UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 130 (LC) UTLC Case Number: LC-2022-142

Location: Royal Courts of Justice via CVP

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – INTERIM CODE RIGHTS – respondent unaware of proceedings – paragraph 26 notice mis-addressed - not clear that the correct respondent has been identified – paragraph 21 of the Code – no "good arguable case" made out

A NOTICE OF REFERENCE UNDER PARAGRAPH 26 OF SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LIMITED

Claimant

-and-

100 NOX S.A.R.L

Respondent

Re: Prospect House,
100 New Oxford Street,
London, WC1A 1HB

Judge Elizabeth Cooke

Heard on 13 May 2022

Decision Date: 13 May 2022

Ms Camilla Chorfi for the claimant, instructed by DWF Law LLP

The following cases are referred to in this decision:

Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd [1977] AC749
Townsend Carriers Ltd v Pfizer Ltd (1977) 33 P & CR 361

Introduction

1. This is a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code or "the Code"; the claimant seeks interim Code rights under paragraph 26 to enable it to inspect and carry out an "intrusive survey" of the rooftop of the respondent's premises at 100 New Oxford Street, London WC1A 1HB. It needs to do this in order to determine whether it would be a suitable site for telecommunications equipment, to replace a site nearby that the claimant is required to leave.

2. The respondent is the registered proprietor of 100 New Oxford Street, which is the subject of multiple leases. It is a company registered in Luxembourg and has a registered office in Luxembourg.

3. The reference to the Tribunal was made on 23 March 2022, and the Tribunal's directions stated that it would hear and if possible determine the reference in a case management hearing on 13 May 2022. I heard the reference by remote video platform. The claimant was represented by Ms Camilla Chorfi of counsel, to whom I am grateful. There is no evidence that the respondent is aware even of the claimant's wish to visit its rooftop, let alone of these proceedings. The application is refused, for that and for other reasons that I go on to explain.

The background to the reference

4. The claimant's Statement of Case was dated 22 March 2023, and verified by a Statement of Truth by the claimant's solicitor. It said that the claimant's agent had written to the respondent at its registered office in Luxembourg on 27 October 2021, and received a reply on 3 November 2021, denying the claimants access to the building and citing confidential future plans for the building.

5. Two days ago the Tribunal was informed that that was not true; in fact no reply was received. What did happen on 3 November 2021 was that the claimant's solicitors sent a chasing letter but again no response was received. A paragraph 26 notice was served by international tracked delivery on 25 January 2022.

6. The paragraph 26 notice was addressed to the Mayor and Burgesses of the London Borough of Lambeth, although the draft paragraph 26 agreement annexed to it gave the correct parties. Ms Chorfi tells me that international tracked delivernotice required a signature on delivery. The Tribunal has seen a proof of delivery from the Post Office but there is no signature and there is no evidence that the notice came to the attention of the respondent.

7. No response to that notice was received and so a reference was issued on 23 March 2022. On 28 March 2022 the Tribunal served the notice of reference upon the respondent at its registered office and gave directions. The directions required the respondent to file and serve a response to the notice of reference, stated that the Tribunal would determine the application if possible at the case management hearing today, and directed that the evidence for the claimant would be the claimant's Statement of Case verified by a Statement of Truth by the claimant's solicitor.

8. The claimant's solicitor has filed a further witness statement dated 11 May 2022 without permission from the Tribunal. In it he said that the reference to a response from the respondent on 3 November 2021 was "pleaded in error", but gave no explanation for that.

9. The Respondent did not respond to the Notice of Reference and did not appear at the hearing.

The law

10. The Tribunal is given a discretion, pursuant to paragraph 26 of the Code, to make an order conferring interim rights on the claimant if it has served on the respondent a notice complying with paragraph 20(2) of the Code (setting out the rights sought) and can show a "good arguable case" that the test for the conferral of Code rights in paragraph 21 of the Code is met. I need not set out that test in full; I refer below to the following part of it:

> "(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."

The claimant's application

11. There are four difficulties with the claimant's application.

12. The first is that the respondent appears to know nothing about it.

13. Ms Chorfi argues that the respondent has been correctly served both with the notice and the proceedings, pursuant to paragraph 91 of the Code and section 394 of the Communications Act 2003 which states that the respondent's registered office is its proper address. I accept that, but am not inclined to exercise my discretion in the claimant's favour when there is no evidence that the respondent received the claimant's letters, or the paragraph 26 notice, or the notice of reference, nor any evidence that the claimant has made a real effort to contact the respondent.

14. The claimant's efforts appear to have been restricted to checking the register of title held by HM Land Registry and the Luxembourg register of companies and then relying upon the registered address. There is no evidence before the Tribunal that the claimant has visited the property or made any enquiries of those who occupy its six floors as to how they communicate with their landlord. There is no suggestion that any representative of the respondent has walked past the property and looked upwards to ascertain whether there is any other telecommunications apparatus on its roof, which might enable the claimant to make contact through another operator. As a matter of common sense all this should have been done once the respondent failed to answer correspondence.

15. Second, the paragraph 26 notice served by the claimant was mis-addressed. Mr Chorfi argues that this does not invalidate the notice, since the information required to be conveyed by paragraph 20(2) of the Code was given, and an explanation was provided in the covering letter so that the notice would not have misled the respondent: *Townsend Carriers Ltd v Pfizer Ltd* (1977) 33 P & CR 361 and *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1977] AC749. But I see no reason why an overseas respondent would not have been misled by a notice that was clearly not addressed to it. True, the annexed agreement named the respondent as a party, but a representative of the respondent who had seen that the notice was not addressed to the respondent might easily have concluded that the notice was simply a copy sent to it for information, and might not have read as far as the notice itself.

16. Third, it is not known whether the claimant has identified the correct respondent. Ms Chorfi in her skeleton argument states that the rooftop is not let. No evidence has been adduced to prove this, save for the registered title which indicates that the premises is the subject of numerous leases. Ms Chorfi states that the claimant has checked the lease of the sixth floor and ascertained that it does not include the roof.; but there are two leases of the sixth floor on the register yet it seems only one has been checked. There is no evidence as to whether any of the other leases includes part of the roof or indeed any easements over the roof. So it is not known that the respondent is the only person in occupation of the roof or indeed whether it is in occupation of the roof at all. Nor has the claimant any idea who is in occupation of the stairs or lift inside the premises, by which – I assume, but there is no evidence that any thought has been given to this – the claimant would gain access to the roof.

17. Fourth, there is no evidence as to what the claimant is going to do on the roof by way of "intrusive survey". Ms Chorfi indicated that the claimant is going to penetrate the roof. I am not aware of any reference in which the Tribunal has made an order for an intrusive survey to a building where that has been opposed by the respondent, let alone in a case where the respondent is unaware of the application, or one where the claimant cannot say what it is going to do. But more fundamentally, the Tribunal cannot perform the balancing exercise set out in paragraph 21 of the Code, even on a "good arguable case" basis, where it does not know what the claimant wants to do and does not know anything about the respondent or about possible prejudice to it.

18. I indicated at the hearing that I was minded to refuse the application for those reasons. Ms Chorfi asked if I would instead adjourn the matter and direct that proper enquiries be made. I refused to do so on the basis that it is now too late to cure the defect in the paragraph 26 notice. In any event, even had that notice been correctly addressed I would have refused the application for the reasons set out above because there is no indication that the notice actually came to the respondent's attention, and because of the claimant's failure to investigate the premises and make real efforts to contact the respondent once the respondent failed to reply to correspondence.

19. Accordingly the claimant's application for interim rights is refused.

Judge Elizabeth Cooke

13 May 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.