SHERIFF APPEAL COURT

[2019] SAC (Civ) 28
LAN-B157-16

Sheriff Principal Pyle
Appeal Sheriff Braid
Appeal Sheriff Small

OPINION OF THE COURT

delivered by APPEAL SHERIFF PETER J BRAID

in appeal by

ARQIVA LIMITED, a company incorporated under the Companies Acts (Company Number 02487597) and having its registered office at Crawley Court, Winchester, Hants, SO21 2QA

Pursuer and Respondent

against

KINGSBECK LIMITED, a company incorporated under the Companies Acts (Company Number SC499747) and having its registered office at Culter Allers, Coulter, By Biggar, ML12 6PZ

Defender and Appellant

Defender and Appellant: Moynihan QC, Upton; Anderson Strathern
Pursuer and Respondent: Thomson QC; Pinsent Masons

27 June 2019

Introduction

[1] This appeal concerns the telecommunications code contained in schedule 2 to the Telecommunications Act 1984 as amended by the Communications Act 2003[1] ("the code"). Although, perhaps somewhat unusually, the parties to this appeal could not, before us,

[1] That code has now been superseded by a new code, introduced by the Digital Economy Act 2017, but the new code does not apply to this action, save in relation to transitional provisions.

agree what question fell to be asked of the court, let alone how it should be answered – about which, more later – the core issue raised by this appeal is the extent to which a code operator under the code is entitled to share not only its own equipment, but access to, and occupation of, land owned by a third party.

[2] The former question – sharing of equipment – was addressed in the decision of this court in *SSE Telecommunications Ltd* v *Millar* 2018 SC (SAC) 73, where it was held that a code operator is entitled to permit others to use its equipment situated on, or passing over, a third party's land without obtaining that third party's permission. However, the separate, and broader, question of sharing a third party's land has not been judicially determined.

Background

[3] Most of the factual background is agreed. We set out the statutory framework, including the relevant provisions of the code, below but for present purposes it is sufficient to note that the respondent is a code operator in terms of the code. It is the statutory successor to the Independent Broadcasting Authority and it, and its sister company, Arqiva Services Limited, are the sole provider, owner and operator of terrestrial television broadcasting services in the UK. The respondent also has a market share of approximately 90% for radio broadcasting. The pleadings contain fuller details of the role which the respondent and its said sister company play in providing digital terrestrial television, including Freeview, throughout the United Kingdom but of particular significance, perhaps, is that the respondent is bound to provide BBC services to households in Lanarkshire until 2034. It provides such services by means of its electronic communications network, which *inter alia* requires the installation of electronic communications masts up and down the

country, to and from which electronic signals can be relayed. In particular, it requires such a mast in Lanarkshire.

[4] Enter the appellant. It is the heritable proprietor of Unthank Farm, Coulter, Biggar, within which lies an area of ground extending to 0.09 hectares (not 0.929, as stated in the crave) ("the site"), upon which stands an electronic communications mast owned and operated by the respondent. The site is telecommunications gold-dust, since without the mast on it, a significant number of households in Lanarkshire, which are otherwise situated within a telecommunications blackspot, would be unable to receive any television signal. The mast enables television coverage to be provided to approximately 2,571 households within the blackspot which, the respondent avers, equates to provision of television broadcast to approximately 6,000 people. The site also enables the transmission of BBC radio to approximately 6,171 households within the said blackspot, and coverage of 112 kilometres of roads.

[5] The value of the site does not end there. Under agreements previously entered into, the respondent currently shares the site with certain mobile network operators, namely: EE, Vodafone, O2, BT and ITS. To enable those operators to provide their respective networks to consumers in Lanarkshire within the blackspot, they have their own antennae attached to the respondent's mast. To enable signals to be relayed via the mast, the signals require to be received on one antenna, transmitted from there via cables to equipment situated on the ground, from where they are bounced back to a different, higher, antenna and subsequently transmitted to the operator's consumer. Thus, the equipment currently on the site includes the respondent's mast (which it shares with other users); certain other equipment which is also shared; but also, and this is not in dispute, certain equipment which is owned by the third party operators but which is not shared, to any extent, by the respondent. Also on the

site are one brick building (there is a second brick building but it is occupied by the respondent), two cabins (one occupied by Vodafone, the other by EE), and associated equipment therein. There are also associated cables mounted on the mast. The mobile phone services provided by the various companies listed above allows members of the public to access a choice of mobile phone providers while ITS provide a faster internet connection to a rural community.

[6] The pleadings contain more detailed averments of the equipment on the site, which it is unnecessary to repeat here. However the respondent goes on to aver (in article 5 of condescendence):

> "The [respondent] has exclusive control over the Site. The process of adding any new antennas or dishes to the mast is controlled and managed by the [respondent] including the design and installation process of sharers' equipment sited on the mast. That includes determining the power requirements for such equipment and determining the location, height and orientation of the proposed antenna or dishes on the mast to achieve the appropriate technical requirements and, where necessary, to comply with the sharers' licence requirements in terms of limits of technology or frequency [of] use. The [respondent] ensures that any radio wave emissions from such equipment and the site overall comply with legislative public safety requirements. The [respondent] will prepare and obtain any third party consents required for such works such as planning or landlord's consent and will conduct any physical works that are required to accommodate such equipment such as any necessary strengthening works to ensure that the mast has the structural capacity to accommodate the equipment. The [respondent] undertakes the installation of the equipment or any equipment upgrade works required. The [respondent] may allow the sharer to undertake its own works… at the Site such as maintenance to their apparatus belonging to it but this is strictly controlled by the [respondent] including through an accreditation system as hereinafter condescended upon. The [respondent] maintains the mast and supporting infrastructure. The [respondent] undertakes regular inspection of, *inter alia,* the structure of the mast, the lightning protection system, the fixed wire electrics tests, earthing and distribution systems. The [respondent] undertakes routine painting to prevent corrosion."

[7] At the heart of this appeal is the question of whether the respondent is entitled to continue to authorise the existing operators to share the site, and situate their own

equipment thereon, and to authorise future operators to do so; or whether all such operators require to obtain the permission of, and, if necessary, code rights from, the appellant.

The Code

[8] Paragraph 2(1) of the Code is in the following terms:-

> "The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—
>
> > (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
> > (b) to keep electronic communications apparatus installed on, under or over that land; or
> > (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network."

[9] Paragraph 5 is, so far as material, in the following terms:-

> "(1) Where the operator requires any person to agree for the purposes of paragraph 2 or 3 above that any right should be conferred on the operator, or that any right should bind that person or any interest in land, the operator may give a notice to that person of the right and of the agreement that he requires.
>
> (2) Where the period of 28 days beginning with the giving of a notice under sub-paragraph (1) above has expired without the giving of the required agreement, the operator may apply to the court for an order conferring the proposed right or providing for it to bind any person or any interest in land, and (in either case) dispensing with the need for the agreement of the person to whom the notice was given.
>
> (3) The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order—
>
> > (a) is capable of being adequately compensated for by money; or
> > (b) is outweighed by the benefit accruing from the order to the persons whose access to [an electronic communications network or to electronic communications services] will be secured by the order;
>
> and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person

should unreasonably be denied access to [an electronic communications network or to electronic communications services].

…

(7) Where an order under this paragraph, for the purpose of conferring any right or making provision for a right to bind any person or any interest in land, dispenses with the need for the agreement of any person, the order shall have the same effect and incidents as the agreement of the person the need for whose agreement is dispensed with and accordingly (without prejudice to the foregoing) shall be capable of variation or release by a subsequent agreement."

[10] Paragraph 21 of the Code is in the following terms:-

"(1) Where any person is for the time being entitled to require the removal of any of the operator's electronic communications apparatus from any land (whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub-paragraph (12) below, in accordance with the following provisions of this paragraph.

(2) The person entitled to require the removal of any of the operator's electronic communications apparatus shall give a notice to the operator requiring the removal of the apparatus.

(3) Where a person gives a notice under sub-paragraph (2) above and the operator does not give that person a counter-notice within the period of 28 days beginning with the giving of the notice, that person shall be entitled to enforce the removal of the apparatus.

(4) A counter-notice given under sub-paragraph (3) above to any person by the operator shall do one or both of the following, that is to say—

(a) state that that person is not entitled to require the removal of the apparatus;
(b) specify the steps which the operator proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land.

(5) Those steps may include any steps which the operator could take for the purpose of enabling him, if the apparatus is removed, to re-install the apparatus; and the fact that by reason of the following provisions of this paragraph any proposed re-installation is only hypothetical shall not prevent the operator from taking those steps or any court or person from exercising any function in consequence of those steps having been taken.

(6) Where a counter-notice is given under sub-paragraph (3) above to any person, that person may only enforce the removal of the apparatus in pursuance of an order of the court; and, where the counter-notice specifies steps which the operator is proposing to take to secure a right to keep the apparatus on the land, the court shall not make such an order unless it is satisfied—

(a) that the operator is not intending to take those steps or is being unreasonably dilatory in the taking of those steps; or
(b) that the taking of those steps has not secured, or will not secure, for the operator as against that person any right to keep the apparatus installed on, under or over the land or, as the case may be, to re-install it if it is removed.

(7) Where any person is entitled to enforce the removal of any apparatus under this paragraph (whether by virtue of sub-paragraph (3) above or an order of the court under sub-paragraph (6) above), that person may, without prejudice to any method available to him apart from this sub-paragraph for enforcing the removal of that apparatus, apply to the court for authority to remove it himself; and, on such an application, the court may, if it thinks fit, give that authority.

(8) Where any apparatus is removed by any person under an authority given by the court under sub-paragraph (7) above, any expenses incurred by him in or in connection with the removal of the apparatus shall be recoverable by him from the operator in any court of competent jurisdiction; and in so giving an authority to any person the court may also authorise him, in accordance with the directions of the court, to sell any apparatus removed under the authority and to retain the whole or a part of the proceeds of sale on account of those expenses.

(9) Any electronic communications apparatus kept installed on, under or over any land shall (except for the purposes of this paragraph and without prejudice to paragraphs 6(3) and 7(3) above) be deemed, as against any person who was at any time entitled to require the removal of the apparatus, but by virtue of this paragraph not entitled to enforce its removal, to have been lawfully so kept at that time.

(10) Where this paragraph applies (whether in pursuance of an enactment amended by Schedule 4 to this Act or otherwise) in relation to electronic communications apparatus the alteration of which some person ("the relevant person") is entitled to require in consequence of the stopping up, closure, change or diversion of any road or the extinguishment or alteration of any public right of way—

(a) the removal of the apparatus shall constitute compliance with a requirement to make any other alteration;
(b) a counter-notice under sub-paragraph (3) above may state (in addition to, or instead of, any of the matters mentioned in sub-paragraph (4) above) that the operator requires the relevant person to reimburse him in respect of any expenses which he incurs in or in connection with the making of any alteration in compliance with the requirements of the relevant person;

(c) an order made under this paragraph on an application by the relevant person in respect of a counter-notice containing such a statement shall, unless the court otherwise thinks fit, require the relevant person to reimburse the operator in respect of any expenses which he so incurs; and
(d) sub-paragraph (8) above shall not apply.

(11) References in this paragraph to the operator's electronic communications apparatus include references to electronic communications apparatus which (whether or not vested in the operator) is being, is to be or has been used for the purposes of the operator's network .

(12) A person shall not, under this paragraph, be entitled to enforce the removal of any apparatus on the ground only that he is entitled to give a notice under paragraph 11, 14, 17 or 20 above; and this paragraph is without prejudice to paragraph 23 below and to the power to enforce an order of the court under the said paragraph 11, 14, 17 or 20."

[11] Paragraph 29 of the Code is in the following terms:

"(1) This paragraph applies where—

(a) this code has been applied by a direction under section 106 of the Communications Act 2003 in a person's case;
(b) this code expressly or impliedly imposes a limitation on the use to which electronic communications apparatus installed by that person may be put or on the purposes for which it may be used; and
(c) that person is a party to a relevant agreement or becomes a party to an agreement which (after he has become a party to it) is a relevant agreement.

(2) The limitation is not to preclude—

(a) the doing of anything in relation to that apparatus, or
(b) its use for particular purposes,

to the extent that the doing of that thing, or the use of the apparatus for those purposes, is in pursuance of the agreement.

(3) This paragraph is not to be construed, in relation to a person who is entitled or authorised by or under a relevant agreement to share the use of apparatus installed by another party to the agreement, as affecting any consent requirement imposed (whether by a statutory provision or otherwise) on that person.

(4) In this paragraph—

'consent requirement' , in relation to a person, means a requirement for him to obtain consent or permission to or in connection with—
(a) the installation by him of apparatus; or

(b) the doing by him of any other thing in relation to apparatus the use of which he is entitled or authorised to share;

'relevant agreement' means an agreement in relation to electronic communications apparatus which—

(a) relates to the sharing by different parties to the agreement of the use of that apparatus; and
(b) is an agreement that satisfies the requirements of sub-paragraph (5);

'*statutory provision'* means a provision of an enactment or of an instrument having effect under an enactment.

(5) An agreement satisfies the requirements of this sub-paragraph if—

(a) every party to the agreement is a person in whose case this code applies by virtue of a direction under section 106 of the Communications Act 2003; or
(b) one or more of the parties to the agreement is a person in whose case this code so applies and every other party to the agreement is a qualifying person.

(6) A person is a qualifying person for the purposes of sub-paragraph (5) if he is either—

(a) a person who provides an electronic communications network without being a person in whose case this code applies; or
(b) a designated provider of an electronic communications service consisting in the distribution of a programme service by means of an electronic communications network.

(7) In sub-paragraph (6)—

'*designated'* means designated by an order made by the Secretary of State;
'*programme service'* has the same meaning as in the Broadcasting Act 1990."

[12] The term "statutory purposes" is defined in paragraph 1(1) as follows:

"'*the statutory purposes'* means the purposes of the provision of the operator's network"

[13] The term "operator" is defined in paragraph 1(1) as follows:

"'*the operator'* means-

(a) where the code is applied in any person's case by a direction under section 106 of the Communications Act 2003, that person…"

[14] The term "operator's network" is also defined in paragraph 1(1). Insofar as applicable to the respondent in this case, it as follows:

> "'*the operator's network*' means—
>
> > (a) … so much of any electronic communications network or conduit system provided by that operator as is not excluded from the application of the code under section 106(5) of the Communications Act 2003"

[15] The definition of an "*electronic communications network*" is to be found (via paragraph 1) within section 32(1) of the 2003 Act, which provides:

> "In this Act "'*electronic communications network*' means—
>
> > (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and
> > (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
> >
> > (i) apparatus comprised in the system;
> > (ii) apparatus used for the switching or routing of the signals;
> > (iii) software and stored data; and
> > (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active."

[16] The definition of "*electronic communications apparatus*" is to be found at paragraph 1(1) of the Code which provides:

> "'*electronic communications apparatus*' means—
>
> > (a) any apparatus (within the meaning of the Communications Act 2003) which is designed or adapted for use in connection with the provision of an electronic communications network;
> > (b) any apparatus (within the meaning of that Act) that is designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;
> > (c) any line;
> > (d) any conduit, structure, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended;

> and references to the installation of electronic communications apparatus are to be construed accordingly;"

[17] The definition of "*apparatus*" is to be found within section 405 of the 2003 Act, which provides:

> "'*apparatus*' includes any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable".

[18] Paragraph 1 of the code provides that "*structure*" does not include a building.

The respondent's summary application and procedure leading thereto

[19] To put the dispute between the parties into context, it is also necessary to say something of how the summary application came about. As mentioned, the respondent previously occupied the site pursuant to an agreement between the parties. We observe that not all of the relevant correspondence and documentation has been lodged, but it appears from the documentation which has been lodged (see page 92 *et seq.* of the Appendix) that on or about 1 October 2015, the appellant's agents served notices to quit on the respondent, and on the various other operators, requiring them to remove from the site. Counter-notices were served by all of those recipients on 23 October 2015, in terms of paragraph 21(3) of the code. The effect of the counter-notices was to preserve the rights of the respondent, and the other operators, to continue to occupy the site (the purpose of the provision being to ensure continuity of service to consumers). An action of removing or ejection was subsequently raised by the appellant (and is presently sisted).

[20] As both parties accept, an operator who wishes to occupy, or acquire rights over, another's land may in the first instance do so by agreement, the nature of an agreement of course being that parties may agree anything they wish. Accordingly, on 22 June 2016, the respondent's agents sent the draft of a proposed lease of the site to the appellant's agents.

That was followed up, on 30 June 2016, with a formal notice pursuant to paragraph 5 of the code. A copy of the notice is contained within the Appendix from page 2. It stated, *inter alia*, that the respondent had previously sought permission from the appellant, in relation to the site,

> "to execute works on your land and/or to keep electronic communications apparatus on your land pursuant to an agreement…in the form of the draft annexed hereto. [The respondent] requires you to agree to confer on it the right for its statutory purposes to execute work on, under or over [the site] for or in connection with the installation, maintenance, adjustment, repair or alteration of the electronic communications apparatus referred to in the said draft Agreement…and to keep the [said apparatus] installed on, under, or over [the site] and to enter upon [the site] to inspect [the said apparatus]"

The draft agreement referred to was the same draft lease which had been sent some eight days previously. Although the paragraph 21 notices had been served on all of the occupiers, it was only the respondent which served a paragraph 5 notice. No response was received to that notice within 28 days.

[21] Consequently, it was open to the respondent to apply to the court in terms of paragraph 5, and the present summary application was duly lodged seeking an order under that paragraph. Rather than seeking any of the specific code rights specified in paragraph 2 of the code (and which had been referred to in the notice), the respondent, in crave 1, seeks an order conferring on it the rights in respect of the site specified in the lease appended to the writ, subject to such modifications as the court shall consider appropriate; and in crave 2, the respondent seeks an order dispensing with the need for the appellant to consent to the lease.

[22] The appellant does not dispute that it is open to the respondent to seek a lease, and for the court to grant an application under the code by dispensing with the need for the appellant's consent to that lease. Rather, it is the extent of the rights conferred by the

proposed lease which is the subject of dispute. The appellant also takes issue with the respondent's ability to seek rights which would enable all current occupiers to remain on the site, its position being that just as separate notices to quit required to be served on each code operator to secure their removal from the site, so too does each occupier require to bring its own application seeking code rights to enable them to occupy the site in the first place.

Appellant's submissions

[23] The central question identified by senior counsel for the appellant was as follows:

> "Does the existing code confer on one operator the rights (a) to share a site with others (operators and third parties), (b) to permit those others to install their own apparatus and (c) to confer on each of those others rights over the site and adjacent land, including the right to carry out future development on it?"

[24] Counsel's submissions were thus, in the main, focussed on the proper construction of the code, and were directed towards persuading us to answer that question in the negative. He also referred us to the terms of the proposed lease, and to the width of the rights sought therein. He referred to the terminology of, and definitions in, the lease, which did not correspond to the terminology of the code. He submitted that deletions made by the respondent to the proposed draft, removing the right to sublet without the appellant's consent not to be unreasonably withheld, if anything increased rather than reduced the scope of the powers sought. He embarked upon a detailed examination of those provisions of the code which are set out above. He compared the code rights with the far more extensive rights sought in the lease. While he did not dispute that the respondent was entitled to share its own equipment, he submitted that it had no rights in relation to that equipment which was admittedly not owned by them, nor any rights to share the appellant's land such as to allow other operators to use equipment which was solely owned

by them, and not shared by the respondent. The whole thrust of the code, beginning with paragraph 21 (which logically and chronologically came into play before the provision of paragraph 5, which in turn referred to paragraph 2, since it was those provisions which had set the current procedure in play) was that each code operator who wished to acquire rights over land, must individually seek its own agreement with the landowner and, if no agreement could be reached, raise its own application under paragraph 5 of the code. That that was so was borne out by the fact that the entire procedure in this case had been instigated by the service of notices on each and every operator which occupied the site. That was necessary, since otherwise the respondent could not have removed the other occupiers. Those occupiers had responded by serving counter-notices. It being necessary to serve notices on all operators when it was desired by the landowner to bring an existing arrangement to an end, so it was necessary for all operators to seek their own agreements at the commencement of occupation. It was simply not open to the respondent to bring an application which would permit them to share the site, as they pleased, with all existing operators. Still less should they have the right to permit any number of future operators to occupy the site and to take access over the appellant's adjoining land. The appellant, as landowner, was entitled to exercise control over who entered the site and on what terms.

Respondent's submissions

[25] Senior counsel for the respondent did not, in the event, take issue with counsel for the appellant's analysis, and construction, of the code, and did not seek to argue that all the rights sought in the lease were code rights. Rather, he posed the question for the court in significantly different terms (paraphrasing slightly):

> "A lease being a competent means of conferring code rights on the respondent, is there any reason, and is it competent for the court, to restrict the respondent's ability, as exclusive occupier, to share the site?"

[26] Thus, he addressed a different question from that addressed by counsel for the appellant. He stressed the need for the respondent to be able to share its mast, and indeed the obligation on them to do so. He referred to the Ofcom direction granted to the respondent under section 106 of the 2003 Act, and to the obligation incumbent on code operators, where possible, to share equipment – in particular, masts, where it was recognised as being undesirable to have a proliferation of masts the length and breadth of the country. He pointed out that it was not simply a question of the respondent allowing other operators to use its mast. That was an unduly simplistic approach. To enable them to do that, the other operators had to have their own equipment physically on the site and that equipment had to be protected from the elements (which necessitated buildings or cabins). The respondent also had to have the right to control access to the site and to control where antennae were situated on the mast. As a matter of fact, the respondent had (and had to have) exclusive occupation of the site. It was therefore appropriate for it to be granted a lease. As occupier, under a lease, it then had the right to confer code rights on others. The appellant claimed that it had the right to control who did and who did not enter the site, but the reality was that they had no choice, since any operator could apply for code rights whether the appellant approved of them or not. The appellant had no control over who was, and who was not, appointed as a code operator. The appellant's argument equated the reason(s) for the lease being granted with the powers conferred by it, but that was fallacious. Once the need for the lease had been established by reference to code rights, there was no good reason to restrict the terms of the lease to those rights, particularly having regard to the fact that the respondent had exclusive occupation. Counsel referred to *EE Ltd and Another* v

The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC), a case under the new code, where the Upper Tribunal held that it was competent for code rights to be conferred in the form of a lease. At paragraph 141 of its judgment, the Tribunal referred to the claimants' entitlement to a lease of a rooftop site, which would give possession to the exclusion of the landowner, with the consequence that responsibility for safety would fall on the claimants. As regards terminology, there was no need for the lease to use the same terminology as the code, provided that it was clear what was meant. A further fallacy in the appellant's position was that it would be the respondent, as the occupier of the land, and not the landowner, which would be required to consent to another operator exercising code rights. The reality was that the site was so attractive from an electronic communications point of view, that the appellant had effectively lost the right to control it in any event. The only live issue was that of compensation, which could be dealt with in the context of the lease. If a restriction were imposed on the respondent's right to share, that would not in fact confer control on the appellant. It would simply have the effect that the respondent could not give its agreement to another operator exercising code rights, which in turn would simply result in a proliferation of paragraph 5 applications. That would not be desirable.

Appellant's response

[27] In response, counsel for the appellant submitted that counsel for the respondent had turned the issue on its head. If correct, it would then come down to a question of what terms should be in the lease. He disputed that the respondent could be regarded as exclusive occupier of the site, when it did not occupy all of the buildings and cabins on the site. Further, the respondent could not on any view be regarded as the occupier of the land adjacent to the site, over which rights of access were sought. The appellant remained a

person whose consent was required to the exercise of code rights, whatever any lease might say.

The sheriff's decision

[28] The arguments presented to us, and in particular the argument presented on behalf of the appellant, were significantly different from those presented to the learned sheriff. Accordingly, we mean no disrespect to the sheriff when we say that we do not propose to consider her judgment in detail. Suffice to say that, in a comprehensive and well-reasoned judgment, she concluded that the respondent was entitled to the remedy sought, that is, a lease containing sharing provisions subject only to adjustment of compensation. She therefore sustained the respondent's second plea in law and repelled the appellant's preliminary pleas as to competency and relevancy; excluded certain averments in the appellant's pleadings from probation; and allowed a proof restricted to *quantum* of consideration. For completeness, we should record that she did so at least partly on the basis (a) that the buildings on the site were "structures" (para. 24 of the judgment, page 27 of the Appeal Print) and (b) that all of the apparatus, including that which was not owned by the respondent, formed part of the respondent's network (para. 51, page 34 of the Appeal Print). Counsel for both parties agreed that, to that extent at least, the sheriff had fallen into error. Paragraph 1 of the code provides in terms that "structure" does not include a building; and the apparatus which is owned by third parties and not shared by the respondent cannot be regarded as part of the respondent's network. However, otherwise, counsel for the respondent commended the sheriff's reasoning to us, particularly at paragraphs 58 to 60, where, it was submitted, she had not only correctly identified the question to be asked, namely, whether the respondent should be prevented from sharing

what it had legitimately obtained by court order (para. 58, page 36 of the Print), but had also answered it correctly.

Discussion

[29] Counsel did not so much view the issue through the different ends of a telescope, as use the telescope to view two different things entirely. However, two significant concessions were made during the appeal, one by counsel for each party, which makes our task significantly more straightforward than it might otherwise have been. First, counsel for the respondent conceded that the right to share land owned by a third party does not spring from the code (thus rendering much of the appellant's argument superfluous). It follows that it is strictly unnecessary to embark upon a detailed examination of the meaning and effect of paragraph 29 of the code, or indeed the other provisions of the code and the legislation, in order to ascertain whether or not sharing of a third party's land is implicitly permitted by the code. As the appellant conceded, the right to share can not be found within the code itself. It is not a code right.

[30] The second concession was that made by counsel for the appellant that code rights *may* be granted by means of a lease of land. It seems to us that concession was correctly made in light of *EE Ltd and Another* v *The Mayor and Burgesses of the London Borough of Islington, supra.* Although that was a case under the new code, we see no reason why the reasoning in it would not apply equally to the old code. That is not to say that a grant of rights under the code must always be made by such a lease, since there will be occasions when that is neither appropriate nor necessary. However, where, as here, at least on the basis of the respondent's averments which we have quoted above in paragraph [6], the code

operator requires exclusive use of the land, there is much force in the assertion that only a lease of the subjects will enable the code rights to be exercised effectively.

[31] The significance of that is that as soon as it is accepted that a lease of land is required, the normal incidents of a lease (including the right to exclusive occupation) must follow. We therefore agree with counsel for the respondent that the question then becomes what should be the terms of the lease. As soon as that proposition is understood, it then becomes simply a question of negotiation (failing which, determination by the court) as to what the terms and conditions of the lease should be.

[32] That negotiation (or court determination) must take place against the background of the code, in other words it must recognise that the respondent not only has certain rights, but certain obligations, as a code operator. In particular, it has the right (and obligation) to share its equipment including the mast. As counsel for the respondent submitted, as occupier under the lease, its consent would be required for any other operator to enter upon the site and to attach equipment to its mast or to place equipment on the ground for that matter. That also makes commercial sense. It would make no sense for the appellant as owner to control who could or could not attach equipment to the mast, or, indeed, whether there was still space on the mast for that to be done. It is also entirely appropriate, given the importance of the mast strategically, that the respondent as occupier should be able to control who does or does not gain access to the site, and on what terms. Accordingly, it seems to us that many of the proposed terms of the lease are unexceptional, and are necessary to enable the respondent to exercise its code rights. That said, it does not follow that the respondent should have the exclusive right to permit work to be done on the site, such as the erection of a new building.

[33] Undoubtedly the waters have been muddied by the form of the crave, which does not refer to code rights at all, in contrast to the terms of the paragraph 5 notice served by the respondent, set out at paragraph [20] above. Had the crave reflected the wording in the notice, the crave would more closely have reflected the terms of the code. However, once it is conceded, as it is, that code rights may be conferred by lease, we do not consider that to be of any moment, provided that the lease does in fact confer code rights on the operator.

[34] As regards the different terminology in the code on the one hand, and the lease on the other, that is perhaps unfortunate in that it makes it less clear to determine what is a code right, and what is a right which derives from the fact that a lease is being granted, but that does not in itself mean that the lease should not adopt different terminology.

[35] While the respondents do not, as the lease is presently framed, seek the right to sublet with or without the appellant's consent, it further seems to us that the sharing of the site by them, on some basis falling short of a sublease, is consistent with principle. Although we were not addressed on this in any detail (or indeed, at all), subletting is generally objectionable (without the landlord's consent) only where there is some element of *delectus personae* in the choice of tenant. However, as counsel for the respondent pointed out, the only persons with whom the respondent would be sharing the site are other code operators, and the appellants have no say over who is or is not appointed as a code operator. The respondent itself has rights over the site only because it is a code operator. Accordingly, there is no element of *delectus personae* in any agreement entered into between the parties (or imposed by the court). It is therefore entirely consistent with principle that the respondent, once granted a lease, should have the right of determining who does, and who does not, enter upon the site, and on what terms.

[36] As agreed with counsel, we shall put the case out by order to discuss what orders parties wish us to make in light of this opinion.