Falcon Chambers

Telecoms
NEWSLETTER

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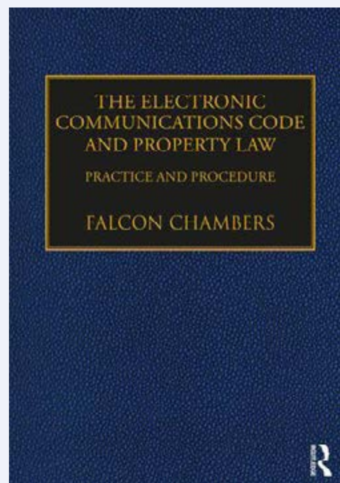
In this Newsletter – our first since publication of our book, and one of a number which we hope to issue at regular intervals to examine developments in the life of the New Code, we consider a number of subjects, which have exercised the industry and their advisers over the last few months, or which may assume greater importance over the course of this Year, and bring you up-to-date with the latest cases and developments.

One year into the operation of the New Code – the Electronic Communications Code 2017 – it is right to mark its first birthday with a searching look at how well the infant has done. Is it in rude good health, or a sickly child? What teething problems has it encountered? Has it tried to run before it can walk, or is it still crawling?

There is much to say, and all those involved in the burgeoning telecommunications industry will wish both to listen and to add their own experiences (which we in turn would be glad to read). Here then is our round-up of the issues that have developed over the course of 2019, some of which were pre-figured in our Book and some of which were not. We have linked the new materials in to the text of the Book where possible.



THE ELECTRONIC COMMUNICATIONS CODE AND PROPERTY LAW: PRACTICE AND PROCEDURE 1ST EDITION

1. The industry/landowner standoff

In a press release on 11 May 2018, OFCOM said:

"The [new] Electronic Communications Code … is designed to facilitate the installation and maintenance of electronic communications networks."

Most of us would agree that this was the aspiration. Equally, however, during the course of the long gestation period leading to the new legislation, although the May 2016 Digital Economy Bill was broadly in line with the Law Commission's original proposals, it differed in at least one significant respect, in that for the first time the Government intended that the basis on which Code rights would be valued would change from the previous true market value approach to a new "no scheme" approach.

As the Deputy President remarked in his judgment in **CTIL** (see Section 2 below):

"In consideration for an agreement imposed by the Tribunal the operator is obliged to pay to the relevant person an amount representing the market value of their agreement to confer or be bound by the Code right (paragraph 24(1)). However, although that market value is to be assessed on a conventional willing buyer/willing seller basis, the assessment is subject to certain assumptions. The detailed effect of those assumptions will have to be considered by the Tribunal in an appropriate case, but it is immediately apparent that they adopt principles similar to those which apply in other forms of compulsory acquisition of land or rights over land in the public interest. In a foreword to the Departmental paper publishing the government's proposals for the Code it was said by the Minister of State, Mr Ed Vaizey, that the new regime would provide for a "no scheme" basis of valuation". The valuation provisions therefore require that it be assumed that the rights to be granted do not relate to the provision or use of an electronic communications network, and that the site provider has no monopoly of suitable sites. Commentators have suggested that, because of these assumptions, the consideration payable under the Code may be quite modest. This would be a significant change from the valuation criteria applied under the old Code in which the true market value of the rights conferred was payable."

Many commentators did indeed voice doubts as to the New Code's ability to encourage landowners to come forward with the sites that would accommodate the necessary facilities, given the changed compensation and consideration provisions in the New Code.

Three quotations, drawn from immediately before and shortly after the introduction of the New Code, make the point that this departure from the principles of valuation under the Old Code would indeed be likely to have a profound effect:

"Mobile operators are capitalising on the confusion surrounding the terms of the new Electronic Communications Code to demand substantial rent reductions." *Strutt & Parker, May 2017.*

"… from a landowner's perspective, the revised valuation procedure will in all likelihood have a detrimental impact on rental yields. This may in turn result in a reluctance to enter into telecoms leases, on the basis that they will offer a less attractive income stream. Operators may be forced to rely on statutory powers in order to coerce landlords to play ball. The inevitable litigation and associated fall out may end up being an unwelcome side-effect of the new regime." *Slater Heelis, June 2018.*

"Landlord push-back on Electronic Communications Code could slow 5G roll-out … Concerns are being raised that some landlords in the UK may refuse to install telecom masts for 5G, and this could slow its roll-out." *5G News, September 2018.*

This impasse was obviously a matter of grave concern, not merely to operators, but also to the Government, whose ambition that the UK should be a leading global economy is founded upon the provision of a world-class full-fibre network and 5G infrastructure.

The interested parties were not slow to seek a solution to this problem. On 7 August 2018, Government (represented by the Department for Digital, Culture, Media & Sport - DCMS), the telecoms industry (represented by Mobile UK - the trade association for the UK's mobile network operators - EE, O2, Three and Vodafone), the landowner community (represented by the Country Landowners Association - CLA) and the Royal Institution of Chartered Surveyors – RICS - came together for a round table meeting to address these concerns. The participants produced a Joint Statement on 22 August 2018, reaffirming commitments to the New Code and the OFCOM Code of Practice.

1. The industry/landowner standoff

continued

The Joint Statement[1] said:

"The reformed Electronic Communication Code (ECC) came into force in December 2017 with the aim of boosting coverage and connectivity across the UK, through a package of measures which Government expects to deliver significant cost reductions to the sector, while ensuring that landowners receive a fair payment for allowing their land to be used.

Since the new legislation was introduced, there have been problems with negotiations progressing. While some initial uncertainty is to be expected, Government, regulators, the telecoms sector, independent infrastructure providers and the landowner community, recognise the importance of all parties working collaboratively together, both during this transition period and moving forwards.

We are therefore coming together to reaffirm the commitments made to each other in Ofcom's Code of Practice, and to reiterate our support for the Government's ambition to be a leading global economy underpinned by world class full fibre network and 5G infrastructure. It is essential that parties engage professionally in open and constructive communications. The future needs of customers and the economy are too important for it to be otherwise."

The issue of the Joint Statement was accompanied by enthusiastic endorsements from its participants. Thus, Margot James MP, Minister for Digital, said:

"It's great to see MobileUK, the CLA and RICS committing to the Electronic Communications Code and backing our ambitions to improve connectivity and ensure Britain is fit for the future. From improving our existing networks to using the next generation of technology, collaboration is vital when it comes to building our digital infrastructure."

Hamish MacLeod, Director Mobile UK, said:

"Achieving the Government's ambition of becoming a leading digital economy relies on boosting coverage and capacity, which can only be achieved if landowners work together with the telecoms sector as per the reformed Electronic Communications Code and the OFCOM Code of Practice. We welcome the publication of the statement jointly with the DCMS, RICS, and the CLA reaffirming these commitments."

But have these warm words translated into effective action over the months since? We look at the positions of the main stakeholders: the parties themselves; DCMS, OFCOM and the RICS.

THE POSITION OF THE PARTIES

First, we should make it clear that a number of operators have been prepared to arrive at compromises with landowners that allow access on terms that presumably reflect give and take on both sides, and have quietly been progressing with the installation of their apparatus.

Apart from that, on 25 September 2018, an announcement was made of a Memorandum of Understanding and wayleave agreement between Openreach, the CLA and NFU, aimed at making it easier for Openreach to reach agreement with landowners over both locations and payment rates for cables and other electronic communications apparatus, and in turn allowing the extension of Openreach's superfast broadband ISP network(s) into rural areas.

Commenting on the agreement, Mark Bridgeman, CLA Deputy President, said:

"Landowners are a committed and crucial part of the solution to alleviate the rural-urban digital divide. It has taken almost 18 months of hard negotiation but we have secured an agreement that satisfies the Government, the infrastructure providers and our members.

We have shown, through constructive dialogue across the industry, that rollout is not driven by price alone. A proportionate increase in the annual wayleave payment, coupled with clear documentation and an effective Memorandum of Understanding, will hasten the rollout of fixed line broadband beyond what is achievable by the revised Electronic Communications Code alone.

A robust and effective national framework has been created which brings much needed clarity and stability to the market while at the same time injecting more money into the rural economy through accelerated deployment."

[1] www.mobileuk.org/joint-statement-between-dcms-rics-cla-and-mobile-uk.html.

1. The industry/landowner standoff

continued

Stuart Roberts, NFU Vice President, added:

> "The NFU and CLA have worked closely together to provide the means to enable landowners to easily reach an agreement with Openreach, bringing much-needed, effective broadband to rural areas.
>
> Statistics from the NFU show that a considerable amount of farmers do not have access to superfast broadband and in an increasingly digital world, it is crucial that our digital communications are fit for purpose. This initiative marks another step forward to ensuring our members have all they need to establish and maintain productive, profitable and progressive farming businesses."

Kim Mears, Openreach's MD of Strategic Infrastructure, said:

> "We know that people in rural areas want fast, reliable broadband. They also want a fair deal when companies need to access their land or install equipment on it. That's why our new framework is great news for the countryside. It gives landowners certainty and clarity on our pricing and is endorsed by the CLA and NFU. The agreement will also help us speed up our rural build programme and drive the UK's digital growth.
>
> As Britain's leading digital infrastructure provider, we've invested more than £11 billion over the last decade to build a better, broader and faster network – and few countries in the world have such widespread superfast broadband coverage as we do here. But we know that some people are still waiting for decent broadband, and we're keen to help the Government and Ofcom finish the job. This is a great step towards achieving that."

According to more recent reports, the agreement deal involves securing a 5% increase in the wayleave payments from Openreach and a 4% increase from altnet ISPs, such as Gigaclear and Virgin Media. For example, Openreach now makes a one-off payment for a telegraph pole of £157.50 (up from £150), with the annual wayleave payment rising to £10.50.

Meanwhile alternative network providers will now be making one-off payments of £3.90 per metre for the installation of underground cabling and ducting, with an annual payment of £0.26p/metre. However, landowners that wish to charge more than has been agreed may now find it a lot harder to do so.

THE POSITION OF DCMS

For its part, the Government, through DCMS, has been active in investigating impediments to its ambition to ensure widespread digital connectivity. In paragraphs 1.1.3 to 1.1.5 of our Book, we mention the importance to the Government of ensuring such connectivity, and in particular, to achieve:

- eventual high speed broadband for everyone in the UK, regardless of where they live or work;
- 95% geographic UK coverage of mobile networks by 2022, leading to the 10Mbps+ Universal Service Obligation (USO) for broadband, which will focus on some of the most digitally isolated areas;
- 15 million premises to have access to Gigabit capable full Fibre-to-the-Premises (FTTP) by 2025;
- full FTTP infrastructure by 2033.

In broad terms, the aim is for fifth-generation (5G) mobile technology to be available in the majority of the UK by 2027, and for homes and businesses nationwide to have access to full-fibre broadband networks by 2033, aiming for 15m in place by 2025. The government says it is clear that a mix of full-fibre and 5G broadband networks is the long-term answer to ensuring that the speed, resilience and reliability demanded by consumers and businesses are all provided.

Steps taken by the Government include:

- On 23 July 2018, it published the Future Telecoms Infrastructure Review[2] in which it said it would work to identify and remove the barriers to deployment and create a legislative and regulatory environment that encourages investment, reduces costs and allows as many people as possible to receive high quality, reliable broadband. It confirmed its commitment to providing the UK with world-class digital connectivity that is gigabit-capable, reliable, secure and widely available across the UK - and to do so at pace. It referred to its target of making gigabit-capable networks available to 15 million premises by 2025, with nationwide coverage by 2033. Significantly, it added in paragraph 49:

> "We will be bringing forward new **primary legislation** to address issues with wayleaves and new build connectivity. We intend to deliver these changes in the next Parliamentary session. We are also publishing **best practice** for street works and wayleave issues, showcasing what has worked well in some parts of the country and encouraging local bodies to adopt progressive, pro investment practices."

[2] www.gov.uk/government/publications/future-telecoms-infrastructure-review.

1. The industry/landowner standoff

continued

- On 29 October 2018, the Government published a consultation[3] seeking responses on the following proposals:
  - Amending the Electronic Communications Code to place an obligation on landlords to facilitate the deployment of digital infrastructure when they receive a request from their tenants.
  - Enabling communications providers to use magistrates courts to gain entry to properties where a landlord fails to respond to requests for improved or new digital infrastructure.

The results of that consultation, which closed on 21 December 2018, are awaited.

THE POSITION OF OFCOM

OFCOM contributed at an early stage with its Code of Practice, which it published following a public consultation[4], and which we describe in Section 41.9 of our Book, and critique in Section 41.10. The Code has no guidance to offer on the question of consideration to be paid by operators to site providers.

OFCOM has taken its own action in response to the Government's decision to introduce the Universal Service Obligation, now that it is responsible for its implementation:

- In June 2018, OFCOM asked telecoms providers to come forward as prospective Universal Service Providers;
- In September 2018, it consulted on the regulations for designating Universal Service Providers.
- On 21 November 2018, in exercise of its powers under sections 66 and 403(7) of the Communications Act 2003, it made the Electronic Communications (Universal Service) (Broadband) Regulations 2018 (SI No. 2018/1231)[5], which came into force on 4 December 2018, and set out (a) the process by which OFCOM is to designate providers as Universal Service Providers – that is, the persons to whom broadband universal service conditions are to be applicable; and (b) the conditions[6] that should apply to them in delivering USO connections and services.
- On 5 December 2018, OFCOM published a consultation paper "Delivering the Broadband Universal Service: Proposals for designating providers and applying conditions"[6]. The consultation closes on 13 February 2019.
- OFCOM's proposal is that BT and KCOM will be designated as Universal Service Providers for the whole of the UK and the Hull areas respectively. Its minimum criteria required the providers to demonstrate: 1) that they can adequately finance the delivery of the service and maintain adequate operation of the service between deployment and any compensation; 2) that the proposed geographic coverage area covers more than 5,000 eligible premises and; 3) that the proposed technology would meet the technical specification set out in the legislation. If a consumer cannot access a decent, affordable broadband service, they may be eligible for the USO. A USO connection must be capable of delivering download speeds of at least 10Mbit/s and upload speeds of at least 1Mbit/s plus additional parameters designed to improve consumer experience and the reliability of connections. Universal Service Providers will have 30 days to determine whether a consumer is eligible for the USO. As part of this process, they will have to check that: the premises is a home or business; it has no access to existing decent, affordable broadband; it will not be covered by a public rollout scheme in the next 12 months; and the cost of a connection will not exceed £3,400, as set in the legislation. Universal Service Providers will have 12 months to deliver connections to eligible consumers. A consumer should receive their USO service no later than 12 months after they place their order, unless there are exceptional circumstances which would disrupt network build. USO customers should pay the same price as the rest of the UK and this should not be more than £45 a month. Universal Service Providers must offer connections and services on its own network at the same price regardless of whether the consumer is a USO customer or a non-USO customer. Although most services are already charged at less than £45 a month, we are proposing to set a maximum cap of £45 a month (incl. VAT) as a further affordability safeguard. USO customers should receive the same quality of service as the rest of the UK. A USO customer will be entitled to the same quality of service as customers connected through a commercial service. Universal Service Providers must report on performance and keep records. This is to demonstrate compliance with the conditions, and to allow any claim for funds to be properly audited and verified.

[3] www.gov.uk/government/consultations/ensuring-tenants-access-to-gigabit-capable-connections.
[4] bit.ly/2DvJeof.
[5] www.legislation.gov.uk/uksi/2018/1231/made
[6] www.ofcom.org.uk/__data/assets/pdf_file/0024/129408/Consultation-Delivering-the-Broadband-Universal-Service.pdf.

1. The industry/landowner standoff

continued

THE POSITION OF THE RICS

Sue Doane FRICS and Mark Talbot FRICS (both RICS Telecoms Forum Board Members) review the current position, including a useful analysis of the progress of the legislation and the opposing positions of the relevant parties, in an article in the RICS Land Journal in October/November 2018, "Ending the code deadlock". Encapsulating the current deadlock, they write, under the heading "Paralysis":

"As such, a new hypothetical scenario, the new valuation basis and the dearth of evidence of agreements transacted on the new basis appears to have led to a paralysis in activity. Understandably, representatives of all parties directly involved in negotiating electronic communication agreements want to ensure that such transactions correctly reflect the new code's rules and achieve a fair outcome in this respect.

However, the legal interpretations of paragraph 24 vary extensively in what is currently an absence of evidence that reflects the new code, and this has a direct impact on the potential valuation parameters. In turn, this has resulted in parties taking widely divergent positions, which are then exacerbating delays in reaching agreement thanks to a reluctance to set a market precedent."

The authors end by drawing attention to the need for guidance which would redress the current absence of any neutral professional advice on the valuation principles and best practice under the New Code. The RICS is currently drafting a Guidance Note **'SURVEYORS ADVISING IN RESPECT OF THE ELECTRONIC COMMUNICATIONS CODE'**, authored by Sue Doane and Mark Talbot FRICS, which we will review in full in a future Falcon Chambers Newsletter.

2. Access to land for inspection; interim rights

In paragraph 42.34 of our Book, we voiced the view that the New Code contained no express right of inspection of a prospective site, and that this, if correct, conferred a valuable advantage upon a landowner, who could then impose terms to suit it. In other words, one way in which it appeared that landowners could exert leverage against operators seeking sites was by refusing access for surveys, on the basis that there is no express code right for inspection. If that were right, then landowners would have an upper hand in negotiations.

The operators' recourse was to contend that access for inspection is an express or implied Code Right; and to seek an interim right of access under paragraph 26 of the New Code. Landowners contended in turn that there was no room for statutory implication; and that the drafting of the Communications Act 2003, Sched 4, para 6(1), specifically recognised that a survey should be authorised in some, but not all cases:

> **"A person nominated by a code operator, and duly authorised in writing by the Secretary of State, may at any reasonable time, enter upon and survey any land in England and Wales for the purpose of ascertaining whether the land will be suitable for use by the code operator for, or in connection with, the establishment or running of the operator's network."**

This drafting does not apply to land which is covered by buildings – para 6(2) - so how, landowners argued, can a more extensive right be implied given the presence of such an express provision in the very same Act?

So who was right?

Paragraph 3 of the New Code gives operators the rights:

(a) to install electronic communications apparatus [ECA],

(b) to keep installed [ECA],

(c) to inspect, maintain, adjust, alter, repair, upgrade or operate [ECA],

(d) to carry out any works on the land for or in connection with the installation of [ECA],

(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of [ECA],

(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any [ECA],

(g) to connect to a power supply,

(h) to interfere with or obstruct a means of access to or from 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 [ECA].

None of these Code Rights expressly confers a right just to inspect. The closest Code Rights are (a): to install; and (d): to carry out any works on the land for or in connection with the installation. But is a non-intrusive survey "a work"? Not according to paragraph 3.10 of the Law Commission's Report No. 336, which preceded the New Code:

> **"The focus of these rights is on physical works and the maintenance of electronic communications apparatus on land for the provision of the Code Operator's network."**

So if a survey requires no physical works – how can it be a Code Right?

The answer was said to lie in the principle that, in general terms, an express statutory power carries with it all of the implied ancillary powers that are needed in order to give effect to the express power: see *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473. If it is necessary for an operator to exercise a Code Right that it should be able first to ascertain the suitability of the site for that purpose, then it follows, according to this principle, that there must be an ancillary right to inspect. Moreover, if there is such a right, can it be imposed as an interim right under paragraph 26 of the New Code, in the absence of any application for a permanent Code Right under paragraph 20?

These competing arguments came before the Deputy President of the Upper Tribunal (Lands Chamber), Martin Rodger QC, on 3 October 2018 in *Cornerstone Telecommunications Infrastructure Limited v The University of London* [2018] UKUT 356 (LC). Counsel for the Claimant was Oliver Radley-Gardner (instructed by DAC Beachcroft LLP); Counsel for the Respondent was Wayne Clark (instructed by Fladgate LLP).

OLIVER RADLEY-GARDNER | WAYNE CLARK | MARTIN RODGER QC

2. Access to land for inspection; interim rights

continued

The Deputy Chamber President gave judgment on 30 October 2018.

FACTS:
The claimant, Cornerstone Telecommunications Infrastructure Ltd (CTIL), had recently lost a site on the roof of a building in Paddington which was to be demolished, and believed that a building in the vicinity belonging to the respondent ("the Building") was likely to be the most suitable venue to provide a new site for its electronic communications apparatus. The claimant wished to have access to the roof of the Building to carry out a survey and other non-intrusive investigations to establish whether the site was as suitable as its desk top assessments suggested. The respondent did not want electronic communications apparatus on its roof, and refused the claimant's requests for access. On 17 May 2018, the claimant's solicitors gave notice to the respondent under paragraph 26 of the New Code seeking interim Code rights. When no agreement was reached, the claimant issued a notice of reference inviting the Tribunal to impose an agreement for interim code rights exercisable for 28 days from the date of the agreement.

ISSUE:
Whether the Tribunal has power under the New Code to impose an agreement allowing access to a building for the purpose of determining whether it is a suitable site for the installation of electronic communications apparatus; and in particular:

(1) whether the Tribunal has jurisdiction to impose an agreement under paragraph 26 providing only for a right of access to undertake a survey of the roof of the Building. This required consideration of whether a right of access to undertake a survey is a Code right at all.

(2) whether the claimant is entitled to seek an interim Code right under paragraph 26 without at the same time seeking the same or any permanent Code right under paragraph 20.

(3) if the Tribunal has jurisdiction to impose an agreement as requested, whether the claimant had shown a good arguable case that the conditions in paragraph 21 were satisfied.

DECISION:

(1) The right conferred by paragraph 3(a) to install apparatus on over or under land must include a right to enter on the land and to carry out each step required to achieve the permitted installation. The fact that no mention is there made of "entry" or of any specific works (such as excavation or tunnelling) does not support the conclusion that no right of entry has been conferred or that works were not envisaged as being an essential part of the process of installation permitted by paragraph (a). The inclusion of a specific right, at paragraph (f), to enter land to inspect, maintain etc, apparatus already on that land does not make it any less clear that paragraph (a) was intended to include a right of entry to install. In the same way as a right of entry is clearly included in the right to install under paragraph 3(a), so must the taking of other necessary steps be included, since otherwise the grant of the right would be illusory. This does not involve implying additional rights, nor any departure from the presumption that private property rights will not be infringed without clear words, but is simply a matter of giving full effect to the language in which the right has been described. The right to "install" is intended to permit an operation involving a series of distinct steps and the single word is sufficient to connote, as a component of the right, each of those steps. No electronic communications apparatus could be installed without some preparatory work, including a "multi skilled visit", being undertaken. Accordingly, an agreement conferring the right to install equipment necessarily entitles an operator to undertake preparatory surveys required as a prelude to the installation itself. As a matter of ordinary meaning, such surveys, and a right of access to carry them out, are part of the right "to install" under paragraph 3(a), or, failing that, paragraph 3(d).

(2) The sense in which the word "interim" is used when referring to interim rights is explained in paragraph 26(2); the circumstances which will end the interim rights are not limited by reference to a determination or agreement under paragraph 20, they are expressed much more generally as the expiry of a specified period or the occurrence of a specified event.

2. Access to land for inspection; interim rights

continued

The fact that a notice complying with paragraph 20(2) must be served does not import a requirement that permanent rights must be sought in that notice, or in another served simultaneously. It is not right to regard the giving of a notice under paragraph 20 as a step which implies an intention to seek permanent rights. A notice under paragraph 20(2) is a precondition of any application for Code rights, whether permanent, temporary or interim; it is the mechanism for initiating the statutory procedure whatever rights are sought. The terms of the notice are not limited by paragraph 20(2) and need not seek permanent rights; they may include a proposal that the rights are to be on a temporary or interim basis and, in the latter case, will no doubt specify the event or period for which they are sought. For the same reason nothing of relevance to this question can be read into paragraph 26(5), which allows the Tribunal to make an order in a case of urgency even though the period specified in the paragraph 20 notice has not elapsed. Nor does the adoption of the test for permanent rights in paragraph 26(3)(b), to be satisfied on a "good arguable case" basis, suggest that the same qualifying test must necessarily be intended to be satisfied to the full standard of proof on some subsequent occasion. Accordingly, the absence of an application for the same, or any, permanent Code rights does not deprive the Tribunal of jurisdiction to impose an agreement for interim rights on a reference under paragraph 26.

(3) In relation to the third issue ("good arguable case"), the expectation was that applications for interim rights would be dealt with by the Tribunal on a summary basis, without oral evidence or cross examination, and without full disclosure of documents. In this reference the parties had agreed that there should be cross examination, and the Tribunal acceded to their request to permit it, but that was an exceptional course reflecting the infancy of the jurisdiction. In future, applications for interim rights would be dealt with, in the absence of agreement, at a hearing at which evidence would be received in writing. It would be for an operator seeking such rights to provide sufficient information, supported where appropriate by the disclosure of sufficient documents, to demonstrate to the Tribunal that it has a good arguable case that the test in paragraph 21 was made out. In the instant case, the test was made out, and the Tribunal made an order imposing an agreement for interim Code rights sufficient to enable the claimant to undertake the surveys and investigations required to establish whether the Building was an appropriate site for its apparatus.

Comment (by Guy Fetherstonhaugh QC): This was a robust decision by a Tribunal which clearly accepted that, in the words of the Deputy President:

"An important consideration in support of giving paragraphs 3(a) and 3(d) a wide ambit is the need to avoid a situation in which the whole edifice of Code rights is liable to be undermined. It is apparent from the Code itself (for example from paragraph 21(4) which identifies "the public interest in access to a choice of high quality electronic communications services") that the Code is not simply concerned with the better regulation of private rights. Its objective is the speedy and economical delivery of communications networks in the public interest. It simply cannot have been intended that, before an operator may insist on the acquisition of Code rights in consideration of payments assessed on a favourable "no network" basis, it must first negotiate outside the scope of the Code to acquire a right of entry to undertake essential preliminary surveys. The ransom position which site owners would enjoy on that interpretation of the Code, and their ability to insist on sharing in the economic value of the operator's network which paragraph 24 denies them, are both contrary to the principles on which the Code has been designed."

3. Changes in EU Telecoms regulation

As noted in paragraph 2.5.5 and Chapter 4 of our Book, much of our domestic practice, regulation and procedure concerning electronic communications in the UK have their roots in European Union jurisprudence.

In particular, in 2001, in response to the rapidly developing market, the European Council of Ministers issued five framework directives to encourage the market in competitive telecommunications services across Europe. These effectively ended monopoly provision in all EU countries, requiring member states to adopt a common system of regulation for the telecommunications industries, the relaxation of restrictions on the supply of services, and common rules on interconnection, universal service and consumer protection.

The Deputy Chamber President noted in paragraph 45 of his judgment in *Cornerstone Telecommunications Infrastructure Limited v The University of London* [2018] UKUT 356 (LC) (see Section 2 above) that:

"It is not necessary to dwell on the detail of the relevant EU directives other than to note their objective, which forms part of the policy background to the Code. In general terms that objective is to harmonise the digital market across the EU, to encourage competition within that market, and to minimise obstacles to the creation of digital communications networks. The latter concern can be illustrated by reference to the following recitals:

"Permits issued to undertakings providing electronic communications networks and services allowing them to gain access to public or private property are essential factors for the establishment of electronic communications networks or new network elements. Unnecessary complexity and delay in the procedures for granting rights of way may therefore represent important obstacles to the development of competition. Consequently the acquisition of rights of way by authorised undertakings should be simplified."

(recital (42), Better Regulation Directive 2009/140/EC)

"It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. …"

(recital (22), Framework Directive 2002/21/EC)."

The EU has not neglected the need to promulgate further directives for electronic communications, given the speed of technological change since the last update to the directives in 2009. On 14 November 2018, the European Parliament voted in favour of establishing a European Electronic Communications Code (EECC) and a body of European regulators for electronic communications[7]. The Council of the EU formally adopted the Directive establishing the EECC and the Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) on 3 December. The Directive came into force on 20 December 2018. Once published in the EU Official Journal, the new rules will enter into force on the third day thereafter, and Member States will have two years to transpose the Code into national law.

The Directive establishes a framework for the EECC, and includes details on: the subject matter, scope and aims; General objectives; Strategic planning and coordination of radio spectrum policy; National regulatory and other competent authorities; Independence of national regulatory and other competent authorities; Political independence and accountability of the national regulatory authorities; Regulatory capacity of national regulatory authorities; Participation of national regulatory authorities in BEREC; Cooperation with national authorities; General authorisation of electronic communications networks and services; General authorisation rights and obligations; Accounting; Amendment and withdrawal; Provision of information, surveys and consultation mechanism; Implementation; Internal Market Procedures; Consistent radio spectrum assignment; Harmonisation procedures; Security; Market Entry and Deployment; Access to Land; Access to radio spectrum; Rights of Use; Procedures; Deployment and use of wireless network equipment; Access and Interconnection; Market analysis and significant market power; Access remedies imposed on undertakings with significant market power; Regulatory control of retail services; Services; Numbering Resources; End-user rights.

It is likely that the UK will be minded to implement, where appropriate, the substantive provisions in UK law, on the basis that it would support UK's domestic policy objectives. This will enable the extension of market review periods to five years and provide mechanisms to aid fibre network rollout in certain areas.

[7] ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code; [2018] OJ L321/36 europa.eu/rapid/press-release_STATEMENT-18-6419_en.htm.

4. Brexit – the possible impact of no deal

On 13 September 2018, DCMS published a press release

"What telecoms businesses should do if there's no Brexit deal"[8]

The release is set out below, and is subject to © Crown copyright 2018.

"Delivering the deal negotiated with the EU remains the government's top priority. This has not changed. However, the government must prepare for every eventuality, including a no deal scenario. For 2 years, the government has been implementing a significant programme of work to ensure that the UK is prepared to leave the EU on 29 March 2019. It has always been the case that as we get nearer to that date, preparations for a no deal scenario would have to be accelerated. We must ensure plans are in place should they need to be relied upon.

In the summer, the government published a series of 106 technical notices setting out information to allow businesses and citizens to understand what they would need to do in a no deal scenario so they can make informed plans and preparations.

This technical notice offers guidance for continued planning in the event of no deal.

Also included is an overarching framing notice[9] explaining the government's approach to preparing the UK for this outcome in order to minimise disruption and ensure a smooth and orderly exit. We are working with the devolved administrations on technical notices and we will continue to do so as plans develop.

Purpose

The purpose of this notice is to inform businesses of our contingency plan with regard to the telecoms regulatory framework in the event that the UK leaves the EU in March 2019 with no agreement in place. It does not cover other matters which may also be relevant to telecoms providers (please see separate technical notices for information on mobile roaming and data protection).

Before 29 March 2019

The UK electronic communications regulatory framework is mainly contained within the Communications Act 2003 and the Wireless Telegraphy Act 2006, which implement the EU Common Regulatory Framework. This domestic legislation governs the regulation of the telecoms markets, guarantees basic user rights, and sets out the powers and duties of Ofcom as the national regulator including how radio spectrum in the UK is managed.

The EU Common Regulatory Framework has been under review and a new electronic communications directive – the European Electronic Communications Code (EECC) - is expected to be adopted by the EU in Autumn 2018. EU countries will have 24 months from adoption to transpose the new directive into their national law.

After March 2019 if there's no deal

If the UK leaves the EU in March 2019 with no deal in place, parts of the UK electronic communications regulatory framework would no longer be appropriate without corrections (e.g. the requirement to notify matters to the European Commission would not be applicable because the UK would cease to be a member of the EU).

The UK framework also includes references to the EU policy objective of promoting the Single Market, and cross-references to EU obligations and Commission Recommendations with which Ofcom would no longer be required to comply. We would correct references within the UK's regulatory framework to EU bodies, processes and legislation, to ensure that the regulatory framework remains operable. We intend to make secondary legislation under the EU Withdrawal Act 2018 later this year, which would bring these corrections into force in March 2019.

If the EECC is adopted by the EU before exit day but with a transposition deadline post-exit (likely to be 24 months from Autumn 2018), the Government would be minded to implement, where appropriate, its substantive provisions in UK law, on the basis that it would support the UK's domestic policy objectives. We would intend to implement these provisions according to a similar timetable to the EU, subject to UK Parliamentary business.

Implications

After March 2019, irrespective of the outcome of the negotiations between the UK and the EU, we do not expect there to be significant impacts on how businesses operate under the telecoms regulatory framework and how consumers of telecoms services are protected. This is because the EU-derived rules applicable to communication providers and governing the way Ofcom regulates telecoms markets are implemented in UK law and would be corrected by statutory instruments made under the EU Withdrawal

[8] www.gov.uk/government/publications/what-telecoms-businesses-should-do-if-theres-no-brexit-deal/what-telecoms-businesses-should-do-if-theres-no-brexit-deal.
[9] www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/uk-governments-preparations-for-a-no-deal-scenario.

4. Brexit – the possible impact of no deal

continued

Act 2018. The rules on spectrum allocation and assignment would similarly be corrected so that the way Ofcom carries out these functions would be essentially unchanged.

Ofcom has always been able to and would continue to be able to tailor its regulatory approach to the needs of the UK telecoms market. In a no deal scenario, this approach would continue to be founded on the regulatory principles implemented presently in UK law, which aim to encourage competitive markets and guarantee consumer rights.

In a no deal scenario, UK operators would continue to be able to provide cross-border telecoms services as well as operate within the EU, under the World Trade Organisation's GATS (General Agreement on Trade in Services).

This notice is meant for guidance only. You should consider whether you need separate professional advice before making specific preparations.

It is part of the government's ongoing programme of planning for all possible outcomes. We expect to negotiate a successful deal with the EU.

Norway, Iceland and Liechtenstein are party to the Agreement on the European Economic Area and participate in other EU arrangements. As such, in many areas, these countries adopt EU rules. Where this is the case, these technical notices may also apply to them, and EEA businesses and citizens should consider whether they need to take any steps to prepare for a 'no deal' scenario."

On 28 November 2018, the Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1243) were promulgated under s.8(1) of the European Union (Withdrawal) Act 2018. These Regulations made amendments to legislation relating to open internet access. Pt 2 amends the Open Internet Access (EU Regulation) Regulations 2016, and Part 3 amends Regulation 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services and Regulation 531/2012 on roaming on public mobile communications networks within the Union. The Explanatory Paper accompanying the Regulations noted that its purpose was:

"to fix deficiencies in the EU Regulation and the UK Regulations arising from EU exit. These deficiencies include terminology contained in the legislation, which will no longer be appropriate post EU exit (such as references to "national regulatory authorities"). The SI also removes the need for Ofcom to take due account of applicable BEREC guidelines, and removes a requirement for the Commission to review the EU Regulation. The UK Regulations also currently require that OfCom take "due account" of all applicable guidelines issued by BEREC when applying the EU Regulations, and this has been removed. We are also removing a requirement that Ofcom provide reports to the Commission and BEREC, which will not be appropriate once the UK has left the EU."

Despite these changes, the Government considers that the overall policy position will remain the same, with OFCOM regulating according to the same.

5. Decisions on the New Code

There have already been a number of decisions on the New Code. Before we turn to them, we should first mention a decision of the Ontario High Court of Justice, which escaped our attention when we wrote our Book, but which adds a point of interest to our treatment of the question whether installed electronic communications cabling is capable of being a chattel rather than a fixture.

Credit Valley Cable TV/FM Ltd v Peel Condominium Corp 27 O.R. (2d) 433; 107 D.L.R. (3d) 266 – a decision of Grange J given on 29 February 1980.

FACTS:
C's predecessor, by agreement with the developer of a block of flats, obtained the exclusive right to supply community antenna cable television services to the building and the units in it. The agreement provided that the cabling was to remain C's property. C then caused cabling to be installed in conduits built into the walls of the building which led to each unit, and C signed up a substantial number of flat owners.

Subsequently, however, the owner of the building, P, entered into an agreement with a third party to install a master antenna television system on the roof of the building and to attach it to the existing cabling. C's subscriptions dropped drastically as a result. C brought proceedings claiming a declaration that it was the owner of the cabling, and damages for trespass. P contended that the cabling was a fixture rather than a chattel, and had become its property once installed.

ISSUE:
Whether the cabling had become a fixture, or remained a chattel, the ownership of which was retained by C.

DECISION:
In determining whether a chattel has become a fixture, the court had to look to the degree and the object of affixation. The cabling was affixed to the building, but only in a minor way, and it was removable, albeit with time and patience and with considerable potential damage to the cabling, albeit no damage to the building. Moreover, it had been affixed not to improve the building, but in order that C could provide its subscribers with cable television. It therefore remained a chattel.

COMMENT:
The analysis of the issue in this case, albeit conducted with reference to Canadian authority, follows the settled position in England and Wales, which is examined in Sections 14.4 (Rights under property agreements) and 18.5 (Ownership of electronic communications apparatus) of our Book. The question is also relevant when it comes to the consideration of rateable property and the definition of the "hereditament" – subjects which are analysed in Section 37.5 of our Book.

And now we turn to five decisions of our own domestic tribunals decided in 2018 and early 2019.

Cornerstone Telecommunications Infrastructure Limited v The University of London [2018] UKUT 356 (LC) – a decision of the Upper Tribunal (Lands Chamber) given on 30 October 2018. See the full discussion of this case in Section 2 above.

EE Ltd and Hutchison 3G UK Ltd v Islington LBC [2018] UKUT 361 (LC) – a decision of the Upper Tribunal (Lands Chamber), given on 30 October 2018. Available at Bailii www.bailii.org/uk/cases/UKUT/LC/2018/361.html.

FACTS:
By notice of reference filed on 28 August 2018, the claimants asked the Tribunal to impose an agreement on them and on the respondent, granting rights on an interim basis over a site on the roof of a block of flats in Islington ("the Building"), to afford them temporary facilities following their removal from a current site on a rooftop 140m away. The claim was in two parts: (a) the imposition of a long-term agreement for rights under paragraph 20 of the New Code to enable them to install electronic communications apparatus on the roof of the Building; and (b) an order under paragraph 26 of the Code imposing an agreement in similar terms for an interim period lasting until the final determination of the reference. The Tribunal listed issue (b) for hearing.

ISSUES:
whether interim rights should be granted to the claimants and, if so, on what terms.

DECISION:
Interim rights should be granted, with the terms left to be worked out between the parties.

5. Decisions on the New Code

continued

COMMENT: The Deputy President approached this reference in a way that will be valuable for future claimants and respondents, to whom a series of clear signals concerning matters of principle, practice and procedure have been sent:

- First, such applications should be determined without delay and by a summary procedure; the reference in this case was made and decided within 9 weeks.
- Secondly, extensive disclosure, is not required nor, ordinarily at least, should the evidence be subject to cross-examination. An application for interim rights should be determined on the basis of the material put before the Tribunal on paper.
- Thirdly, and to the contrary, operators who do not freely provide evidence regarding the extent to which the paragraph 21 tests are satisfied to the required standard should not expect to succeed: the Tribunal will not generally make assumptions in favour of an operator which is in a position to provide evidence.
- The Tribunal can otherwise be expected to make a robust assessment in relation to the paragraph 21 tests, and will be alert to detect gamesmanship.
- The Tribunal will not impose a lengthy agreement under a paragraph 26 application, given the safeguards available to the landowner: "The claimants' proposed agreement under paragraph 20 is an elaborate document, but it need not be if it is only going to be of 3 or 4 months duration. … I consider that in principle it ought to impose no obligations on the site owner other than an obligation not to derogate from the rights which have been granted. It should require no covenants or undertakings from the site owner. It should put the full risk of the operation which the operator wishes to embark on on the operator and none of the risk on the site provider."
- Henceforth, applicants for interim rights would be well advised to read carefully the remarks in this case and in Cornerstone Telecommunications Infrastructure Limited v The University of London [2018] UKUT 356 (LC) concerning the procedural and evidential hurdles they are to overcome if they are to prevail in their references.

Note: for further steps in this litigation, see the final report below, which shows that this may be the first consideration case to be decided under the New Code.

Elite Embroidery Limited v Virgin Media Limited [2018] UKUT 364 (LC) – a decision of the Upper Tribunal (Lands Chamber) given on 31 October 2018.

FACTS:
In 2016, the claimant, which had acquired land in Newcastle-upon-Tyne for the purpose of erecting a new factory and offices, discovered a fibre optic cable buried below the surface of the land. It transpired on enquiry that the cable had been installed in the mid-1990s by a telecommunications company which had subsequently been acquired by the respondent. When the claimant discovered the cable, it did not remove it, but instead redesigned the works which it was undertaking to enable the cable to remain in its original location. The modifications involved the diversion of some drainage runs which resulted in additional expense to the claimant, together with the loss of certain Government grants as a result of the delay, amounting in total to £246,000. The claimant issued a notice of reference under the New Code on 20 March 2018 seeking to recover its losses from the respondent. The respondent thereupon applied to strike out the claimant's notice of reference.

ISSUE:
(the cable having been installed under the Old Code) whether the provisions of the New Code applied to the claim, and therefore whether the Tribunal had jurisdiction to determine it.

DECISION:
Given that the installing operator had no right under the old or new Codes to install the apparatus in its current location, and the respondent had no right under the New Code to retain or make use of it, it was difficult to see how the Tribunal could have jurisdiction. It was not alleged that the respondent had exercised any rights under the new Code. For that reason, the operative provisions concerning compensation found in Part 14 of the New Code had no application. Paragraph 84(1) applies only where the Tribunal is asked to make an order imposing an agreement, or an order requiring the removal of equipment. No such order was sought in this case, so it followed that no compensation could be payable under paragraph 84.

5. Decisions on the New Code

continued

Moreover, although paragraph 85 conferred an entitlement to compensation for injurious affection, it does so only when a right is conferred by or in accordance with any of the provisions of Parts 2 to 9 of the Code. It was common ground in this case that no such rights have been conferred on anyone.

An alternative submission that the provisions for compensation for injurious affection which were contained in paragraph 16 of the Old Code were subsumed within the New Code was also rejected. The transitional provisions having effect in relation to the cessation of the old Code and the introduction of the new Code did not allow for the replacement of rights under the Old Code by rights under the New Code; rather, the repeal of the Old Code was without prejudice to any accrued right to compensation under it.

COMMENT:
Although the claim itself appeared to be a viable claim for damages for trespass or nuisance or for compensation under the old Code, the Tribunal had no jurisdiction to entertain it. The decision underlines the importance of respecting the limits of the Tribunal's authority, no matter how meritorious the claim might appear.

British Telecommunications plc v Office of Communications [2018] EWCA Civ 2542 – a decision of the Court of Appeal given on 14 November 2018

FACTS:
OFCOM had conducted a Business Connectivity Market Review pursuant to ss.84 and 84A of the Communications Act 2003, in which it concluded that it was appropriate to define a single product market for contemporary interface symmetric broadband origination services of all bandwidths, and that the "Rest of the UK" outside London comprised a single geographic market. Following a challenge brought by BT under s.192 of the 2003 Act, the Competition Appeal Tribunal (CAT) held that Ofcom had reached erroneous conclusions in relation to its definition of the product and geographic markets, and ordered OFCOM to pay 50% of the recoverable costs incurred by BT in bringing the successful appeal.

ISSUE:
Should OFCOM be subject to adverse costs orders in situations where it was acting purely in its regulatory capacity in prosecuting or resisting a claim before the CAT, even if it was unsuccessful, provided that its actions were reasonable and in the public interest?

DECISION:
Where Ofcom acts purely in its regulatory capacity in prosecuting or resisting a claim before the CAT and its actions are reasonable and in the public interest, there should be no predisposition to award costs against it even if it were unsuccessful. In this case, the CAT had adopted an erroneous approach to the costs, and the decision should be remitted to it for reconsideration of the applicable starting point on the correct legal principles adumbrated in the judgment.

COMMENT:
This decision (the prior stages of which are referred to in paragraph 39.8.6 of our Book, dealing with Electronic Communications and Competition Law) is of even application to OFCOM investigations in relation to the New Code.

EE Ltd & Hutchison 3G UK Ltd v London Borough Of Islington [2018] UKUT 0361

A final hearing of this case (see report above) was held before the Deputy President of the Upper Tribunal on 21/22 January 2019. The target decision date is 24th February. It is the final decision in this case that will provide the answer to the $64,000 (or, perhaps, $64) question: what is the consideration payable under paragraph 24 of the Code?

The question is a lively one: the Code departed from the Law Commission's proposals in Law Com 336, in which it was proposed that there be an open market valuation with a scarcity disregard. However, it is clear that this proposal was not accepted, and that a no-scheme valuation was implemented. This has resulted in battle lines being drawn between operators, who regard consideration as being very low as a result of the New Code. In EE, the offered consideration was £1 on the basis of the no-scheme valuation; the valuer for the operator considered that rooftop storage would have a nominal value only. This departed from a prior valuation by a different valuer, which assumed a consideration of £2,551.77 per annum, apparently based on storage rates, but which was offered to secure an agreement without the need to go to the Tribunal.

5. Decisions on the New Code

continued

EE/H3G's position was that they did not object to the inclusion of this amount in the final Code Agreement determined by the Tribunal on the basis that it included both the consideration payable under paragraph 24 and any compensation payable under paragraph 25. Islington sought an assessment at £11,000 per annum.

It is clear that the Upper Tribunal will provide detailed guidance in this case on roof top sites, but the question of greenfield and other locations remains to be considered, and will no doubt come before the Tribunal in due course. The case also considered the operation of the compensation provisions under paragraph 25 of the Code, and it was suggested by the Tribunal during submissions to it that the right to claim compensation was not limited to claims at the date of the paragraph 20 final hearing - an occupier who suffered a loss, at any rate one that could not be foreseen at that date, was entitled to return to claim further losses.

Finally, a practical lesson - it is quite clear from the hearing, as it is from other hearings under the Code - that the Tribunal expects the parties to engage with one another on the terms of the draft agreements, even if there is an argument about whether or not an agreement should ultimately be imposed. The Tribunal has indicated that it will view failures to engage, especially when directed to do so, with real displeasure, and the risk for the defaulting party is that it will simply be subjected to the terms the other party is seeking. The overriding objective in the Tribunal therefore carries a big stick.

6. Other News

Wayne Clark of Falcon Chambers gave the RICS Telecoms Forum Conference 2018 speech on 13 November 2018. A link to his speech, containing topical discussion of frequently-encountered problems, along with video clips, is **here**.

Throughout 2018, Members of Falcon Chambers lectured and wrote widely on the New Code, and are very happy to travel to speak to professionals in the field.

If interested, please speak to one of our clerking team – **clerks@falcon-chambers.com.**

Electronic communications code: is it working?

This conference, promoted by the Compulsory Purchase Association, and chaired by Barry Denyer-Green, brings together both lawyers and surveyors to examine current problems with the Code, and to provide some answers. Please look out for an announcement of the date, to be held in April-June.

The conference will examine three principal themes

1. The rules by which site providers can have apparatus removed to enable development to proceed;
2. The procedures leading to and in the Upper Tribunal (Lands Chamber); and
3. What does 'Consideration' actually mean, and how should surveyors carry out the required open market valuation.

Wayne Clark, Oliver Radley-Gardner and Toby Boncey, barristers and authors of the book on the subject, **The Electronic Communications Code and Property Law:** practice and procedure, 2018, will examine the law and procedure in some detail.

Experts including Kate Russell MRICS FAAV of the CAAV will analyse the definition of 'consideration' for valuation purposes.

Leading judges and civil servants are being invited as observers.

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