UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CATCHWORDS: ***Electronic Communications Code – OFCOM direction – conduits – infrastructure – jurisdiction of the Upper Tribunal – notices under paragraph 20 of the Code – Code rights – electronic communications apparatus - fixtures and land.***

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

RICHARD GREGORY KEAST

Respondent

Re: Penrose Farm,
Moorland Road,
Indian Queens,
Cornwall,
TR9 6HN

JUDGE ELIZABETH COOKE sitting as a Judge of the Upper Tribunal

Royal Courts of Justice, Strand, London WC2A 2LL
on
6 February 2019

Oliver Radley-Gardner for the Claimant, instructed by DAC Beachcroft
Toby Watkin for the Respondent, instructed by Foot Anstey

The following cases are referred to in this decision:

EE Limited and Hutchison 3G UK Limited v Mayor and Burgesses of the London Borough of Islington [2019] UKUT 0053 (LC)
Elitestone v Morris [1997] 1 WLR 687
R v Inspectorate of Pollution ex p Greenpeace [1994] 4 All ER 329
R (Sainsbury's) v Wolverhampton City Council [2011] 1 AC 437
Cornerstone Telecommunications Infrastructure Ltd v The Guinness Partnership Ltd and Sheffield City Council TCR/72/2018
Wagstaff v Department of the Environment [1999] 2 EGLR 108

Introduction

1. The Claimant, Cornerstone Telecommunications Infrastructure Ltd, is a company owned in equal shares by Vodafone Limited ("Vodafone") and the Telefonica group of companies ("Telefonica"). It was established to manage and facilitate the sharing of sites and infrastructure by Vodafone and Telefonica, both of which provide independent and competing electronic communications networks. The Claimant seeks to acquire rights pursuant to Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code"), over Penrose Farm, Indian Queens, Cornwall. Penrose Farm is registered at HM Land Registry under title number CL8150 and the registered proprietor is the Respondent, Mr Richard Keast.

2. There is already a telephone mast and other equipment on a small parcel of land ("the mast site") on Penrose Farm. The mast site has been there since before 2007 when it was leased to Vodafone; the lease ("the Vodafone lease") is protected by the Landlord and Tenant Act 1954. The contractual term expired in 2015 but Vodafone remains in occupation. It is now Vodafone's policy for its sites to be taken over by the Claimant and made available to Vodafone and Telefonica, and that is why the Claimant seeks rights over the Respondent's land.

3. The Respondent is unwilling to grant those rights. He says that the Claimant has not satisfied the test set out in the Code for the imposition of Code rights upon the Respondent. In due course the Tribunal may have to decide whether that is so. But this decision is about a number of preliminary issues of law, which were the subject of a hearing before me at the Royal Courts of Justice on 7 February 2019. At the hearing the Claimant was represented by Mr Oliver Radley-Gardner and the Respondent by Mr Toby Watkin, both of counsel, and I am grateful to both for their helpful arguments.

4. In the paragraphs that follow I introduce the relevant provisions of the Code and some other relevant legal principles. I explain the procedural background to this case. I then turn to the first three of the preliminary issues I have to decide. Next I explain why at the hearing on 7 February I allowed in part the Respondent's application to amend his Statement of Case. Finally I decide the additional preliminary issue introduced by that amendment. References to "Penrose Farm" are to the whole of title number CL8150.

The provisions of the Code and other legal principles

5. The following is a very brief summary of what the Code does, so as to set the context for what follows. I revert later to some of the provisions of the Code in more detail.

6. The Code governs the acquisition and exercise of certain rights by providers of electronic communications networks to install equipment on land and to carry out works on land. Typically the equipment consists of masts, cabinets and other apparatus needed for the maintenance of mobile phone networks.

7. Section 106(3)(a) of the Communications Act 2003 provides that the Code shall have effect "in the case of a person to whom it is applied by a direction given by OFCOM." I refer to such persons as "Code operators". The Claimant is a Code operator.

8. Paragraph 3 of the Code sets out a number of rights, to which I shall refer as "Code rights", which can be conferred on a Code operator by an occupier of land, or imposed upon the occupier in default of agreement. In summary, they are rights to install and keep electronic communications apparatus on land, to carry out works on land, and so on. Paragraph 5 of the Code defines "electronic communications apparatus" (in this decision, "ECA") as "apparatus designed or adapted for use in connection with the provision of an electronic communications network."

9. Paragraph 20 provides that a Code operator may give a notice to the occupier of land setting out the Code right and all the other terms of the agreement that it seeks ("a paragraph 20 notice"). If agreement is not forthcoming the operator may apply to the court (as the Code says; rules provide that application is made to this Tribunal), which may (according to paragraph 23) make an order conferring that right upon the operator together with such terms as it thinks appropriate. The legal test to be satisfied before such an order can be made is set out in paragraph 21 of the Code.

10. Paragraph 23 also states that an agreement imposed by the Tribunal must include terms about consideration, and the level of consideration payable to an occupier of land for Code rights is set out in paragraph 24. Consideration is defined in paragraph 24(2) as "the market value of a person's agreement to confer or be bound by a code right" on the basis of a number of assumptions set out in paragraph 24, including the assumption "that the right that the transaction relates to does not relate to the provision or use of an electronic communications network". It is in that assumption that the Code diverges both from the provisions of Schedule 2 to the Telecommunications Act 1984 ("the old Code") and also from the recommendations made by the Law Commission in its Report *The Electronic Communications* Code, Law Com No 336, 2013 ("the Law Commission Report"). This Tribunal has described the "no network" assumption in its decision in *EE Limited and Hutchison 3G UK Limited v Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 0053 (LC) at paragraph 66. The consequence of the no network assumption is that in many cases the consideration payable under the Code is likely to be substantially lower than that payable under the old Code.

11. The Code makes provision for Code rights to be imposed upon occupiers of land, and paid for at a market rate far lower than that which occupiers could have obtained in the absence of a code. Mr Watkin therefore says that the Code confers a

power of compulsory acquisition against citizens and must be very strictly construed. I mention this now because the preliminary issues I have to decide all rest to some extent upon the construction of the Code. The point Mr Watkin makes was pressed in particular as regards issues 2 and 5, but it seems to me to be relevant to them all.

12. Mr Watkin refers to *Bennion on Statutory Interpretation*, 7th edition at paragraph 9.1 where the editors observe that the court in construing a statute must start from and stay with the words of the statute. They say:

> "Context and mischief do not constitute a licence to judges to ignore the plain meaning of the words that Parliament has used."

13. The courts take a particularly strict approach to the construction of statutes that expropriate private property: *R (Sainsbury's) v Wolverhampton City Council* [2011] 1 AC 437. Where there is any ambiguity, the construction chosen will be the one that interferes least with private property rights. It seems to me that that principle is relevant both to the construction of the Code and to the exercise of the Tribunal's discretion under the Code, for example in its judgment as to what are the "appropriate" terms to be imposed alongside Code rights. I bear this closely in mind in assessing the preliminary issues, all of which challenge the Claimant's application on the basis that it is out of line with the requirements of the Code – whether as to the form of the notice, the nature of the rights sought, or the OFCOM direction that authorises the Claimant to seek them.

The procedural background

14. On 8 November 2018, following a telephone Case Management Conference, the Deputy President directed that four preliminary issues should be determined. The first was whether the Claimant is entitled to seek the rights which it seeks in this reference notwithstanding the continuation of the Vodafone lease. That issue is to be determined on 16 April 2019 by the Deputy President together with the preliminary issue in *Cornerstone Telecommunications Infrastructure Ltd v The Guinness Partnership Ltd and Sheffield City Council TCR/72/2018*. The other three preliminary issues were ordered to be heard on 7 February 2019. They are:

ii. Whether the rights which the Claimant seeks in this reference are different from the rights which it claimed in the notice dated 14 May 2018 and, if so, whether it is permissible for it to do so.

iii. Whether the Claimant is seeking Code rights over "*electronic communications equipment"* which the Tribunal cannot confer.

iv. Whether the Claimant is seeking rights which are not Code rights and which the Tribunal cannot confer.

15. Following the amendment of the Respondent's Statement of Case there is a fifth preliminary issue:

v. Whether the application of the Code to the Claimant by OFCOM is sufficient to enable it to acquire the rights it seeks.

Issue 2: the paragraph 20 notice and the rights now claimed

16. This issue relates to what the Respondent says is a mismatch between what the Claimant asked for in its paragraph 20 notice and what it seeks in the reference to the Tribunal. Paragraph 20 reads as follows:

> "(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—
>
> (a) to confer a code right on the operator, or
>
> (b) to be otherwise bound by a code right which is exercisable by the operator.
>
> (2) The operator may give the relevant person a notice in writing—
>
> (a) setting out the code right, and all of the other terms of the agreement that the operator seeks, and
>
> (b) stating that the operator seeks the person's agreement to those terms.
>
> (3) The operator may apply to the court for an order under this paragraph if—
>
> (a) the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or
>
> (b) at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.
>
> (4) An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which—
>
> (a) confers the code right on the operator, or
> (b) provides for the code right to bind the relevant person."

17. Mr Watkin points out that "the right" that is sought in proceedings in the Tribunal must be the same as "the right" set out in the paragraph 20 notice. He argues that the rights claimed in the Claimant's paragraph 20 notice are not the same as those sought in its Statement of Case and that therefore the notice is invalid and the proceedings should be struck out. Mr Radley-Gardner says that as a matter of fact the rights sought are the same, but argues that if he is wrong about that the proceedings should not be struck out.

Are the rights now sought the same as those claimed in the paragraph 20 notice?

18. At first sight this is a surprising point because the draft agreement appended to the paragraph 20 notice is exactly the same as the draft appended to the Claimant's Statement of Case. But Mr Watkin's argument is as follows.

19. He examines first the paragraph 20 notice itself. It seeks rights over "the Land", defined as "the land at Penrose Farm, Moorland Road, Indian Queens, Cornwall TR9 6HN". The rights that it seeks are set out at paragraph 6 of the notice, which sets out all the Code rights listed in paragraph 3 of the Code. In other words the paragraph 20 notice begins by asking for all possible Code rights over the whole of the Respondent's land.

20. The proposed agreement is then set out at Annex 2 to the notice. Paragraph 7 of the notice says that Annex 2 sets out the "additional terms" sought by the Claimant, but in fact the draft agreement sets out more precisely the Code rights sought and (as the Claimant says in paragraph 6 its Reply to the Respondent's Statement of Case) the precise areas in relation to which those rights are sought. The draft agreement seeks rights over:

i. The "Grantor's Property", defined as Penrose Farm in its entirety;

ii. The "Communications Site" edged red on the plan;

iii. The "Set Down Area" hatched brown on the plan.

iv. The "Access Route" coloured brown on the plan.

21. The Communications Site, the Set Down Area and the Access Route are all parts of Penrose Farm; the Communications Site is the mast site, and the Access Route and the Set Down Area both feature in the Vodafone lease. Some of the rights set out in the agreement relate only to one or more of those areas; but some of them relate to the whole farm – for example in clause 4.2.1(a) a right of access across any part of the farm as necessary.

22. Turning then to the Claimant's Statement of case, Mr Watkin points out that paragraph 8 defines the scope of the Claimant's application as relating to "the Land", defined as:

> "that part of the freehold land registered at HM Land Registry under title number CL8150 being land and buildings known as Penrose Farm [etc] and shown edged red, coloured brown and hatched brown on the plan".

23. The Land over which rights are sought from the Tribunal, according to Mr Watkin, is thus defined as and limited to the Communications Site, the Set Down Area and the Access Route (as they are called in the draft agreement), whereas the paragraph 20 notice related to the whole of Penrose Farm. The Statement of Case relates to a few square metres of land rather than to 60 acres.

24. As Mr Radley-Gardner points out, the Respondent's argument ignores the wording of paragraph 12 of the Claimant's Statement of Case, which says that the Claimant seeks the Code rights set out in the draft agreement appended to the paragraph 20 notice and, in the exact same form, to the Claimant's Statement of Case. It is therefore perfectly clear – and cannot have been the slightest bit ambiguous to the Respondent – that the rights sought by the Respondent are those set out in the terms of the draft agreement, which relate largely to the three defined areas but also, in part, to the whole of Penrose Farm.

25. Paragraph 8 of the Claimant's Statement of Case does not limit the scope of the application. It defines a term ("the Land") for the purposes of this document and states, correctly, that the application relates to it. But it then goes on in paragraph 12 to define the scope of the application by reference to the agreement. Far from disowning parts of the draft agreement as Mr Watkin suggested, the Statement of Case holds fast to the draft appended to the paragraph 20 notice by referring to that appended draft and appending the same draft again.

26. In my judgment therefore there is no substance in this preliminary issue. To suggest that the Statement of Case seeks rights that are different from those sought in the paragraph 20 notice because they relate to a smaller area of land, in the face of the clear terms of paragraph 12 and of the draft agreement itself, is incorrect and to suggest that the Respondent could have been misled is fanciful.

The effect of a discrepancy between the paragraph 20 notice and the claim in the Tribunal

27. The Respondent says that if there is any difference – other than *de minimis* – between what is claimed in the Tribunal and the paragraph 20 notice, the paragraph 20 notice is invalidated and the Claimant must start again. He says that that is the case even if what is claimed in the Tribunal is less than what is sought in the notice – whether that be fewer rights, or less extensive rights, or rights over a smaller area of land. That is because otherwise negotiation takes place on a false basis. It is wrong, says Mr Watkin, to issue a paragraph 20 notice in extensive terms in order to pressurise the occupier of the land into granting some or all of the rights sought for fear of being subjected to them all by the Tribunal. Clearly a Code right that was not claimed in the paragraph 20 notice cannot be claimed before the Tribunal, but equally if a Code right is sought in the paragraph 20 notice but not pursued before the Tribunal the whole procedure fails.

28. In view of what I have decided about the rights claimed in this case there is no need for me to say any more about this further point. And indeed it will be unusual for the rights sought in a paragraph 20 notice to be different from those sought in the Tribunal proceedings for the simple reason that the notice should contain a draft of the agreement sought, and that same draft will be the starting point of the Tribunal reference. Negotiations with the occupier of the land will, almost invariably, have begun long before the paragraph 20 notice is drafted and there may well be changes of position on both sides in the course of negotiations. The paragraph 20 notice is likely

to be drafted only when a Tribunal reference is obviously going to be necessary and therefore will append the same draft agreement that the Code operator will seek from the Tribunal.

29. That being the case, the point argued here is probably academic, but at any rate it is best left for decision if it actually arises. Obviously the Tribunal cannot impose upon the occupier of land any Code right that has not been sought in the paragraph 20 notice; that is perfectly clear from the terms of paragraph 20. On the other hand, where the reference to the Tribunal seeks fewer rights than were sought in the paragraph 20 notice, and the Respondent was in fact misled or pressurised or inconvenienced by the notice, then that is a matter that may weigh with the Tribunal in the exercise of its discretion as to what are the appropriate terms to be imposed upon the occupier of the land. But my provisional view is that it is unlikely that that sort of discrepancy will invalidate the paragraph 20 notice.

Issue 3: is the Claimant seeking rights over electronic communications equipment?

30. The Code regulates the legal relationship between Code operators and occupiers of land. It does not create or regulate legal relationships between Code operators. They are a matter of private contract, subject to regulation by OFCOM. In particular it is not the policy of the law to give Code operators access to each other's equipment on favourable terms (in particular as to consideration; see paragraph 10 above). So the Code prevents what Mr Watkin tells me are called "blue on blue" applications for Code rights by providing that Code rights can be obtained over "land", and stating in paragraph 108 that:

> "'land' does not include electronic communications apparatus"

31. There is already ECA on the mast site pursuant to the Vodafone lease. In his Statement of Case the Respondent says that if any of it has been annexed to the land then on the usual common law principles it has become part of the Respondent's freehold land (although demised to Vodafone).

32. It is well-known that chattels that have become attached to the land with a sufficient degree of permanence become part of the land. In *Elitestone v Morris* [1997] 1 WLR 687 at 691 Lord Lloyd approved the threefold classification of items brought on to land as (a) chattels, (b) fixtures and (c) items which have become part and parcel of the land itself, and added that "objects in categories (b) and (c) are treated as being part of the land."

33. The Respondent gives as an example the concrete bases for the existing mast and cabinets. He says that they are ECA because they are "designed or adapted for use in connection with the provision of an electronic communications network", but are now part of the land because they are annexed to it and could not be removed without being destroyed. Therefore in seeking Code rights over the land comprised in the mast

site the Claimant is in fact seeking Code rights over ECA, which the Tribunal cannot grant.

34. The Claimant's immediate answer is that it does not want Code rights over ECA. The equipment on the site belongs to Vodafone. The intention is that once the Claimant has Code rights it will be entitled to put and/or keep ECA on the site and Vodafone will transfer its ECA to the Claimant. It does not need Code rights over ECA, only over land.

35. However, the Respondent's argument is that whatever the Claimant wants or needs, as a matter of fact it has asked for Code rights over ECA because the Respondent's land includes ECA which has become part of the land on ordinary common law principles.

36. Whether that is correct or not depends upon the interpretation of paragraph 101 of the Code, which reads as follows:

> "The ownership of property does not change merely because the property is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with this code."

37. The old Code contained similar wording at paragraph 27(4):

> "The ownership of any property shall not be affected by the fact that it is installed on or under, or affixed to, any land by any person in the exercise of a right conferred by or in accordance with this code."

38. Does that provision mean that ECA that is affixed to land does not become part of the land? The Respondent says that this provision does not have that effect. Strictly, he argues, it means that the common law rule continues unabated, and is not changed by the fact that ECA is annexed to land by virtue of a Code right. Therefore any ECA that is sufficiently annexed to the land at the mast site has become part of his own freehold. However, he concedes that Parliament did intend that ownership of ECA would remain with the Code operator; therefore, it is argued, ECA that becomes sufficiently affixed to land does as usual become part of the land, although its ownership does not change. The Claimant on the other hand says that this means that ECA installed on land pursuant to the Code does not become part of the land despite the common law principle.

39. Which of those two meanings did Parliament intend?

40. The Law Commission's discussion and recommendation of this provision can be found at paragraphs 2.55 to 2.57 of the Law Commission Report.

> "2.55 "Land" is not defined in the 2003 Code, and it has been suggested that this might be clarified. We take the view that it does not generally cause confusion; land is defined in the Interpretation Act 1978 to mean the earth together with buildings and fixed structures upon it. Apparatus placed on land pursuant to the 2003 Code may or may not form part of the land. However, even if it does not, it would be artificial to argue either that a wholesale infrastructure provider was not occupying land with a mast or that its customers were not doing so, in sharing the mast and keeping equipment on the ground either in standalone cabins or within the infrastructure provider's buildings.
>
> 2.56 Inevitably infrastructure providers and their customers have a wide range of different legal agreements; whether or not any given agreement contains Code Rights is a matter of construction of its terms and no generalised answer can be given.
>
> 2.57 One point that does require clarification, however, is the ownership of apparatus that may have become a fixture; as we said above, the drafting of the 2003 Code leaves this unclear. We believe that the policy of the 2003 Code was to ensure that the ownership of electronic communications apparatus should not change despite its being attached to land. In most cases, this would mean that the apparatus would remain the property of the network operator or infrastructure provider in question; it would also preserve the property rights of others, for example where there is a charge in favour of a bank which financed the acquisition. We make a recommendation to effect that policy, at paragraph 2.80 below."

41. The recommendation read:

> "We recommend that the revised Code should provide that property rights in electronic communications apparatus installed by a Code Operator do not change by reason of their being attached to land.

42. Parliament accepted that recommendation, and paragraph 101 was enacted. The wording is not quite the same as that of the recommendation; the addition of the word "merely" emphasises that the attachment of ECA to land does not by itself effect a change of ownership, but that some other factor (for example a sale) might do so.

43. It appears that the Law Commission's thinking was confined to the ownership of ECA, and the Commission was not concerned with whether or not ECA became part of land. The mischief that the provision was designed to prevent was the loss of the Code operator's property by virtue of its becoming part of the land and therefore vested in the landowner. That might be a problem for the operator if it led to the loss of valuable equipment; equally from the landowner's point of view it might be important to be able to say: "that concrete is yours, not mine, and you must remove it".

44. However, I take the view that the effect of paragraph 101 goes further than ownership and must have an effect upon status. If part of an operator's ECA on a mast site were to become land, albeit without a change in ownership, then the Code operator will not be able to sell that part of its apparatus without making a transfer by deed in accordance with section 52 of the Law of Property Act 1925, and on sale title to that ECA would be registrable pursuant to section 4 of the Land Registration Act 2002. That would be an obviously absurd result and cannot have been Parliament's intention.

45. Therefore I conclude that the effect of paragraph 101 of the Code is that ECA installed pursuant to Code rights, however firmly affixed to land, does not by virtue only of that attachment become land in accordance with the common law and the principles set out in *Elitestone v Morris*.

46. In argument before me Mr Watkin suggested that if that is the case then the presence of ECA on the site means that the most the Claimant can have is Code rights over as much of the three-dimensional space of the site as is now unoccupied but not over the airspace currently occupied by the ECA. The Claimant gets a Swiss cheese, he says, the holes being shaped by the ECA on the site. It would then follow that Code rights cannot enable the Claimant to keep that equipment on site; it has no rights over the ECA and no rights over the airspace it occupies.

47. The Claimant does not want a Swiss cheese; it wants Cheddar, as Mr Radley-Gardner put it. He argued that it would be absurd to suppose that it is not possible to apply for Code rights over land simply because another operator's ECA is present there. The Code itself makes provision for this by defining Code rights to include the right to keep on land ECA that is already present, for example when interim or temporary rights have already been granted under paragraphs 26 or 27.

48. I accept Mr Radley-Gardner's arguments on this point. It is not the case that the presence of chattels (whether ECA or something else) on land blocks out from the rights or potential rights of others the airspace, or space in the ground, that they occupy. Neither a lease of land nor an exclusive licence to occupy land (the one being an estate and the other being a personal and often a contractual right) is diminished by the presence of chattels on land; it is not the case that if an operator seeks Code rights over a plot of land on which the owner has parked his car, the Code rights can be conferred only over what the car does not occupy. The presence of ECA is no different. The prohibition upon the acquisition of Code rights over ECA does not mean that it is impossible to acquire Code rights over land where ECA is present.

49. Manifestly if the ECA currently on the mast site were the property of a Code operator with whom the Claimant was not in friendly relations, a request for Code rights over the land would be pointless. Such rights would not enable the Claimant either to use or to remove the ECA; it would be trespassing upon and interfering with another's goods if it did so. The prohibition of "blue-on-blue" applications means that the Claimant would not be able to get round that problem. But here the owner of the

ECA is a friendly operator and indeed a shareholder in the Claimant. The relations between the Code operators involved in this scenario are a matter of private contract law between them, but if the Claimant succeeds in getting Code rights against the Respondent it will be able to complete the picture by acquiring Vodafone's ECA.

50. So preliminary issue 3 is decided in the Claimant's favour; it has applied for Code rights over land, not over ECA.

Issue 4: is the Claimant seeking rights that the Tribunal does not have jurisdiction to confer?

51. The Tribunal's jurisdiction to impose Code rights and other terms on the occupier of land is set out in paragraph 23 of the Code:

> (1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.
>
> (2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).
>
> (3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).
>
> (4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).
>
> (5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> > (a) occupy the land in question,
> >
> > (b) own interests in that land, or
> >
> > (c) are from time to time on that land.
>
> (6) Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement.
>
> (7) The terms of the agreement must include terms specifying for how long the code right conferred by the agreement is exercisable.
>
> (8) The court must determine whether the terms of the agreement should include a term—
>
> > (a) permitting termination of the agreement (and, if so, in what circumstances);

(b) enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates (and, if so, in what circumstances).

52. The Respondent says that the rights the Claimant seeks include rights that the Tribunal does not have jurisdiction to confer. Moreover, he says that the inclusion of such rights invalidates the paragraph 20 notice and the Claimant has to start again.

53. Mr Watkin notes that paragraph 23 of the Code enables the Tribunal to impose not only Code rights but also "such terms as it thinks appropriate". But he says that that is not a blank canvass. The "terms" that can be imposed are to be construed as terms upon which Code rights are to be exercised. They cannot include free-standing obligations, and in particular they cannot include positive obligations on the part of the occupier of the land, nor can they restrict the occupier's activities elsewhere on his or her property.

54. Turning to the rights sought in this case, Mr Watkin says that there is no jurisdiction to impose the following:

i. Warranties and a covenant for quiet enjoyment by the Respondent.

ii. The right for the Claimant to install a generator.

iii. The right to compel the Respondent to enter into agreements with third parties and to restrict his rights to negotiate with them.

iv. The right to restrict the Respondent's access to the site.

v. Obligations on the part of the Respondent to maintain the condition of his farm and to protect the site from interference.

vi. The obligation of the Respondent to notify the Claimant of various matters.

vii. Covenants by the Respondent not to interfere with the site or to authorise any interference.

viii. A restriction on the Respondent's ability to develop other parts of his property.

55. Mr Radley-Gardner in response points to the breadth of the Tribunal's discretion to impose such terms as it thinks appropriate. He says that "terms" in paragraph 23(2) is not restricted. All the terms of the draft agreement are in principle within the jurisdiction conferred by paragraph 23, but all are a matter of discretion. They may or may not be granted in due course but none of them is out of bounds.

56. In my judgment Mr Radley-Gardner's reading of the Code is correct. If the meaning of "terms" was limited as Mr Watkin suggests the draftsman would have made that clear. As it is paragraph 23 contains no restriction upon the terms that may be imposed, although sub-paragraphs (3) to (8) set out what they must include.

57. Clearly in deciding what it thinks appropriate the Tribunal will have very careful regard to the overall scheme of the Code, which provides for the imposition of Code rights and other terms on occupiers of land at a rate of consideration far lower than was payable under the old Code. The Tribunal will have in mind the need to be fair to both parties, and what is "appropriate" is likely to be influenced by the basis of consideration that it can impose. It may be considered inappropriate to impose on a site provider certain obligations intended to facilitate the provision of the operator's network when the consideration receivable by the site provider is to be unrelated to the value of that network.

58. But there is no principled reason why there should not be, for example, a restriction on the landowner's right of access to the site, in the interests of safety, or a restriction on the landowner's ability to give others access to the site. Whether there is any scope for the imposition of positive obligations on the landowner is a difficult question and one might expect that it would be a rare occurrence. But it is not outside the Tribunal's jurisdiction. I see no reason to regard any terms to which the Respondent points as outside the Tribunal's jurisdiction, although there are some that it might well, in the exercise of its discretion, refuse to impose. There is no need for me to comment further on the individual terms and it would be wrong to do so in the absence of argument at a full hearing about the terms of the agreement to be imposed.

59. Accordingly I take the view that the draft agreement does not contain any terms that are outside the Tribunal's jurisdiction. The Claimant is therefore successful on this preliminary issue, but it should not count its chickens. All the draft terms can be considered as a matter of discretion, and the Claimant may have an uphill struggle to persuade the Tribunal that some of them are appropriate.

60. The Respondent argues that if a draft agreement did contain a term that the Tribunal had no jurisdiction to grant, the paragraph 20 notice would be invalidated. I am not persuaded that that is the case, but I take the view that it is so unlikely to happen that it would not be useful to decide this point on a hypothetical basis. As a matter of logic it is not impossible that a term of a draft agreement would be outside the scope of the Tribunal's discretion, but a Code operator is clearly not going to ask for the sort of right that Mr Watkin put forward by way of example, such as an obligation for the occupier of land to provide the Code operator's manager with three meals a day.

61. The preliminary issue as to the rights demanded in this case is decided in favour of the Claimant, and I make no decision on the effect of a draft agreement that sought to impose terms that the Tribunal had no jurisdiction to impose. In the light of the breadth of the Tribunal's discretion it will not generally be useful or cost-effective for respondents to argue this jurisdiction point as a preliminary issue.

The Respondent's application to amend his Statement of Case

62. The application was made on 22 January 2019, accompanied by a draft amended Statement of Case. The amendments sought related to two preliminary issues which the Respondent wanted to be heard, in whole or in part, at the hearing on 7 February 2019. One was whether ECA already on the site is owned, not by Vodafone, but by the Claimant or by another third party. The other was whether the terms of the direction made by OFCOM in applying the Code to the Claimant are too narrow for it to have the Code rights for which it applies. A witness statement made by the Respondent's solicitor, Mr Daniel Cuthbert, and dated 22 January 2019 was served in support of the application.

63. The Claimant naturally objected to any such amendment on the basis that the application was made very late, allowed insufficient time for the Claimant to prepare a response, and threatened to derail the hearing on 7th February. Those are legitimate concerns and I bear them in mind in responding to the application.

The ownership of equipment on the site

64. I consider first the application to make amendments that put in issue the ownership of the equipment on the site. In its Statement of Case the Claimant said that all the equipment on the site belonged to Vodafone, and in his Statement of Case the Respondent agreed. He now seeks to withdraw that admission and to ask the Tribunal to ascertain whose equipment is on the site.

65. The reason he wants to do this relates to preliminary issue 3 above. If there is equipment on the site that does not belong to Vodafone, the Respondent argues that it may not have been installed pursuant to Code rights. If that is the case, and if any of it amounts to a fixture at common law, it will not be prevented from becoming part of the land by paragraph 101 of the Code. That would mean that in applying for Code rights over the Respondent's land the Claimant is in fact applying for Code rights over ECA, which is not permitted.

66. Mr Watkin accepted that there would not be an opportunity to hear evidence about the ownership of equipment on 7th February; instead he invited me to permit the amendment, to defer a hearing with evidence on this issue until a later date, and to decide issue 3 on two alternative bases to cover both the case where the equipment is owned by Vodafone and the case where it is not.

67. The reason why the application is made so late in the day is that the Respondent received a plan of the site from the Claimant on 7th January. On that plan was shown a mast labelled "CTIL mast". That prompted him to suggest that the mast does not belong to Vodafone and was not installed pursuant to Code rights. But the only evidence he has to that effect is the labelling on the plan. It is pointed out that CTIL has substantial assets and is likely to own large amounts of ECA, and it is suggested that it is unlikely that Vodafone would have bought a mast from CTIL.

68. Moreover, in April 2017 British Telecommunications plc ("BT") asked the Respondent for a wayleave to lay a cable and install equipment on the site. Mr Cuthbert's evidence is that the Respondent says that the request for the wayleave was received after the work had already been done, and that the Respondent "believes that British Telecommunications plc may have equipment at the Site. Although this is not clear from the Site Survey". Therefore it is said that there is a further possibility that there is ECA on the site that was not installed pursuant to Code rights.

69. Finally Mr Cuthbert adds that "the Respondent is also unsure whether any of the current electronic communications apparatus was installed by Vodafone or the Claimant."

70. At the hearing on 7 February 2019 I refused the Respondent's application to amend his Statement of Case in respect of the ownership of apparatus.

71. First, it is made far too late, at least so far as the possible BT cable is concerned. That situation appears to be unchanged since the spring of 2017 and any legal points arising from it should have been raised a long time ago – and only after proper investigation by the Respondent himself, who has all along been best placed to know what if anything BT has installed on his land. It is unfair at this stage to ask the Claimant to produce information about it.

72. Second, so far as the ownership of equipment in use by Vodafone is concerned, it is speculative. The only basis for the Respondent's suspicions is the plan, which does not by itself constitute evidence of ownership of that mast. I accept that CTIL does, as its accounts demonstrate, own ECA. But whether or not a mast labelled, on a plan, "CTIL mast" actually belongs to the Claimant is unknown. The label may indicate that the mast belongs to the Claimant, but equally it may indicate that it has been bought from the Claimant, or leased from it, or designed by it, and so on. The Respondent's further generic uncertainty as to whether Vodafone or the Claimant has installed other ECA on the site is, again, pure speculation.

73. Third, the application is arguably pointless because even if the Respondent can establish that there is ECA on the site that does not belong to Vodafone, that does not mean that that ECA was not installed pursuant to Code rights. The Vodafone lease – to which the only parties are Vodafone and the Respondent - gives Vodafone the right to install and keep on the site whatever equipment it requires (clause 2.1 and 2.2 of the Vodafone lease). The lease also permits Vodafone to share the site, provided it gives notice of doing so to the Respondent (clause 3.8). There is no requirement that all the ECA on the site must belong to Vodafone. The lease states that what is there in 2007 belongs to Vodafone (clause 11), but permits Vodafone to add to further equipment (clause 2.1). ECA installed by Vodafone, even if it belongs to a third party such as the Claimant, is therefore present pursuant to Code rights.

74. What is not permitted is the sharing of the site without notice to the Respondent under clause 3.8. Accordingly, if the Respondent could show not only that there is

ECA on site that does not belong to Vodafone but also that the site is being shared with the owner, or with another user, of that ECA in a way that is not permitted by the lease, then the Respondent might be in a position to argue for a different outcome to issue 3.

75. Mr Cuthbert in his witness statement suggests that the site is being shared with the Claimant or with Telefonica, and says that the Respondent has had no notice of sharing. But this is conjecture. There is no evidence of sharing, and therefore no evidence that any ECA has been installed otherwise than pursuant to Code rights. The Respondent's application to amend his Statement of Case is speculative and he is a very long way from a position that could have any effect on the outcome of issue 3.

76. Accordingly I have refused to allow the amendment of the Respondent's Statement of Case so far as that amendment relates to the ownership of the ECA on the site.

The OFCOM direction

77. The requested amendment in connection with the OFCOM direction is a very different matter. I accept that, as the Claimant says, the application could and should have been long ago, and that there are good reasons for refusing to add a further issue to those directed by the Deputy President. However, there are also good reasons for addressing it now rather than later.

78. First, it is crucial to this case. If the Respondent's argument succeeds then the case will come to an end; it is, as Mr Radley-Gardner put it, a nuclear button. It is therefore best not put off. It is of some general importance and it will be helpful to have a decision of the Upper Tribunal on the point. Second, the determination of this issue does not require any witness evidence; it is a point of construction which can be argued relatively briefly. I took the view in the morning of 7th February that there would be time to deal with it on that day as well as the three issues already to be decided, and that proved to be correct. Accordingly the amendments to the Respondent's Statement of Case which relate to this preliminary issue were allowed, and I now turn to that issue.

Issue 5: the OFCOM direction

79. The only organisations that can obtain Code rights over land (by agreement, or by order of the Tribunal) are those that have had the Code applied to them by a direction of OFCOM. Section 106 of the Communications Act 2003 provides:

> "(1) In this Chapter "the electronic communications code" means the code set out in Schedule 3A. …
>
> (3) The electronic communications code shall have effect—

> (a)…in the case of a person to whom it is applied by a direction given by OFCOM …
>
> (4) The only purposes for which the electronic communications code may be applied in a person's case by a direction under this section are—
>
> (a) the purposes of the provision by him of an electronic communications network; or
>
> (b) the purposes of the provision by him of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.
>
> (5) A direction applying the electronic communications code in any person's case may provide for that code to have effect in his case—
>
> (a) in relation only to such places or localities as may be specified or described in the direction;
>
> (b) for the purposes only of the provision of such electronic communications network, or part of an electronic communications network, as may be so specified or described;
>
> or
>
> (c) for the purposes only of the provision of such system of infrastructure, or part of a system of infrastructure, as may be so specified or described."

80. That section was amended by the Digital Economy Act 2017. The word "infrastructure" was substituted for the word "conduits". So before the 2017 amendments, OFCOM's direction could be made either to enable the operator to provide an electronic communications network, or to enable it to provide a system of conduits which was to be made available to network providers.

81. The word "conduits" is rather obviously outdated, belonging to an era where telephone or television signals generally travelled along pipes or wires. Before the amendment section 106(7) of the Communications Act 2003 read:

> "In this section "conduit" includes a tunnel, subway, tube or pipe."

82. The Law Commission commented as follows at paragraph 2.28 of its Report:

> "The infrastructure provider will not fall within [the provisions of section 106, pre-amendment] if it does not itself operate an electronic communications network, unless its mast sites also involve the presence of

> cable or fibre within a system of conduits. It is perhaps strange that a provider of conduits for the use by others for electronic communications apparatus can be a Code Operator, but a provider of other infrastructure cannot. We consider that infrastructure providers should be eligible to have the Code applied to them, and therefore … to acquire Code Rights. This would enable the Code to be applied consistently across all infrastructure providers."

83. Hence the deletion in 2017 of "conduit" and substitution of "infrastructure". The Claimant had the Code applied to it by a direction made by OFCOM on 25 May 2017, prior to the 2017 amendments, not for the purpose of the provision of an electronic communications network but for "the purposes of the provision by [the Claimant] of a system of conduits which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks."

84. The Claimant is in the business of providing not only pipes and wires but also masts, cabinets and other items that cannot plausibly be described as conduits, and that is the sort of apparatus that it wishes to keep on the Respondent's land. The Respondent says that OFCOM's direction is limited to the provision of conduits and that it therefore cannot have the Code rights that it seeks.

85. The Respondent further argues that the direction made in respect of the Claimant is in fact a limited one, of the kind envisaged in section 106(5)(c) (set out above). He refers to paragraph 3(2) of the Electronic Communications Code (Transitional Provisions) Regulations 2017, which reads:

> "3.—(1) Paragraph (2) applies where, immediately before the coming into force of the new code, the existing code applies to a person by virtue of a direction made by OFCOM under section 106(3)(a) of the Act.
>
> (2) The direction referred to in paragraph (1) shall be treated as having been made in relation to the new code."

86. It is pointed out that that provision does not do away with any condition or limitation imposed by the direction made under the old Code. The explanatory memorandum laid before Parliament in respect of the 2017 regulations stated:

> "The provisions in these Regulations are intended to secure continuity between the existing Electronic Communications Code … and the new Code … which replaces it. They ensure that actions taken under sections 106 to 199 of the existing code, and any conditions or limitation applicable to them, will have continuing effect."

87. To this the Claimant has two obviously correct answers.

88. First, paragraph 3 of Schedule 3 to the Digital Economy Act 2017 says:

> "In any enactment passed or made before the commencement date, unless the context requires otherwise – (a) a reference to a conduit system, where it is defined by reference to the existing code, is to be read as a reference to an infrastructure system as defined by paragraph 7(1) of the new code".

89. Paragraph 1 of that Schedule states that "enactment" includes "an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978." And section 21(1) of the Interpretation Act 1978 says:

> "'subordinate legislation' means Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act."

90. That definition provides the answer, according to the Claimant, because *Bennion on Statutory Interpretation* (7th edition, 2017, para.1913) says of the term "instruments made":

> "Although this might suggest that the instruments concerned are limited in nature to legislative instruments, it has been treated as including other instruments, particularly an authorisation given under an Act."

91. The Respondent says that the material within the definition of subordinate legislation is indeed limited to legislative instruments, being broad enough to encompass any subordinate legislation created through a power delegated by Parliament. Mr Watkin points to the statutory predecessor of the 1978 Act, namely the Interpretation Act 1889 of which section 31 is in similar terms. It goes no further, he says, than legislation and subordinate legislation.

92. But Bennion in support of the editors' view at paragraph 1913 cites *Wagstaff v Department of the Environment* [1999] 2 EGLR 108, at 112, where "instrument" was found to include a compulsory purchase order, and *R v Inspectorate of Pollution ex p Greenpeace* [1994] 4 All ER 329, at 342, where the term was held to include an authorisation to discharge waste under section 6 of the Radioactive Substances Act 1960. The analogy with a direction of OFCOM applying the Code to an operator seems obvious.

93. Mr Watkin acknowledges the two cases just referred to, and says that they are mentioned by the editors of Bennion with a raised eyebrow. But there is no suggestion of doubt or criticism in the text of Bennion. The two cases are mentioned as straightforward instances of the meaning of "instrument made". I accept the Claimant's argument, and I find that the OFCOM direction is likewise an instrument made within section 21(1) of the Interpretation Act 1978 and therefore an "enactment" within paragraph 3 of Schedule 3 to the Digital Economy Act 2017. The term "conduits" in the direction made in respect of the Claimant is to be read as "infrastructure" pursuant to the 2017 amendment.

94. The Claimant's second argument focuses on paragraph 3(2) of the Electronic Communications Code (Transitional Provisions) Regulations 2017, quoted at paragraph 85 above.

95. The Claimant acknowledges that that provision does not do away with any limitation or condition imposed under the old Code, but according to the Claimant, there is no limitation here. There is a direction in one of the two full forms made possible under the old Code and there is no limitation under section 106(5); an unlimited direction with reference to conduits under the old Code becomes an unlimited direction in respect of infrastructure under the new.

96. That seems to me to be what was intended. There is no indication in the direction made with reference to the Claimant that it was to be limited, and no reference to section 16(5). It was as unlimited as was possible, under the old Code, in respect of an organisation that was not actually providing a telephone network. It was a straightforward direction relating to conduits and was not a limited or conditional direction under the old Code. It is therefore to be read now as a straightforward and unlimited direction relating to infrastructure under the new Code.

97. It is worth noting, as the Claimant points out, that the proposal made to OFCOM for a direction in respect of CTIL, to be found on the OFCOM website, and in response to which the direction was made, describes the Claimant as providing "a system of conduits as it undertakes, amongst other things, the provision of passive infrastructure on sites including, but not limited to: masts/towers, cabins, cabinets, ducts and cable trays which are installed both horizontally and vertically, and power supplies (with associated cabling))." So the Claimant was always providing, and was known to OFCOM to be providing, much more than just conduits. The statutory authorisation for the purpose of providing conduits was widely used, as the Law Commission's discussion acknowledges, to apply the Code to providers of infrastructure including masts and cabinets so long as they also provided conduits (see in particular the first sentence of the Law Commission's paragraph 2.28, quoted above at paragraph 82.). It was Parliament's intention, in amending "conduits" to read "infrastructure", to bring the wording of the statute into line with practice so far as such operators were concerned; they were not intended to have to apply for a fresh direction, after the amendment, to enable them to carry on providing other infrastructure. The Claimant had all it needed under the old Code and has all it needs now. What changed with the 2017 amendment was that providers of infrastructure that did not include conduits could now have the Code applied to them.

98. The Claimant further refers to paragraphs 6(a) and 7 of the Code. Paragraph 6(a) states:

> "In this code "network" in relation to an operator means—
>
> (a) if the operator falls within paragraph 2(a), so much of any electronic communications network or infrastructure system provided by the operator as is not excluded from the application of the code under section 106(5)…"

99. Paragraph 7 states:

> "(1) In this code "infrastructure system" means a system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks.
>
> (2) References in this code to provision of an infrastructure system include references to establishing or maintaining such a system."

100. The Claimant argues that because there is no reference in paragraph 7 of the Code to any limitation under paragraph 106(5) – in contrast to the reference in paragraph 6(1), and in contrast to the way a conduit system was defined under the old Code - then any Code operator who has had the Code applied to it for the purpose of the provision of infrastructure, subject to a limitation under section 106(5), is able nevertheless to seek Code rights that fall outside that limitation. I make no decision on that point, although I note that it seems far-fetched; but I do not need to address it because there is clearly no section 106(5) limitation in the direction made in respect of the Claimant.

Conclusion

101. That brings to an end my decision on the preliminary issues that have been argued before me. They have all been decided in favour of the Claimant. The first preliminary issue is yet to be decided.

102. Because this is therefore not the end of the road I am minded to reserve costs. If either party wishes nevertheless to apply for costs, such an application may be made within 14 days of the date of this decision; the other party will then have 14 days to respond, and the applying party a further 14 days to reply to that response if so advised.

Judge Elizabeth Cooke
Upper Tribunal (Lands Chamber)

8 April 2019