

UPPER TRIBUNAL (LANDS CHAMBER)



LC-2022-187

Location: Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – OTHER – the right to removal of apparatus under paragraph 37 of the Code – date for removal - whether the Tribunal has a discretion – application for a stay – removal ordered

A NOTICE OF REFERENCE UNDER PARAGRAPH 40 OF SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

CRAWLEY BOROUGH COUNCIL

Claimant

-and-

EE LIMITED AND HUTCHINSON 3G LIMITED

Respondent

**Re: Telecommunications Site at Broadfields Stadium,
Brighton Road,
Crawley, RH11 9RX**

Upper Tribunal Judge Elizabeth Cooke

Heard on 13 June 2022

Decision Date: 20 June 2022

Jonathan Wills for the claimant, instructed by DMH Stallard LLP
Oliver Radley-Gardner QC for the respondent, instructed by Winckworth Sherwood LLP

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The following cases are referred to in this decision:

Cornerstone Telecommunications Infrastructure v Ashloch Ltd [2021] EWCA Civ 90
Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2019] EWCA Civ 1755

Introduction

1. This is a reference under paragraph 40 of Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code or “the Code”. The respondents have been operating a telecommunications site on the claimant’s land at the Broadfields Stadium under the terms of a lease which was protected by the Landlord and Tenant Act 1954. Their right to stay on the land has come to an end and the claimant seeks an order under paragraph 44 of the Code for the removal of their equipment.
2. A case management hearing was listed for 13 June 2022, on the basis that the Tribunal would determine the application at that hearing if possible. The claimant was represented by Mr Jonathan Wills of counsel and the respondents by Mr Oliver Radley-Gardner QC, and I am grateful to them both.
3. I made an order at that hearing that the respondents remove their equipment on or before 13 December 2022. The following paragraphs set out my reasons for making that order. The claimant also seeks compensation and it was agreed that that would be determined on written submissions if not agreed.

The facts and the law

4. The Code regulates the relationship between those who provide telecommunications services or infrastructure and landowners on whose land telecommunications equipment has to be sited.
5. The respondents’ lease of the site was granted in 2003 for a term of 15 years, and was protected by the Landlord and Tenant Act 1954. Prior to its expiry the claimant served notice under section 25 of the 1954 Act seeking to determine the lease on its term date and proposing terms for a new lease. It gave the respondents a number of extensions of time in which to commence court proceedings. The last of those extensions expired in April 2021, without proceedings being commenced.
6. Part 5 of the Code provides at paragraph 30 that Code rights continue after the expiry of the agreement by which they are granted, and goes on to prescribe the procedure for an operator to get new Code rights or to have their existing agreement amended in those circumstances. But part 5 does not apply to leases granted prior to the coming into force of the Code which were protected by the Landlord and Tenant Act 1954. Hence the service of the section 25 notice and the anticipation that proceedings would be commenced in the county court if the respondents wanted a new lease.
7. The respondents’ lease has now come to an end and it is common ground that they have no Code rights in relation to the site, and that while they remain in occupation of the site they cannot acquire new Code rights by serving paragraph 20 notices because of the effect of the Court of Appeal’s decisions in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755 and in *Cornerstone Telecommunications Infrastructure v Ashloch Ltd* [2021] EWCA Civ 90. Those decisions have been appealed to the Supreme Court; they were heard in February 2022 and a decision is still awaited.

8. One of the reasons why the “old Code” (the statutory predecessor of the Code, Schedule 2 to the Telecommunications Act 1984) was regarded as unsatisfactory was that it was very difficult for landowners to get rid of electronic communications apparatus that was on their land but was not supposed to be there – either because there had never been an arrangement for it to be there, or because rights had expired. The Code addressed this problem. Paragraph 37 of the Code provides as follows:

“(1) A person with an interest in land (a “landowner”) has the right to require the removal of electronic communications apparatus on, under or over the land if (and only if) one or more of the following conditions are met. ...

(3) The second condition is that a code right entitling an operator to keep the apparatus on, under or over the land has come to an end or has ceased to bind the landowner— ...

(d) where the right was granted by a lease to which Part 5 of this code does not apply.”

9. It is common ground that the condition in paragraph 37(3)(d) is met so that the claimant has the right to require the removal of their equipment from the site. The claimant was not initially trying to remove the respondents; on the contrary it proposed terms for a new lease. Mr Wills explained that the claimant is unhappy about the undocumented occupation of the site and wishes to regularize the position. Having failed to get a response to correspondence after the expiry of the last of the extensions of time it made the reference to the Tribunal on the basis that it seemed to be the only way to get anything done.
10. Paragraph 40 makes provision for the enforcement of the right conferred by paragraph 37. If the site is not vacated following the service of a notice the landowner can apply to the Tribunal for an order. Paragraph 44 sets out the orders that the Tribunal may make, and what is sought in this reference is an order under paragraph 44(1) for removal of the apparatus and under paragraph 44(5) for compensation:

“44(1) An order under this sub-paragraph is an order that the operator must, within the period specified in the order—

(a) remove the electronic communications apparatus, and

(b) restore the land to its condition before the apparatus was placed on, under or over the land.

...

(5) An order under this paragraph on an application under paragraph 40 may require the operator to pay compensation to the landowner for any loss or damage suffered by the landowner as a result of the presence of the apparatus on the land during the period when the landowner had the

right to require the removal of the apparatus from the land but was not able to exercise that right.”

The arguments

11. In light of the agreement that the condition in paragraph 37(3) was met the issue at the hearing was whether the reference should be stayed. Mr Radley-Gardner explained that the respondents’ failure to issue proceedings under the 1954 Act was inadvertent. The site is in operation, providing a phone signal, and his clients wish to continue to do so. If they cannot remain on this site they will need to move to another one; they have served notices under paragraph 20 of the Code in respect of another part of the stadium, again on the claimant’s land. They therefore ask for the reference to be stayed, pending either their reaching an agreement in relation to the neighbouring site or the Supreme Court’s decision in *Compton Beauchamp* (etc) on the basis that that decision might reverse the current law and enable them to serve paragraph 20 notices in relation to the present site. They are anxious to be able to continue to provide a signal, and Mr Radley-Gardner QC argued that to stay the reference would be consistent with the objectives of the Code.
12. Mr Wills argued that the Code does not give the Tribunal a discretion as to whether or not to make an order under paragraph 44. There is a discretion as to the date on which equipment is to be removed but the claimants have a right to have the equipment removed which they are now enforcing. Whilst the claimant’s statement of case sought a removal date in June, the claimant now seeks a date six months hence to allow time for the respondents make a reference in relation to the nearby site and have the reference determined by the Tribunal (if agreement cannot be reached) within the six-month period required by regulation 3(2), Electronic Communications and Wireless Telegraphy Regulations 2011.
13. For the respondents it was said that six months is not long enough to ensure continuity, because if there is a reference in respect of the neighbouring site the Tribunal will determine it within six months but there might then be an appeal and considerable delay.

Determination

14. Paragraph 37 gives the claimant respondents “the *right* to require the removal of electronic communications apparatus” (emphasis added). The respondents do not dispute that right; their difficulty is that their position makes it inevitable that they either keep their equipment on the present site by agreement with the claimant but without the protection of the Code (and in particular without the Code’s limitation of the consideration payable) or they have to go through the expense and upheaval of moving to the new site. But if I were to stay the reference because of the respondents’ difficulties I would be going beyond what the Code provides. There are no conditions precedent to the making of an order under paragraph 44 beyond the accrual of the right in paragraph 37; there is no list of considerations and no public interest test. The claimant’s suggestion of a date six months hence is helpful in the circumstances and is likely to enable the parties to resolve the situation. I make the order sought by the claimant and the equipment is to be removed by 13 December 2022.

Judge Elizabeth Cooke

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.