Falcon Chambers

Telecoms

Newsletter

Issue 02 – February 2020

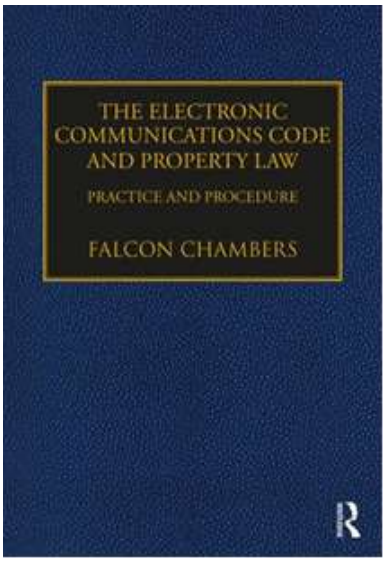
Contents:

In this Newsletter – our second since publication of our book, and one of a number which we will issue at regular intervals to examine developments in the life of the New Code, we consider the following subjects, which have exercised the industry and their advisers over the last few months, or which may assume even greater importance over the course of this New Year:

We are now two years into the operation of the New Code – the Electronic Communications Code 2017. As with its first birthday, we celebrate the second with another Newsletter containing a searching look at its reception by practitioners; at the burgeoning case load that has developed, and at what further progress may be expected.

There is much to say, and all those involved in the electronic communications 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 to the text of the Book where possible.

We also draw attention in Section 7 to the new guidance note for surveyors in telecoms matters; we review in Section 8 other recent decisions which have a bearing upon the operation of the New Code; we reprint a Message from the Senior President of Tribunals in Section 9; and we end in Section 10 by drawing attention to our programmes of lectures and articles on the New Code.



Electronic Communications Code and Property Law

Practice and Procedure

1st Edition

1. 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?

According to the Deputy President of the Upper Tribunal (Lands Chamber), Martin Rodger QC, who gave judgment on 30 October 2018 in Cornerstone Telecommunications Infrastructure Limited v The University of London [2018] UKUT 356 (LC), the operator. There was then an appeal to the Court of Appeal, in which judgment was given on 26 November 2019. A full account of the decision is given in Section 8 of this Newsletter. Suffice it to say that the appeal was dismissed, with the result that the right of the operator to go on to land to carry out a "multi skilled visit" has now been affirmed as a code right.

2. 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. As we also noted in our Newsletter last year, 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[1]. 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, and the Directive 2018/1972/EU came into force on 20 December 2018. The new rules must be applied by EU Member States by 21 December 2020.

The Department for Digital, Culture, Media & Sport consulted on the implementation of the Directive from 16 July to 10 September 2019[2], and its report is awaited.

The effect which Brexit may have upon the UK's participation is considered in Section 3 of this Newsletter, although it is thought 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.

In simple terms, the European Commission believes that the new rules will change the way we live, work and travel. It will pave the way to the next generation of networks – 5G (see Section 4 of this Newsletter).

In more detail, 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.

[1] https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code; [2018] OJ L321/36 http://europa.eu/rapid/press-release_STATEMENT-18-6419_en.htm.
[2] https://www.gov.uk/government/consultations/implementing-the-european-electronic-communications-code

3. Brexit – preparations for exiting the EU

There have been developments since DCMS's publication "What telecoms businesses should do if there's no Brexit deal"[3] (considered in the last newsletter) On 12 February 2019, the Secretary of State for Digital, Culture, Media and Sport made The Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019 No. 246, to come into force on "Exit Day", as defined in the European Union (Withdrawal) Act 2018 s.20(1), namely the date upon which the UK is to leave the EU. These Regulations provide for the amendment of both primary and secondary domestic legislation, as well as retained direct EU legislation, in preparation for the UK exiting the EU.

On 25 March 2019, the Secretary of State made the Network and Information Systems (Amendment etc.) (EU Exit) Regulations 2019 2019/653, with the aim of ensuring that UK governance bodies can continue to be able to liaise, co-operate and share information with the EU where it is necessary and appropriate to do so, whilst ensuring that they are not under an obligation to do so.

On 9 May 2019, the Secretary of State made the Electronic Communications (Amendment etc.) (EU Exit) Regulations 2019 (2019 SI 919). This Instrument, which also comes into force on Exit Day, makes technical amendments to legislation relating to the notification of personal data breaches by providers of electronic communications services, and revokes direct EU legislation which is redundant or otherwise inappropriate to retain on the UK's statute book after exit from the EU.

4. Other legislative and rule changes

As one might expect of a technologically active sector becoming used to a new operating Code, the laws and procedure are evolving swiftly to accompany the changes. We draw attention below to four specific areas of activity:

- Rule changes;
- Practice direction changes;
- Proposed new legislation;
- Delegated legislative changes.

Rule changes

On 14 March 2019, the Tribunal Procedure Committee published a consolidated version of the rules for how cases are handled in the Upper Tribunal Lands Chamber[4]. This consolidates the following statutory instruments (each of which remains in force, with amendments):

- Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600)
- Tribunal Procedure (Amendment) Rules 2012 (SI 2012/500)
- Tribunal Procedure (Amendment No. 3) Rules 2013 (SI 2013/1188)
- Tribunal Procedure (Amendment) Rules 2014 (SI 2014/514)
- Tribunal Procedure (Amendment No. 2) Rules 2017 (SI 2017/1168)
- Tribunal Procedure (Amendment) Rules 2018 (SI 2018/511)

[3] https://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.

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786247/upper-tribunal-lands-chamber-procedure-rules-converted.pdf

The principal instrument remains the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended by the succeeding instruments. The Rules are referred to in Section 33.9 of our Book.

Practice Direction changes

The Chamber President and Deputy President of the Upper Tribunal (Lands Chamber) are seeking to finalise new Practice Directions for the Upper Tribunal (Lands Chamber), both to modernize the existing Practice Directions, which were made in 2010, and to include references to procedure under new jurisdictions, including the Electronic Communications Code.

Professional associations whose members appear regularly in the Tribunal, and a number of individuals active in specific jurisdictions, were invited to comment on the draft Practice Directions before they are finalised during the course of 2020. Thereafter, the Tribunal intends to convene one or more meetings at which the document itself and the Tribunal's practices can be discussed. It is hoped that these may provide the basis for a Lands Chamber users' group which may then meet periodically to enhance communication between the Chamber and its professional users.

New proposed legislation

In October 2019, the Department for Digital, Culture, Media and Sport published a Government Bill, the Telecommunications Infrastructure (Leasehold Property) Bill 2019-20[5]. This received its First Reading (no debate) in the House of Commons on 15 October 2019. The Bill then failed to complete its passage through Parliament before its dissolution on 6 November 2019 to make way for the general election. The result was that the Bill made no further progress. It has however been resurrected by the new Government, and received its first reading on 7 January 2020[6], and its second reading on 22 January. The Public Bill Committee is now going to consider the Bill, which and has called for written evidence by 6 February 2020.

The aim of the Bill is to introduce a new Part 4A into the New Code, the purpose of which is to give operators the right by order of the Tribunal to procure the provision of electronic communications apparatus to leased premises where the landlord is being unresponsive or uncooperative (to be demonstrated by repeated failure to respond to notices given by the operator).

New delegated legislation

On 14 February 2019, the Scottish Ministers made The Non-Domestic Rating (Telecommunications New Fibre Infrastructure) (Scotland) Order 2019, and The Non-Domestic Rates (Telecommunications New Fibre Infrastructure Relief) (Scotland) Regulations 2019. These instruments, which came into force on 1 April 2019, provide that where *telecommunications new fibre infrastructure* is installed on lands and heritages, separate entries are to be made in the valuation roll for the new fibre infrastructure and for the remainder of the lands and heritages; and that the ratepayer in such circumstances is granted a reduction in the amount of rates payable by 100%.

Telecommunications new fibre infrastructure is defined as (i) new fibre used for the purposes of facilitating the transmission of communications by any means involving the use of electrical or electromagnetic energy, (ii) a proportion of any poles, posts, towers, masts, mast radiators, pipes, ducts and conduits, and any associated supports and foundations on the lands and heritages, used in connection with new fibre, which proportion is to be apportioned in accordance of paragraph (3)(c), and (iii) any parts of the lands and heritages which are exclusively occupied by new fibre.

[5] https://publications.parliament.uk/pa/bills/cbill/2019-2020/0005/20005.pdf

[6] https://www.parliament.uk/business/news/2020/january/have-your-say-on-the-telecommunications-infrastructure-leasehold-property-bill/

Fibre is “new” if it was not laid, flown, blown, affixed or attached before 1 April 2019, and is not “new” if it replaces existing fibre, unless it upgrades what was previously provided). The overall effect of this Order is that the lands and heritages will be valued separately.

The Policy Note accompanying the Order explains that in the Scottish Budget 2019-20, the Scottish Government announced the creation of a 100% relief from 1 April 2019 for a ten-year period (to 31 March 2029) for new fibre infrastructure installed after 1 April 2019. The availability of this relief is said to be likely to incentivise the upgrading of fibre, rather than like-for-like replacement.

We deal with rating in Scotland in Section 40.7 of our Book.

5. Preparations for 5G

2019 witnessed the publication of many articles in the media heralding the launch of the fifth generation of mobile wireless technology (5G), which went live in the UK on 30 May 2019, following commercial launch in April 2019 in the USA and South Korea. Most of the articles sought to draw attention to new coverage in areas of the UK by certain operators. According to an article in the Guardian on 21 June 2019, EE was the first to provide 5G coverage. A geographical depiction of the EE coverage rollout is shown on the map:

EE were followed by Vodafone in July 2019, with Three offering home broadband from August 2019, and O2 and BT in October. 5G will greatly increase download speeds, with 5G being 1,000 times faster than 4G. It will permit a greater number of connections to be made, facilitating the internet of things. The way in which 5G operates means that many more, smaller, structures – such as lamp posts and street furniture – are likely to be needed to host apparatus, in addition to large base stations. With 5G, we may therefore gradually see an increase in both the number and types of sites which will be needed. Equally, we may gradually see a shift away from the use of private land to host apparatus.

Up to date coverage may be checked at https://5g.co.uk/coverage.

6. The Statement of Strategic Priorities

The Government’s Future Telecoms Infrastructure Review (FTIR) was published in July 2018 (see Section 2.12 of our Book), and set out the changes that need to be made to the telecoms market and policy framework to help secure world-class digital infrastructure. The FTIR set out a number of strategic priorities in relation to full fibre deployment, including: reducing the costs and barriers to the deployment of fibre networks; easy access to Openreach’s ducts and poles; the need for stable and long term regulation that incentivises investment and ensures competition; an “outside in” approach to full fibre deployment so that the most commercially difficult to reach premises are not left behind; and the need for a timely switchover to full fibre networks.

In the light of the FTIR, on 15 February 2019 the Department for Digital, Culture, Media and Sport published a Consultative Document, "**Statement of Strategic Priorities for telecommunications, the management of radio spectrum and postal services**". This document presented the Government's draft Statement of Strategic Priorities (SSP) for telecommunications, the management of radio spectrum and post. The power for the Government to designate an SSP was introduced in the Digital Economy Act 2017. This is the first time the Government has exercised this power. The document called for comments by 27 March 2019.

The Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services, was presented to Parliament pursuant to Section 2C of the Communications Act 2003 in July 2019. The Government then designated its Statement of Strategic Priorities for telecommunications on 29 October 2019[7], accompanied by an Explanatory Memorandum[8]. Its purpose was to give Ofcom context and guidance on the Government's policy priorities and desired outcomes in a number of areas, in order to achieve the desired changes set out in the FTIR.

The Government has itself been advancing the case for first class electronic communications coverage, both on its own part, and through Ofcom implementing the Government's universal broadband service - a safety net that will give eligible homes and businesses a legal right to request a decent connection.

Thus:

- On 24 May 2019, Ofcom announced rules to support fibre investment. Companies laying high-speed fibre cables for broadband and mobile networks were to benefit from greater access to Openreach's telegraph poles and underground tunnels, under draft decisions by Ofcom. The rules give rival firms better access to Openreach's infrastructure and aim to support competition and investment certainty in business markets[9].
- On 6 June 2019, Ofcom confirmed that everyone in the UK would have the legal right to request a decent and affordable broadband connection from March 2020[10]:
- On 28 June 2019, Ofcom published a further statement setting out how the following markets would be regulated for the period to April 2021: the physical infrastructure market (access to Openreach's ducts and poles); and connections that are used by business broadband networks[11].
- A Government Press Release on 25 October 2019 announced a **£1 billion deal set to solve poor rural mobile coverage**. It added that "Poor mobile phone coverage will be a thing of the past" as the Government champions a £1 billion deal with the mobile phone industry to banish rural not-spots. In particular, it announced:
  - Moves to cement plans to give high-quality 4G coverage to 95 per cent of the UK by 2025, meaning consumers will get good 4G signal on the go wherever they live, work or travel
  - Support for a deal with UK Mobile Network Operators to provide additional coverage to 280,000 homes and businesses and 16,000km of roads
  - New plans for all operators to share phone masts to improve UK coverage

  The move was said to bring 4G coverage to 95 per cent of the UK by 2025 and be a huge boost for consumers. More people in rural areas will benefit from the speed and efficiency of services on the go - from booking travel, shopping online or speaking to friends and family.

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829518/EM_SSP_FINAL.pdf

[9] See https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/further-ofcom-rules-to-support-fibre-investment

[10] https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/countdown-new-broadband-safety-net

[11] https://www.ofcom.org.uk/consultations-and-statements/category-1/review-physical-infrastructure-and-business-connectivity-markets
https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/ofcom-confirms-new-rules-for-business-networks

Digital Secretary Nicky Morgan was also supportive of a £530 million proposal from the UK's mobile network operators for a Shared Rural Network with the potential for it to be matched by £500 million investment from Government.

This would be a world-first deal with EE, O2, Three and Vodafone investing in a network of new and existing phone masts they would all share. Consumers will be able to rely on their own provider's network to use their mobile phones wherever they are.

It follows Government proposals for an overhaul of planning rules and is part of the Prime Minister's plan to level up the country with world-class digital infrastructure across the country to make sure homes and businesses are better connected.

Better 4G connectivity will make flexible working easier, boost regional economic growth and close the digital divide that exists across the country. The benefits will be felt across all four nations of the UK with the greatest coverage improvements in Scotland, Wales and Northern Ireland.

The Government wants to see industry move quickly so that it can reach a final agreement early in 2020. It added:
"Strong competition promotes industry investment in mobile coverage in dense urban areas, but rural areas have fewer potential customers and have not seen the level of investment needed to provide good coverage.
The deal would see all four operators come together to create a new organisation to deliver the Shared Rural Network, in what would be an innovative and unique solution to the persistent problem of poor mobile coverage in the countryside. It would get the maximum use out of existing and new phone masts by allowing all four operators to host equipment on them.
Under the proposal, the four operators will invest £530 million to open up and share existing masts and infrastructure to close almost all partial not-spots - areas where there is currently only coverage from at least one but not all operators. It would also mean additional mobile coverage for 280,000 premises and 16,000 kilometres of roads.
If the operators agree to meet these ambitions on partial not spots, the Digital Secretary Nicky Morgan has been clear government will commit up to £500 million of investment to go even further to eliminate total not-spots - those hard-to-reach areas where there is currently no coverage from any operator.
Government-owned mobile infrastructure built as part of the Emergency Services Network will also be made available to all four operators, taking full advantage of government assets. This is expected to contribute to the coverage target by delivering up to an additional 2% of geographic coverage per operator, in some of the most remote, rural locations.
The Shared Rural Network proposal is subject to legal agreement. The Government's ambition is to reach a formal agreement on it early next year."

- In response to a written question asking what progress has been made on meeting the target to implement the Universal Service Obligation for broadband by March 2020, the Department for Digital, Culture, Media and Sport stated on 6 November 2019 that Ofcom has conducted several consultations on the USO, and is working with the Universal Service Providers, BT and KCOM, as part of the implementation process that it is undertaking. Eligible consumers will be able to request a broadband USO connection directly from BT and KCOM respectively from March 2020.

7. The New RICS guidance note for Surveyors advising in respect of the Electronic Communications Code

The authors ended the last Newsletter 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 has now met that plea. On 14 November 2019, the day of the

RICS Electronic Communications Forum 2019[12], the RICS published a guidance note, authored by Sue Doane and Mark Talbot FRICS. This followed a consultation in July 2019[13].

The aim of this guidance note, according to the RICS, is to highlight the main factors that may influence or impact the variety of roles a surveyor may be called on to perform within this environment. Given the dynamic nature of the industry, it is not intended to provide an exhaustive body of guidance but to identify the main issues likely to arise. This ground-breaking guidance note will also provide a framework that surveyors can refer to when advising their clients in relation to electronic communications networks and installations that fall under the scope of the Electronic Communications Code.

8. New Code Decisions

In our first Newsletter, we reported five decisions of our tribunals decided in 2018 concerning the New Code. 2019 has brought many more, reported both in the Upper Tribunal and in the Court of Appeal, marking a radical departure from the experience of litigation under the Old Code. We review these decisions in detail below:

1. EE Ltd & Hutchison 3G UK Ltd v London Borough of Islington [2019] UKUT 53 (LC)
2. Cornerstone Telecommunications Infrastructure Ltd v Keast [2019] UKUT 116 (LC): 8.4.19
3. Evolution (Shinfield) LLP v British Telecommunications Plc [2019] UKUT 127 (LC) 15.4.19
4. Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Ltd [2019] UKUT 183 (LC) 7.6.19
5. R (Mawbey) v Cornerstone Telecommunications Infrastructure Ltd [2019] EWCA Civ 1016 17.6.19
6. Arqiva Ltd v Kingsbeck Ltd [2019] SAC (Civ) 28 27.6.19
7. EE Ltd v Trustees of The Meyrick 1968 Combined Trust [2019] UKUT 164 (LC) 9.7.19
8. Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755 22.10.19
9. Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd [2019] UKUT 0338 (LC) 8.11.19
10. Cornerstone Telecommunications Infrastructure Ltd v University of London [2019] EWCA Civ 2075 26.11.19

1. EE Ltd & Hutchison 3G UK Ltd v London Borough of Islington [2019] UKUT 53 (LC)

A final hearing of this case was held before the Deputy President of the Upper Tribunal on 21/22 January 2019, with judgment given on 18 February 2019. An account of the earlier hearing was given in our first newsletter. Key points that emerge from the case are:

1. **Compliance with directions is not optional**: in this case the site provider declined to engage with the draft agreement provided by the operator. The sanction was that the form of agreement contended for by the operator (subject to some exceptions) was imposed on the site provider.
2. **Granting a Lease:** The Upper Tribunal is able to grant a code agreement in the form of a lease (and see further Arqiva v Kingsbeck below).

[12] For a video summarising the highlights of the day, see https://www.rics.org/uk/news-insight/latest-news/news-opinion/collaboration-remains-key-telecoms-forum-conference-review.

[13] https://www.rics.org/uksurveying-profession/contribute/consultations/surveyors-advising-in-respect-of-the-electronic-communications-code/

3. Consideration

The main points appear to be:

1. The Nordicity Report[14] is no guide to consideration under the Code. It was based on different valuation assumptions from those found in paragraph 24.

2. At paragraph 61, the Tribunal noted that the starting point under paragraph 24 is the open market value.

The basic measure of consideration is stated in paragraph 24(1) and is "the market value of the relevant person's agreement to confer or be bound by the code right". In some ways this is a surprising formulation. A "market value" is usually understood to be the value or price agreed on between a willing buyer and a willing seller in an arm's length transaction after proper marketing,and one might therefore have expected the draftsman to refer simply to the "market value of the Code right". Paragraph 24(1) expresses the basis of valuation in more elaborate terms, focusingon the value of the agreement to only one of the parties – the seller (referred to as the relevant person).

3. At paragraph 62, the Tribunal noted that a "no scheme" valuation was required.

4. At paragraph 63, the Tribunal went on to explain that

Whatever the true purpose of expressing the measure of consideration in this unusual way, any suggestion that paragraph 24(1) requires some unconventional approach to determining market value is immediately negated by paragraph 24(2). This explains that the market value of a person's agreement to confer or be bound by a code right is the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for an agreement (on the terms imposed under paragraph 20) in an arm's length transaction in which both parties act prudently and with full knowledge.

5. Once that was understood, this was a conventional open market valuation with specified statutory assumptions and disregards, as set out in paragraph 24.

6. Critical in future for rooftops will be paragraph 98:

"values achieved on lettings of parking spaces or for basement storage are of no real value in determining what would be agreed in the market for the right to keep installations unconnected to a telecommunications network on the roof of a ten-storey residential building. We accept his evidence that there is no demand for such space for any commercial purpose unconnected to telecommunications, but we do not accept that that conclusion dictates a nominal consideration."

The Tribunal took the view that consideration should reflect an element of payment for services at the building, which the operator would make use of, and determined that "*On the basis that the nominal value of the rights themselves, on the no-network assumption, is £50, we consider that the consideration which willing parties would agree for the terms to be imposed in this case would be £1000 per annum*" (scaled off the residential annual tenant's service charge of £1,300). The Tribunal expressed the view that payments for services ought to be rolled into consideration and not compensation, a further important point of valuation practice for the future.

4. Compensation

The relevant person is not just entitled to consideration, but also to compensation. As we have seen, the fact that the operator enjoys some (but not all) of the services at a building means that this fact should be rolled into consideration, and not compensation (as one understandable school of thought has argued). This was to head off disputes later.

As to compensation, the Tribunal rejected the operator's submission that the Tribunal had to determine compensation when the order was made, and that the site provider was then unable to return if further losses arose. The Tribunal explained (at paragraph 111) that

The making of an order under paragraph 20 is a condition precedent of any order under paragraph 25, but in our judgment once that condition has been satisfied there is nothing to restrict the time when an order for compensation may be made. That is the obvious intent of paragraph 25(2)(b)

[14] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270165/Wayleave_Economic_Analysis_2013_10_23.pdf

which allows an order to be made "at any time afterwards" i.e. at any time after the imposition of an agreement under paragraph 20. It would also be contrary to the flexible terms in which the power to award compensation has been conferred.

Further, when it came to diminution in value of the land in question, the Tribunal explained that:

We acknowledge that, in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from realising the true value of its land. In reality, the site provider is prevented from realising that portion of the value of its land which is attributable to its suitability for use in connection with the provision of a telecommunications network. But that does not give rise to a loss for which compensation is payable under paragraph 84. For the purpose of the Code, including for the purpose of determining whether a compensatable loss has been sustained, consideration determined in accordance with paragraph 23 must be taken to be the market value of the rights conferred.

In other words, in most cases that issue will have formed part and parcel of the paragraph 24 exercise. That said, however, in other cases there may be an additional loss not within the paragraph 24 exercise, stating at 134 that

To the extent that the value of the site provider's land is diminished as a consequence of the rights granted (for example because the site provider no longer has the same freedom to use the site as it had before) we consider that is capable of being fully reflected in the consideration payable under paragraph 24. If it could be shown that the value of the land had been diminished to a greater extent than had been reflected in the assessment of consideration a separate claim may be admissible.

However, that question did not arise in this case. Other losses were considered which are not considered here, though account must be taken of them in any future valuation.

5. Mechanism

When does an imposed agreement under Part IV take effect? The Tribunal stated

In our judgment the operative instrument in imposing an agreement under Part 4 of the Code is the order under paragraph 20 itself. We are satisfied that once the order is made an agreement has been imposed and binds the parties without the need for any further document to be executed by them.

2. Cornerstone Telecommunications Infrastructure Ltd v Keast [2019] UKUT 116 (LC)

In this case,

1. The Tribunal doubted that a discrepancy between a paragraph 20 notice and what was claimed,

where what was claimed was less than what was in that notice, would invalidate the process (see paragraph [29])

2. The Tribunal found that code rights could not be asserted purely against electronic communications apparatus within paragraph 5, as those rights could only be asserted against land, and land excludes electronic communications apparatus (see paragraph 108). However, if rights were sought to keep apparatus on land, then (even if the apparatus was vested in a different operator who had agreed to transfer ownership), then that was permissible under the code as the code rights in such a case related to the land and not the apparatus. The Tribunal helpfully clarified the effect of paragraph 101 of the Code and made clear that conventional common law annexation principles were not relevant in cases falling within that paragraph (see paragraphs [44] - [49]).

3. The Tribunal found that policing the terms sought under a code agreement was a matter of discretion not jurisdiction under paragraph 23 of the Code. It was in principle open to grant any terms, but the discretion to grant was naturally ringfenced by the principles in paragraph 23. The Tribunal doubted that the inclusion of a term which the Tribunal could not grant would invalidate the whole process (paragraphs [56] - [61]).

3. Evolution (Shinfield) LLP v British Telecommunications Plc [2019] UKUT 127 (LC)

An owner or occupier of land had the right under the Electronic Communications Code para.38 to require the removal of electronic communications apparatus from adjacent land only if that

apparatus interfered with or obstructed an existing means of access to or from his land. There was no right of removal in the case of a prospective or future means of access.

4. Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Ltd [2019] UKUT 183 (LC)

Parties who refused access to their land or buildings for surveys could not expect to recover costs of the scale incurred by the parties in the instant case. Equally, operators could not simply demand unquestioning co-operation from property owners. The conduct which the instant case illustrated, namely over-reaching on one side and obstruction on the other, was disproportionate, inappropriate and unacceptable. Such senseless disputes were discouraged and should not be allowed to become a recurring feature of Code disputes concerning new sites. Although there were legitimate matters to argue about in such cases, whether a small number of surveyors was permitted to go on to a rooftop for a few hours on two or three occasions to establish whether it was even suitable for the installation of apparatus was not one of them (paras 2, 30).

5. R (Mawbey) v Cornerstone Telecommunications Infrastructure Ltd [2019] EWCA Civ 1016

In a challenge to a local authority's determination that electronic communications apparatus installed on top of a block of flats was permitted development under the Town and Country Planning (General Permitted Development) Order 1995 Sch.2 Pt 16 para.A, the court held that the meaning of the term "mast" in para.A.1(2)(c) was a matter of law. It had to be interpreted in accordance with its ordinary and natural meaning, unless that meaning was displaced by anything in the legislative context.

The court accordingly upheld the definition of "mast" as an upright pole or lattice-work structure whose function was to support an antenna or aerial.

6. Arqiva Ltd v Kingsbeck Ltd [2019] SAC (Civ) 28

This was an appeal in the Scottish Sheriff Appeal Court. The Court held that where an operator required exclusive use of a site to exercise its code rights, the imposition of a lease was appropriate if required. That carried with it the normal incidents of a lease in Scottish law, namely the right to exclusive occupation. Further, the operator in this case was to be entitled to share with present and future operators under the new agreement.

7. EE Ltd v Trustees of The Meyrick 1968 Combined Trust [2019] UKUT 164 (LC) 9.7.19

Landowners relying on the Electronic Communications Code para.21(5) to resist the imposition of Code rights had to demonstrate that they had a reasonable prospect of being able to carry out a proposed redevelopment project and that they had a firm, settled and unconditional intention to do so. If, in reality, the redevelopment plans were conceived in order to defeat the claim for Code rights, para.21(5) would not be met.

The Tribunal, quite usefully, drew upon the case law under s.30(1)(f) of the 1954 Act and made it clear that, (1) the decisions under these analogous provisions were to be adopted where relevant, but the UT would be mindful when applying those decisions of the need to be aware of the different context of the Code (e.g. with respect to timing: judgment at para [38]); (2) that the date for establishing the relevant intention is the date of the hearing as per the decision of the House Lords in Betty's Café's Ltd v Phillips Furnishing Stores Ltd [1959] AC 20, HL under the 1954 Act and (3) that the decision of the Supreme Court in S .Franses v Cavendish was also to be taken into account in determining the relevant intention.

8. Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

The Court of Appeal upheld the Upper Tribunal's ruling that it lacked jurisdiction to impose an agreement on a landowner under the Electronic Communications Code Pt 4 where the landowner was not in occupation of the relevant site. If another operator was in occupation, then that operator was the relevant "occupier" for conferral purposes.

9. **Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd** [2019] UKUT 0338 (LC)

The Upper Tribunal lacked jurisdiction under the Electronic Communications Code Pt 4 to impose an agreement conferring Code rights on an operator and a landowner of a telecommunications site where the operator was in occupation of the land under a subsisting agreement. Nor could an operator in occupation under a tenancy continued by the Landlord and Tenant Act 1954 Sch.1 Pt II avail itself of Part 5 of the Code to obtain a new tenancy; it had instead to apply to the County Court for a new tenancy.

10. **Cornerstone Telecommunications Infrastructure Ltd v University of London** [2019] EWCA Civ 2075

For the purposes of the Electronic Communications Code contained in the Communications Act 2003 Sch.3A, the "code rights" set out at para.3 of the Code included a right of access to undertake a survey to assess the suitability of a building for the installation of electronic communications apparatus. It was not a necessary part of an interim application under para.26 that it should be accompanied by an application under para.20: a freestanding application was permitted by the Code.

9. Message from the Senior President of Tribunals

The Senior President of Tribunals, Sir Ernest Ryder, delivered his Annual Report on 30 October 2019. This said, in relation to the Code:

> An entirely new source of first instance work for the Lands Chamber has been provided this year by the Electronic Communications Code introduced in December 2017 by the Digital Economy Act. It is difficult to over-state the significance of electronic communication to modern social and commercial activity. Business, entertainment, and personal lives now rely hugely on devices undreamt of only a few years ago, and digital communication is regarded as a utility service comparable to the supply of water, gas or electricity. Our indispensable phones, tablets and laptops would be of little use without the physical infrastructure essential to support them. In 2016 it was estimated that telecommunications operators paid £359m annually for rents, licence fees and business rates for 18,200 greenfield sites and 4,000 rooftop sites for their masts, dishes and other equipment. The expansion of that infrastructure to meet additional demands would not be achievable without the legal tools necessary to enable network providers to secure sites and to resolve disputes between operators and site providers. Those legal tools are now provided by the new Electronic Communications Code.
>
> The new Code replaced a first-generation code introduced in 1984 which regulated telecommunications in the era of landlines and which was updated in 2003 in response to technological changes. The old code was described in the High Court as one of the least coherent and thought-through pieces of legislation on the statute book. One of its demerits was that it left dispute resolution to the County Court or to arbitration, which made it difficult for any coherent interpretation of the code to emerge.
>
> The uncertainty of Parliament's intentions and the inability of the county court to resolve disputes with the speed required to keep pace with the demand for telecommunications services meant that in more than thirty years there were fewer than a handful of decided cases on the provisions of the old code. One of the significant changes proposed by the Law Commission in its work on the new Code was the allocation of all disputes under the revised Code to the Upper Tribunal, and specifically to the Lands Chamber. It was hoped that this would allow authoritative guidance on the effect of the complex new provisions to be given in a specialist forum familiar with issues of land valuation and compensation.
>
> The new jurisdiction is distinctly different from the Lands Chamber's long-established functions in relation to compensation for compulsory acquisition, where we generally resolve disputes over the value of land which has been already been acquired for public purposes using other processes. Our role under the Code is a much more immediate and instrumental one; where parties cannot agree, it is the Tribunal which will impose agreements conferring Code rights.

The Lands Chamber now has a vital part to play in realising the ambition of the Law Commission and Parliament for the health of the UK as a leading digital economy to be founded on the provision of a world-class full-fibre network and fifth-generation (5G) infrastructure. It was fundamental to the Law Commission's thinking that the new regime should be capable of meeting the needs of a rapidly developing sector by resolving disputes quickly and by making interim relief available within even shorter timescales. The Government's stated aim is for mobile technology to be available throughout the UK by 2027, and for 15 million homes and businesses to have access to full-fibre broadband networks by 2025 with nationwide access by 2033. A significant responsibility for achieving that objective now falls on the Lands Chamber.

It is apparent that operators and site providers take very different views of the effect of the valuation provisions in the new Code. It is said that finalising many agreements is being delayed while definitive guidance is awaited. So far, each case which has been determined by the Chamber has been a test case on a different point of principle.

References under the new Code began to arrive in the Lands Chamber in April 2018, a few months after the commencement of the legislation. More than 50 had been received by the end of March 2019, of which six have been determined after contested hearings and a further 23 have been resolved by agreement after case management hearings. The Code presents particular case management challenges in cases where rights are sought over new sites; these are required by statute to be determined within six months of the issue of proceedings. Where the statutory deadline applies it has been complied with. Most cases received have concerned the renewal of rights over existing sites to which the same stringent time limit does not apply, but the Chamber recognises the importance of prompt resolution of these disputes and, except where parties have agreed to a more elongated timetable, we have sought to list final hearings (generally of two or three days duration) within about six months of issue.

The Chamber's first Code cases were determined in October 2018 and concerned transitional provisions and the availability of interim relief. A series of decisions has followed on fundamental issues concerning the availability of access to determine whether a site is suitable to host apparatus, the jurisdiction to impose rights where a third party is in occupation of a site, the relationship between the compensation and consideration provisions of the Code, and the consideration payable for new rights in urban and rural locations. As each case has been argued the complexities of the legislation have become more apparent, and new issues have been identified. The Chamber has adopted a cautious approach, resolving only those issues which arise directly for determination in each reference while sign-posting others which are likely to arise in future so that parties may give them proper consideration.

10. Falcon Chambers Telecoms briefings

Throughout 2019, Members of Falcon Chambers lectured and wrote widely on the New Code:

- On 22nd March 2019, Oliver Radley-Gardner spoke to the Property Litigation Association on "New Enigmas Under the Code" at the annual conference.
- On 3 June 2019, the Conference: **Electronic Communications Code: is it working?**, was held, promoted by the Compulsory Purchase Association, and chaired by Barry Denyer-Green, past chairman of the CPA, with talks among others by Wayne Clark, Oliver Radley-Gardner and Toby Boncey, all barristers and authors of the book on the subject, *The Electronic Communications Code and Property Law: practice and procedure,* 2018. In the absence of an industry wide body to bring the operators, landowners and their agents, the judiciary, and civil servants together, this conference assembled lawyers and surveyors to examine current problems with the Code, and to provide some answers. It examined three core 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, how should surveyors carry out the required open market valuation, and what can be claimed as compensation.

- On 7 November 2019, Oliver Radley-Gardner spoke to the Agricultural Law Association (ALA) on developments under the Code at their annual conference.
- On 14 November 2019, Wayne Clark and Stephanie Tozer QC gave a legal update at the RICS Telecoms Forum; while Guy Fetherstonhaugh QC facilitated a lively panel discussion with Dr Charles Trotman, Senior Economist, CLA, Juliette Wallace, Business Planning and Property Director, MBNL, Michael Watson, Partner and Head of Property Litigation, Shulmans and Carlos Pierce, Head of Legal Projects, Strategy and Director of the ECC Programme, Cornerstone Telecommunications Infrastructure Ltd.
- Members of Chambers have also given bespoke talks to Howard Kennedy LLP, Mishcon LLP, Teacher Stern LLP and Wallace LLP.

Upcoming events

- Stephanie Tozer QC and James Tipler will be speaking at the EMW Law Telecoms seminar on 6 February 2020 on the latest authorities on the interpretation and application on the code.
- Oliver Radley-Gardner is speaking on electronic communications law at the upcoming CPA 4th Stakeholders' Forum for Reform of CPO Law and Practice - **New year, new Government, new priorities, same challenges for land assembly** which takes place on 23rd March 2020.

Please visit our website for more information and to book a place at either event please visit our website: https://www.falcon-chambers.com/

The Falcon Chambers Telecoms Newsletter Team

Guy Fetherstonhaugh QC

Jonathan Karas QC

Stephanie Tozer QC

Wayne Clark

Barry Denyer Green

Oliver Radley-Gardner

Toby Boncey

James Tipler

We 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.

All members of Falcon Chambers specialise in property and telecommunications law, and are happy to advise on issues arising. Please contact clerks@falcon-chambers.com for further information.

Falcon Chambers Members

Derek Wood CBE QC	Joanne Moss	Adam Rosenthal	Kester Lees
Jonathan Gaunt QC	Anthony Radevsky	Elizabeth Fitzgerald	Ciara Fairley
Kirk Reynolds QC	Wayne Clark	Greville Healey	Toby Boncey
Guy Fetherstonhaugh QC	Barry Denyer-Green	Nathaniel Duckworth	Tricia Hemans
Jonathan Karas QC	Paul Letman	Oliver Radley-Gardner	Julia Petrenko
Jonathan Small QC	Gary Cowen	Tamsin Cox	James Tipler
Stephen Jourdan QC	Martin Dray	Philip Sissons	Mark Galtrey
Janet Bignell QC	Anthony Tanney	Joseph Ollech	Gavin Bennison
Caroline Shea QC	Catherine Taskis	Camilla Chorfi	Imogen Dodds
Mark Sefton QC	Emily Windsor	Cecily Crampin	Thomas Rothwell
Stephanie Tozer QC	Edward Peters	Jamie Sutherland	Fern Horsfield-Schonhut

Falcon Chambers

Chambers Director: Edith A. Robertson

Senior Clerk: John Stannard

Falcon Court, Falcon Chambers, London EC4Y 1AA

Telephone: 020 7353 2484

Fax: 020 7353 1261

DX: 408 Chancery Lane

www.falcon-chambers.com

clerks@falcon-chambers.com

FalconChambers1

Falcon Chambers