UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 128 (LC)
UTLC Case Numbers: LC-2021-165

ELECTRONIC COMMUNICATIONS CODE – INTERIM RIGHTS - request for access to critical national infrastructure to assess suitability to host electronic communications apparatus – whether security concerns sufficient to demonstrate prejudice to prospective site provider - agreement imposed

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:
EE LIMITED AND HUTCHISON 3G UK LIMITED

Claimants

-and-

LONDON UNDERGROUND LIMITED

Respondent

Martin Rodger QC, Deputy Chamber President

Hearing by remote video platform

28 May 2021

Kester Lees, instructed by Winckworth Sherwood, for the claimants
Mischa Balen, instructed by TfL Legal, for the respondent

© CROWN COPYRIGHT 2021

The following case is referred to in this decision:

University of London v Cornerstone Telecommunications Infrastructure Ltd [2019] EWCA Civ 2075; [2020] 1 WLR 2124

1. The reference before the Tribunal this morning is brought under paragraph 26 of the Electronic Communications Code by two telecommunications operators, EE and H3G, against the respondent, London Underground, a subsidiary of Transport for London responsible for running the tube. The claimant operators ask the Tribunal to impose on them and on London Underground, on an interim basis, Code rights to enable them to undertake an "MSV" or "multi-skilled visit"; the proposed MSV would involve a small number of the claimants' surveyors, engineers and telecommunications experts having access to the roof of a building belonging to London Underground to assess the technical suitability of the site for the installation of new telecommunications apparatus.

2. This is the first hearing of the reference but, as is explained at paragraph 14.12 of the Tribunal's Practice Directions, and in its directions for the hearing, the Tribunal seeks to determine claims for interim rights by a summary procedure at the first hearing, if that can be done fairly.

3. The building to which the claimants would like to have access and in respect of which the reference is made is part of London Underground's operational estate, which is designated as critical national infrastructure. The building has been referred to in London Underground's own correspondence with the claimant's agents as a network power control centre, which provides a sufficient description of the function of the building at this stage of the proceedings; the respondent has been reluctant to provide further details of exactly how the building is used.

4. The building is in Central London, very close to another roof-top used by the claimants as a site for their telecommunications apparatus, but where they have been requested by the building's owner to vacate the roof-top and remove their apparatus. The claimants do not enjoy any security of tenure at that site and must comply with the owner's request. In their search for an alternative Central London site for their apparatus the claimants have lighted upon London Underground's building as one which they consider may be suitable for the claimants' purposes. Whether the building is suitable or not at a technical level is something which can only be assessed by undertaking the MSV and carrying out the necessary surveys.

5. It is not disputed that the Tribunal has power to impose an agreement conferring rights of access over land in favour of a telecommunications operator. In *University of London v Cornerstone Telecommunications Infrastructure Ltd* [2019] EWCA Civ 205 the Court of Appeal confirmed that although it is not mentioned specifically in the list of code rights in paragraph 3 of the Code, the right to carry out an MSV can be conferred as a Code right. The Court approved the decision of this Tribunal which had allowed access for an MSV to the roof of a building which the University used for student accommodation.

6. In the same case the Court of Appeal also confirmed that rights of access to undertake an MSV could be conferred on an interim basis under paragraph 26 of the Code, without the operator needing to apply under paragraph 20 of the Code for the Tribunal to impose an agreement conferring the same rights on a permanent basis. That is important because when the Tribunal considers an application under paragraph 26 it need only be satisfied that the claimant has a good arguable case that the conditions in paragraph 21 for imposition of the relevant Code right are made out.

7. For a claimant to demonstrate a good arguable case does require that it make out its case to the normal civil standard of proof on the balance of probability; as the Court of Appeal confirmed in *University of London*, at [77], a good arguable case is a lower test than is laid down by paragraph 21 itself. Instead it means that the claimant must show that it has a plausible evidential basis for its claim that the paragraph 21 conditions are satisfied. The test is flexible and fact specific.

8. The first of the paragraph 21 conditions is that any prejudice caused to the relevant person by the order is capable of being adequately compensated by money. The only relevant person in this case is London Underground, since it is the only person being asked to confer or be bound by the rights sought by the claimants. The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person. In deciding whether the second condition is met, the Tribunal is directed by paragraph 21(4) to have regard to the public interest in access to a choice of high quality electronic communication services.

9. The only rights which the claimants seek at this stage are rights which would allow them to enter London Underground's premises and pass through them to gain access to the flat roof of the building. The rights are requested for a limited window of time (the claimants have suggested three months, but Mr Lees, who appears on their behalf, mentioned that a shorter period could be discussed). The rights would be exercised on notice to London Underground (the claimants have suggested 48 hours' notice). The initial MSV would take about an hour and there might be a requirement for a small number of additional visits of similar duration. There is therefore no question at this stage of the claimants installing apparatus or having any permanent presence on the roof of the building. They simply require access on a limited number of occasions to carry out the surveys which are necessary to assess the suitability of the site. The claimants say that any prejudice caused to London Underground would arise simply from the inconvenience of having to provide access and, if necessary, to accompany and supervise their contractors, and that all of that can be adequately compensated by a payment of money.

10. The evidence from the claimants concerning the benefit to the public which the rights would promote and the prejudice which would be caused if access to assess the suitability of this site is not possible is contained in witness statements by Mr Philip Harrison, a chartered surveyor responsible for the acquisition of new cell sites for the claimants, and Ms Jemma Ray, an acquisition project manager employed by the claimants' agents. They explain the difficulties which will be created for the coverage and capacity achievable by the claimants' mobile phone networks when they lose their nearby site if they are not able promptly to replace it. The area is a busy, densely built part of Central London where there is high demand for the claimants' services. The site which is to be lost provides coverage for 2G, 3G and 4G signals for the EE network, and for 3G and 4G signals for the HG3 network. The claimants anticipate that if this coverage is not replaced their customers will experience a significant reduction in service and an increased number of dropped calls. Customers will be unable to make use of data services and, they say, there would be an impact on the performance of the emergency services communications network supported by EE. These problems are familiar to the Tribunal as they are regularly relied on as justifying requests for access to potential new sites. Mobile telecommunications are an important service on which the social and commercial life of our society has come increasingly to depend, and the Code treats their maintenance as being in the public interest. The Tribunal therefore takes seriously the needs of operators to have access to sites belonging to third parties since without that access the necessary preliminary exercise of assessing potential new sites for their suitability would not be possible.

11. London Underground does not challenge the claimants' evidence about the benefits to the public or the prejudice to the operators of being denied access (although the second paragraph 21 condition requires a balancing exercise to be undertaken). Instead, the focus of its evidence to the Tribunal is on the prejudice which it will suffer if access to the building is permitted even for the small number of visits which are proposed. That evidence is provided by Mr Kevin Clack, who is the network security and policing manager for Transport for London, the respondent's parent organisation. Mr Clack is responsible for security on the whole of the London Underground system including its buildings. He identifies a number of reasons why the subject premises are not a suitable location for the installation of the claimants' electronic communications apparatus.

12. Whether the building is technically suitable or not, is not a question for the Tribunal, but is a matter for the operator. The Tribunal's task is to balance the public interest and the prejudice to the site provider as paragraph 21 requires. In making that comparison in this case it is necessary for the Tribunal to keep in mind the limited extent of the rights which are sought. Any decision the Tribunal makes about access for the MSV's to survey the premises should not be taken as prejudging the issues which would arise if the claimants subsequently seek permanent rights to install apparatus on the roof of the building. For one thing, the standard of proof will be different in any paragraph 20 application. Much more extensive rights would also be in issue and the concerns which Mr Clack identifies in his evidence are likely to become even more acute.

13. The concerns which Mr Clack explains in his witness statement are grouped under two headings: first, inadequate access arrangements, and secondly, security risks. Although they are divided in this way Mr Clack's concerns come to the same thing, namely the risk to the security of the building which third party access would create.

14. The building is an important operational building for London Underground which is extremely sensitive to its security. Mr Balen who has appeared this morning for London Underground reminded me of occasions in the recent past when transport networks in London and other big cities, particularly underground transport networks, have been the subject of terrorist attacks causing serious loss of life. Mr Clack referred to briefings which London Underground receives from the security services concerning threats to its network and to instructions from the Secretary of State which it is required to implement to protect the security of critical national infrastructure. Understandably, Mr Clack did not go into detail in his evidence and I do not criticise the respondent for this. Mr Clack did quote from guidance provided by the Secretary of State which referred to the need to take appropriate measures to protect premises against unauthorised access, which London Underground interpreted as requiring it to limit access to visitors with a legitimate operational or business need to be on the premises.

15. The claimants have made it clear in the exchanges which preceded this formal reference that they appreciated that their staff would require security clearance and would be escorted while in the building. In his evidence, under the heading "inadequate access arrangements", Mr Clack makes the rather surprising suggestion that there is simply nobody at London Underground with the time to supervise access to the roof of the building even on only a handful of occasions. Mr Balen has modified that submission somewhat and says everyone employed by London Underground in the building is already fully employed and any diversion of their attention to supervising non-critical third party access to the roof would detract from their primary tasks of looking after the security and functioning of the London Underground network.

16. On a number of occasions since they were first asked to provide access to the building the respondent has made the point that there is simply no one available with the time to provide the necessary supervision. Coming from an organisation as large as London Underground, I am afraid I simply do not find that a credible suggestion. I am sure Mr Clack and the staff in the building are extremely busy, but it is not suggested that London Underground does not employ personnel to look after the security of the network, and who would be expected to be available to deal with limited requests for access where access is necessary to third parties. It is not suggested that no one who is not an employee of London Underground is ever permitted to enter the building, but rather that any authorised contractors must undergo stringent security vetting before they come onto the premises. When the respondent was first asked for access to the building, their response was that only certain limited key personnel who had been security vetted to the highest level were permitted to enter the property. Mr Clack refers in his witness statement to access being permitted only to staff and visitors with employment screening (which I understand to mean visitors with the same security vetting as employees). The claimants say that they are happy to comply with any such restrictions and have staff with the highest levels of security clearance. They also say that

they are required to meet comparable vetting requirements at other sensitive buildings in Central London and elsewhere where their telecommunications infrastructure is installed (as the Tribunal is aware from other cases in this jurisdiction). It does not seem to me to be likely that the limited access proposed by the claimants will impose on the respondent a burden of supervision which would be incapable of being measured in financial terms.

17. The respondent's wider case is that any diversion of staff creates a risk to the security of the network and that risk is not capable of being measured in financial terms. That risk is said to be created in a number of different ways which Mr Clack identifies. He explains that the building contains infrastructure which is critical to the operation of the London Underground network. If that infrastructure was subject to physical attack or sabotage, then the consequences would be extremely serious. Apart from the risk that someone admitted to the building might be intent on causing damage (a "bad actor" as Mr Balen described such a person) any third party access would necessarily increase the number of individuals with knowledge of the building's use and would make it less secure. Mr Balen explained on instructions (there is nothing in the evidence about it) that a visitor to the premises who wished to get to the roof would need to pass through operationally sensitive parts of the Building. It is not simply a matter of ascending a staircase or getting into a lift and emerging on the roof. Although that detail did not feature in the evidence I will assume it is the case for the purpose of this hearing. Mr Balen also explained that London Underground is fearful that someone coming into the Building might insert a USB stick into a computer and either download some critical information or upload some virus, or otherwise do some mischief. The risk of any of these happening is small but unquantifiable; the risk cannot be discounted and cannot be compensated in money, hence, Mr Balen argued, the first paragraph 21 condition is not satisfied.

18. I accept, of course, that if the building was subject to sabotage the consequences would be extremely serious, but I do not accept that what is proposed by the claimants would expose the building to an appreciable risk of sabotage, nor that extending the number of individuals with knowledge of the building and what it is used for (to the extent such knowledge would be acquired by a visitor) would increase such a risk. The first paragraph 21 condition requires the site provider to demonstrate that prejudice will be caused to them if the Tribunal makes the order. The possibility of the sort of serious security incident described in Mr Clack's evidence and in Mr Balen's submissions being caused by an order granting brief supervised access to the building on appropriate terms on a few occasions is too remote and theoretical to amount to prejudice.

19. I take Mr Clack's concerns seriously, but I nevertheless do not accept that the risks of the sort he describes are incapable of being addressed by appropriate conditions. I accept that a significant diversion of staff away from their normal duties could potentially create a risk elsewhere, but no significant diversion is being proposed. All that is sought is access to the building for a short periods of time on a limited number of occasions on notice and I do not accept that that is likely to cause a diversion of resources sufficient to create any risk to the security of the building or other parts of the network.

20. The solution to London Underground's concerns is prior security vetting and proper supervision of those visiting the building, at the claimants' expense. Objections similar to those relied on in this case were considered by the Court of Appeal in the *University of London* case, at [79]-[80], as follows:

> "Mr Clark also emphasised the fact that the Code applies to land of all kinds. There may be sensitive Government buildings, for example where it would be inappropriate to allow access for an MSV, let alone the actual installation of electronic communications apparatus simply on a basis of a good arguable case,

without requiring the operator ultimately to satisfy the full test under paragraph 21. …

We consider that most if not all of the potential problems can be dealt with by the terms of the agreement that the Upper Tribunal imposes. It could for example provide for limited hours of access, restrict access to sensitive parts of the building, provide for supervised access and so on. ... In an extreme case, the Upper Tribunal might exercise the discretion which it has under paragraph 26 to refuse to impose the agreement at all."

21. It is an unusual feature of the interim rights regime that substantive rights, as opposed to procedural advantages, can be conferred simply on a good arguable case basis. I am nevertheless satisfied on the evidence which has been provided that the claimants have made out a good arguable case that both the paragraph 21 condition are met. I am also satisfied that, despite this possibly being an extreme case, there is nothing which would justify me in refusing to exercise the discretion to impose an agreement permitting access for an MSV.

22. Having said that, I would encourage the claimants to have Mr Clack's concerns well in mind when considering the suitability of the building as a site for their telecommunications apparatus. If we get to the stage of considering whether long term paragraph 20 rights should be imposed, involving much more frequent access, the security concerns which Mr Clack has identified and which would no doubt be the subject of more informative evidence, might be enough to tip the balance. Nevertheless, it is a fact that telecommunications operators regularly have access to extremely sensitive buildings around Central London. It is not something that is impossible to achieve but it requires cooperation between operators and site providers whose security concerns need to be taken seriously. I do not see any reason in this case why that ought not to be possible. So, I am prepared to make an order imposing interim rights for an MSV in this case.

23. Mr Lees indicated in his submissions that the Tribunal would be invited to resolve any dispute over the terms on which access should be given on some other occasion. Interim rights applications are supposed to be dealt with summarily and should not be allowed to become extended pieces of litigation in their own right. But it is clear that careful consideration will need to be given to the terms of the agreement in this case, and the parties will be given the opportunity to make further submissions in writing if no sensible consensus emerges. I will make directions for London Underground to identify the terms it wishes to see included in the agreement to meet its security requirements, and for the claimants then to respond.

24. Mr Lees made an application for the claimants' costs but I will make no order today and will give the claimants permission to apply in respect of their costs once it has become clear whether an application under paragraph 20 will be made. If a request for the imposition of full Code rights is to be made it may be appropriate for a decision on the costs of this reference to await the outcome of that further reference.

Martin Rodger QC,
Deputy Chamber President
Transcript approved 1 June 2021