Act together, however it is difficult to achieve this without doing serious violence to the language of the Code. In fact, it would be most satisfactory (but not perfect) for the Court to determine the position under the Code first, and then deal with the questions arising under the 1954 Act. In order to do that, the Court would need to be persuaded that a §21 notice could be served despite there being a subsisting, statutorily continued tenancy.

23. There is in my view a serious argument that §21 would (and that a Court would bend over backwards to find that it should) allow this. It is not true that a person is "entitled" under §21 only when there is no subsisting binding right. Rather, a person is "entitled" in a wider sense than that. In §21 it is stated that such entitlement can also arise, not just where there is no further right which is binding on him, *but also* (and this is sometimes overlooked) if he is able to do this "under any enactment" or for "any other reason". If a landlord is entitled to serve a section 25 notice under the 1954 Act, which has the effect of eventually requiring removal if successful, then why is this not sufficient for him to be able also to serve a notice under §21? In this way, the circle can be squared. However, this argument remains problematic, in that a section 25 notice is not *per se* a right to require removal, but a right to have the question of whether the tenant's 1954 Act continuation rights should be brought to an end determined. One still has the strain the language of the Code to achieve a "fit" with the 1954 Act. However, the other argument has the effect of nullifying key provisions of the 1954 Act as they relate to telecoms leases, which cannot have been Parliament's intention when passing the Code.

24. Since we are talking of going round in circles, it is probably appropriate to re-visit the quote from Lewison J at the start of this talk: the Code " must rank as one of the least coherent and thought-through pieces of legislation on the statute book". This uncertainty is, on the face of it, of more benefit to operators than to landowners. Operators can use the Code to bamboozle landowners with the dizzying complexity of the Code's provisions to buy more time to negotiate alternative sites, or to scare the landowner off entirely. Those advising landowners only have one real option in light of this: to suck the operator into reasonably swift litigation under the Code and (if relevant) the 1954 Act.

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[11] I am grateful to Wayne Clark for his helpful comments on an earlier draft.