



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LC-2023-000710**

Subject premises : **Land at Park Gate Court and
Hampton Hill Service Station
High Street
Hampton**

**Claimant
(Operator)** : **Cornerstone Telecommunications
Infrastructure Limited**

Representative : **Osborne Clarke LLP**

**Respondent
(Site Provider)** : **VMMC Estates**

Type of application : **Application under paragraph 26(1) of the
Electronic Communications Code**

Date of hearing : **5 March 2024**

Tribunal member : **Deputy Regional Judge Nigel Gravells**

Date of Decision : **25 March 2024**

DECISION

Introduction

- 1 This is the Decision of the First-tier Tribunal on a Reference (received by the Upper Tribunal on 26 October 2023 and transferred to the First-tier Tribunal on 31 October 2023) including an application pursuant to paragraph 26(1) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003 ('the Code')).
- 2 The Claimant is an 'operator' within the meaning of paragraph 2 of the Code. More specifically, the Claimant does not provide an electronic communications network of its own: rather it installs and maintains an infrastructure system (as defined in paragraph 7 of the Code) to providers of electronic communications networks.
- 3 The Claimant seeks interim non-intrusive multi-skill visit ('MSV') rights to assess the suitability of the roof of the subject premises for the installation and operation of electronic telecommunications apparatus.
- 4 The Respondent is the registered proprietor of the freehold of the subject premises, registered at HM Land Registry under title number TGL293383.

Legal background

- 5 The Electronic Communications Code regulates the legal relationship between mobile telephone operators (whether providing a phone signal or physical infrastructure) and the landowners on whose land electronic telecommunications apparatus is to be placed. The Code provides protection for landowners while seeking to protect 'the public interest in access to a choice of high quality electronic communications services': see paragraph 21 of the Code.
- 6 Code rights are conferred upon operators by agreement with the occupier of land (paragraph 9), and an agreement may be imposed by an order of the Upper Tribunal (paragraph 20). However, paragraph 26 makes provision for interim Code rights, which can only be created by the Tribunal imposing an agreement upon the parties. The test that an operator must satisfy in order for the Tribunal to impose an agreement conferring Code rights under paragraph 20 is set out in paragraph 21 of the Code –
 - (1) ... the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.
 - (2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.
 - (3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.
 - (4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.
- 7 For interim rights under paragraph 26 the operator need only show that it has a 'good arguable case' that that test is satisfied.
- 8 Interim Code rights can be conferred in the absence of an application under paragraph 20; and they are often sought, as in the present case, as the basis for the operator to carry out the investigation that is needed before deciding whether or not to seek the right to place equipment on the site.

- 9 Such an investigation is known as a ‘multi-skilled visit’ or MSV. It may be a simple visual inspection, or it may involve intrusive works that penetrate the fabric of a building.
- 10 Whether Code rights are sought under paragraph 20 or paragraph 26, the terms on which they are conferred are determined by the Tribunal in light of the provisions of the Code. Paragraph 23 refers to an order under paragraph 20 but is equally applicable to an agreement for interim rights (paragraph 26(4)(3)), and it provides so far as relevant -
- (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).
- ...
- (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.

Factual background

- 11 There is a long history to this case.
- 12 By lease dated 23 July 2013 (‘the 2013 lease’), the Respondent leased a small area of the rooftop of the subject premises to Everything Everywhere Limited and Hutchison 3G UK Limited for the installation of electronic telecommunications apparatus. The lease was for a term of ten years from 26 July 2009 and expired on 26 July 2019. There are no pending applications indicating that the lease has been renewed.
- 13 On 18 October 2020 the Claimant gave a notice to the Respondent pursuant to paragraph 26(3) of the Code, seeking access to the subject premises to undertake a non-intrusive MSV in order to assess the suitability of the premises for the installation and operation of electronic telecommunications apparatus. On 28 May 2021 the Upper Tribunal imposed an agreement conferring MSV rights on the Claimant. However, the Respondent denied the Claimant access; but, following enforcement action, on 21 October 2021 the Claimant undertook a MSV of the premises.
- 14 On 1 November 2022 the Claimant wrote to the Respondent to request further access to the subject premises to undertake another non-intrusive MSV in order to carry out an asbestos survey, a power test and a fire alarm test. The Respondent did not respond to that request.
- 15 On 3 April 2023 the Claimant gave a further notice to the Respondent pursuant to paragraph 26(3) of the Code. The notice and the draft agreement accompanying the notice expressly excluded from the application any part of the subject premises leased to or occupied by any third party.

- 16 In the absence of any response from the Respondent, and following a letter before action, on 26 October 2023 the Claimant made the present reference to the Upper Tribunal; and on 31 October 2023 the Upper Tribunal transferred the reference to the First-tier Tribunal under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.
- 17 On 17 November 2023 the First-tier Tribunal wrote to the parties, scheduling a case management hearing for 5 March 2024 and indicating that the application for MSV rights would be determined on that occasion if that proved to be possible.
- 18 The Respondent failed to provide a reply to the Claimant's notice of reference and statement of case, as required by the Directions issued by the Upper Tribunal on 31 October 2023.
- 19 On 2 February 2024 the Tribunal received an email sent by John McLoughlin, apparently on behalf of the Respondent, together with copies of historic emails. That email failed to comply with the Directions issued by the Upper Tribunal.
- 20 On 5 February 2024 the First-tier Tribunal issued Directions, requiring the Respondent to provide the required documents and indicating that, if the Respondent failed to comply by 16 February 2024, it would be automatically barred from participating further in the proceedings.
- 21 On 16 February 2024 the Tribunal received a further email from John McLoughlin. The substance of that email was that in July 2023 the Respondent had acquired ownership of the electronic telecommunications apparatus installed pursuant to the 2013 lease, that the Respondent was therefore the telecommunications infrastructure provider at the subject premises and that the Tribunal had no jurisdiction to impose a Code agreement on the parties.
- 22 On 20 February 2024 the Tribunal emailed the parties (i) confirming that the Tribunal treated the email of 16 February 2024 as constituting compliance with the Directions, (ii) confirming that the case management hearing would proceed as scheduled on 5 March 2024 and (iii) requiring the Claimant to file submissions on the issue of jurisdiction.
- 23 By letter dated 24 February 2024, the Claimant filed submissions.
- 24 By email dated 26 February 2024, Mr McLoughlin repeated the position set out in his email of 16 February 2024.
- 25 The hearing took place by remote video conference. The Claimant was represented by Miriam Seitler of Counsel and the Respondent was represented by Luke Stevenson.

Position of the parties

- 26 Mr Stevenson began by repeating the position articulated by Mr McLoughlin in his email of 16 February 2024. It appeared that he had not seen the submissions of the Claimant on the jurisdiction issue. At the request of the Tribunal, Ms Seitler summarised those submissions. In any event, Mr Stevenson subsequently indicated that he had no problem with the Claimant undertaking a further MSV at the subject premises.
- 27 This prompted the Tribunal to question the authority of Mr McLoughlin and/or Mr Stevenson to represent the Respondent; and Mr Stevenson failed to provide an unequivocal answer to that question.

- 28 Not surprisingly in the circumstances Ms Seitler requested that the Tribunal proceed to a formal determination of the application.

Determination of the Tribunal

- 29 In determining the issues in dispute between the parties, the Tribunal took full account of the written and oral representations of the parties so far as relevant to the issues in dispute.

Jurisdiction

- 30 In the view of the Tribunal, Ms Seitler, on behalf of the Claimant, comprehensively refuted the assertion that the Respondent was the telecommunications infrastructure provider for the subject premises and that, as a consequence, the Tribunal had no jurisdiction to impose a Code agreement on the parties. First, the Respondent provided no evidence to show that it was a telecommunications infrastructure provider; and the (admittedly negative) evidence provided by the Claimant (Companies House documentation and Ofcom register of persons with powers under the Electronic Communications Code) seemed to negate the assertion. (Similarly, there was no evidence to support the Respondent's assertion that the Respondent owned the telecommunications apparatus installed on the subject premises pursuant to the 2013 lease or that the Respondent had entered into any agreement with any other telecommunications infrastructure providers.)
- 31 Second, even if the Respondent was a telecommunications infrastructure provider, such status only extended to the small section of the roof of the subject premises where telecommunications apparatus had been installed pursuant to the 2013 lease. In the view of the Tribunal, that did not prevent the imposition of a Code agreement in favour of the Claimant to enable it to assess the suitability of other sections of the roof for the installation of telecommunications apparatus: see *On Tower UK Limited v British Telecommunications plc* [2024] UKUT 51 (LC).
- 32 The Tribunal therefore concluded that it had jurisdiction to impose a Code agreement on the parties.

Satisfaction of the section 21 conditions

- 33 As noted above (paragraphs 6-7), before the Tribunal can impose a Code agreement conferring rights under paragraph 26, the Claimant operator must show a good arguable case that the test in paragraph 21 (and its two constituent conditions) is satisfied.
- 34 The Respondent did not dispute that the Claimant can show such a case.
- 35 In any event, the Tribunal finds that the Claimant has shown a good arguable case that both the constituent conditions of the test are satisfied.

Imposition of a Code agreement

- 36 Although Mr Stevenson seemed to indicate at the hearing that he had no objection to the Claimant undertaking the requested MSV visit, as noted above, the authority of Mr Stevenson to bind the Respondent is not clear.
- 37 In the circumstances, it is appropriate that the Tribunal should impose a Code agreement under paragraph 26.

Terms of the agreement

- 38 The Claimant proposed a draft agreement when it gave the Respondent the paragraph 26(3) notice on 3 April 2023.
- 39 Although the Respondent made no representations on the terms of the agreement, it is clear from paragraph 23 that the Tribunal is required to ensure that the agreement imposed must be appropriate (i) to provide for the rights sought by the Claimant and (ii) to provide protection for the Respondent.
- 40 The terms of the Claimant's draft agreement were stated to be substantially the same as the agreement imposed by the Upper Tribunal in *Cornerstone Telecommunications Infrastructure Limited v The Mayor and Burgesses of the London Borough of Hackney* [2022] UKUT 210 ('the *Hackney* agreement'). The Claimant helpfully provided a marked-up version of the agreement showing amendments to the *Hackney* agreement. Although the marked-up version appears to show a significant number of changes from the *Hackney* agreement, there are few changes of substance.
- 41 The Tribunal determines that, by reference to the two objectives referred to in paragraph 39 above, the terms of the proposed agreement are appropriate.

Transaction costs

- 42 For the sake of completeness, the Tribunal confirms that the agreement makes no provision for transaction costs. The Respondent has not sought to claim transactional costs; and that is not surprising since no negotiation of the proposed agreement has taken place.

Litigation costs

- 43 Ms Seitler indicated that the Claimant was seeking a costs order.
- 44 The Tribunal invited the parties to submit written representations.
- 45 The Claimant claims the costs of instructing counsel for the hearing. The amount sought is £4,500 plus VAT.
- 46 The Respondent did not submit any representations.
- 47 Paragraph 96 of the Code provides (so far as relevant) –
- 96(1) Where in any proceedings a Tribunal exercises functions by virtue of regulations under paragraph 95(1), it may make such order as it thinks fit as to costs
- (2) The matters a Tribunal must have regard to in making such an order include in particular the extent to which any party is successful in the proceedings.
- 48 Ms Seitler, on behalf of the Claimant, acknowledged that the usual order in a reference for the imposition of an agreement for MSV rights under paragraph 26 of the Code is that the site provider recovers its reasonable and proportionate costs of the reference: see *EE Limited and Hutchison 3G UK Limited v HSBC Bank Plc* [2022] UKUT 174 (LC).
- 49 However, she submits that any costs order, including one made on such a reference, should reflect: (i) the relative success of the parties on the substantive issues in the reference, and (ii) the parties' conduct in the reference: see *Cornerstone Telecommunications Infrastructure Limited v Central*

Saint Giles General Partner Limited, Clarion Housing Association Limited [2019] UKUT 183 (LC) at paragraphs [28] and [29].

- 50 As to relative success, Ms Seitler submits, first, that the Respondent's challenge to jurisdiction wholly failed. It was unsupported by evidence of any kind and the Claimant's evidence directly undermined it. In any event, it was legally flawed because it was based on the misconception that a Code agreement cannot be imposed where the site provider is itself a telecommunications infrastructure provider. The Tribunal rejected the jurisdiction challenge in the hearing.
- 51 Second, the Respondent did not oppose the Claimant's case on the paragraph 21 tests; and the Tribunal was satisfied in the hearing that the threshold had been met.
- 52 Third, the Respondent did not object to a single term of the Claimant's proposed MSV agreement; nor did it propose any alternative or amended terms. As already noted, the Tribunal has imposed that agreement without amendment.
- 53 As to the parties' conduct, Ms Seitler submits that the Respondent has not acted reasonably.
- 54 First, the Respondent failed to respond to the Claimant's (i) request for a further MSV made on 1 November 2022, (ii) notice and proposed MSV agreement sent on 3 April 2023, and (iii) letter before action sent on 18 October 2023. Moreover, although the reference was issued on 26 October 2023, the Respondent made no contact with the Claimant or the Tribunal until 2 February 2024.
- 55 Second, the Respondent failed to engage properly with the reference: it failed to file a formal statement of case as directed by the Upper Tribunal. When faced with a barring order warning, the Respondent filed an email contesting jurisdiction; but the assertions made by the Respondent were not supported by any evidence.
- 56 Third, the conduct of the Respondent formed part of wider pattern of lack of co-operation with the Claimant and the Tribunal. In relation to the earlier MSV in 2021, the reference and a contested hearing was required; and, although an agreement was imposed by the Upper Tribunal, enforcement action was required before the Respondent would provide access to the subject premises.
- 57 Fourth, the Respondent appeared to have been acting through two representatives - John McLoughlin and Luke Stevenson. Neither of them is a director or secretary of the Respondent company. Neither the Claimant nor the Tribunal has seen any letter from the Respondent company appointing Mr McLoughlin or Mr Stevenson as its representative. Moreover, Mr McLoughlin and Mr Stevenson adopted different positions. In the weeks leading up to the hearing, Mr Stevenson indicated to the Claimant that the Respondent did not oppose the proposed MSV. In the meantime, Mr McLoughlin continued to oppose it on the basis of jurisdiction. At the hearing, the Respondent was represented by Mr Stevenson. The Claimant has therefore been required to deal simultaneously with two alleged representatives, who adopted different positions on the reference.
- 58 For the above reasons, Ms Seitler submits that it is appropriate for the Tribunal to make a cost order in favour of the Claimant.

- 59 As to quantum, Mr Seitler submits that the Claimant was justified in instructing Counsel. The reference deals with an area of law that requires specialist knowledge; and the failure of the Respondent to engage with the reference and the different positions adopted by its two representatives required the Claimant to prepare argument on all issues, including the issue of jurisdiction. The costs claimed, which are limited to Counsel's fees reflects the complexity of the matter and the time and expertise required to prepare for and attend the hearing.
- 60 For the reasons advanced by Ms Seitler, the Tribunal is satisfied that it is appropriate to make a cost order in favour of the Claimant. The Claimant has been successful on every aspect of the case and the conduct of the Respondent has been wholly unreasonable.
- 61 The Tribunal summarily assesses the Claimant's costs, which the Claimant has limited to Counsel's fees of £4,500.00 plus VAT, to be both reasonable and reasonably incurred.

Order

- 62 In order to give effect to this Decision, the Tribunal has issued a formal Order pursuant to paragraph 26 of Schedule 3A to the Communications Act 2003, imposing on the parties the Agreement annexed to the Order.

Appeal

- 63 If a party wishes to appeal this Decision, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.
- 64 The application for permission to appeal must be received by the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- 65 If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- 66 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

25 March 2024

Professor Nigel P Gravells
Deputy Regional Judge