Cornerstone Telecommunications Infrastructure Ltd v Fothringham

Positive/Neutral Judicial Consideration

Court
Lands Tribunal (Scotland)

Judgment Date
11 August 2020

Where Reported
[2020] 8 WLUK 258
[2020] R.V.R. 351
2020 G.W.D. 31-408
[2021] C.L.Y. 2732
Judgment

Subject
Telecommunications

Keywords
Compensation; Consideration; Electronic communications apparatus; Electronic Communications Code; Scotland; Telecommunications operators; Telecommunications sites; Trees

Judge
Lord Minginish;
A Oswald, FRICS

Case Digest

Summary
A telecommunications operator was granted code rights under the Electronic Communication Code para.20, enacted as the Communications Act 2003 Sch.3A, in respect of the respondent heritable proprietor's property.

Abstract
Following the grant of interim code rights, a telecommunications operator made an application for code rights under the Electronic Communication Code para.20, enacted as the Communications Act 2003 Sch.3A, in respect of the respondent heritable proprietor's land.

The applicant's communications network apparatus had been situated on the respondent's land in terms of an agreement between the applicant and the respondent's father. That site had been compulsorily acquired by the Scottish Ministers, with possession of the site required by May 2020, and the apparatus required to be relocated. The applicant had identified a suitable site on the respondent's land approximately 20 metres east of the existing site. An order had been made grating interim code rights (*Cornerstone Telecommunications Infrastructure Ltd v Fothringham [2020] R.V.R. 138, [2020] 2 WLUK 495*) which remained in force until determination of the present application. The matters in dispute were (i) the scope of the definition of "operator" in the agreement, in which the applicants sought for it to read: "references to any rights exercisable by the operator shall be construed as being exercisable by the operator and all persons properly authorised by them", and the respondent sought to have the words "in accordance with the terms of this agreement and the Code" added thereto, (ii) whether the applicants' sharing rights ought to be confined to those found in para.17 of the Code, (iii) the extent of the applicants' tree lopping rights, (iv) the extent of the applicants' duties to remove from the land equipment belonging to third parties when vacating site on termination of the agreement, (v) consideration, (vi) compensation.

Held
Order granted.

Scope of definition of operator - The words "properly authorised" referred the Code, and reference to "the agreement" in addition thereto was unhelpful: should there be a conflict between the agreement and the Code, the Code ought to rule. Accordingly, that provision would be reworded as: "references to any rights exerciseable by the operator shall be construed as being exercisable by the operator and all persons properly authorised by them in accordance with the Code".

Extent of sharing rights - For the purposes of the present argument, the tribunal would assume that it was competent for it to grant rights which went beyond para.17, and that whether to grant such rights was a matter for its discretion, however, it would require compelling evidence to justify the imposition on the respondent of rights which might result in a more than minimal adverse impact on the appearance of the mast, or an additional burden which had an adverse effect on his enjoyment of the land or caused him additional, and unquantified, loss, damage and expense. In enacting para.17, Parliament was striking a balance between the interests of the operators and the public, on one hand, and site providers, on the other, and the tribunal would require to be persuaded that there was some justification for removing the level of protection for site providers which Parliament had provided. The new mast, once fitted with its active equipment, would look much like the old and would have no greater adverse effect on the respondent's enjoyment of his land, and there ought not, therefore, to be any reason to apprehend that restricting sharing rights to those envisaged in para.17 would tie the applicants' hands in some way which was at odds with the sharing imperative. The draft agreement would be altered so as to cause cl.8.1.2 to read "the operator may without the grantor's consent share the rights with third parties... to the extent permitted by para.17 of the Code" (paras 20-24).

Tree loping rights - So far as the historical significance or horticultural value of the trees was concerned, the respondent ought to be adequately reassured by the need to get statutory consents, and so far as the ownership of the trees was concerned, with some belonging to the respondent's tenants, the relevant lease was among the items excluded from the definition of "the grantor's property" in terms of the definition thereof agreed by parties and the tree lopping rights would not apply to the land it covered. An operator would not lop trees just for the sake of it, and it would be done only where a transmission problem actually arose, and the right would be granted in the terms sought by the applicants (paras 28-29).

Extent of duties to remove equipment belonging to third parties - The tribunal sought to strike a balance by imposing upon the applicants an obligation to do all they could to ensure that all equipment was removed at the expiry of the agreement but not requiring them to do the legally impossible. A clause would be written into the agreement in the following terms: "on request of the grantor, prior to its rights under the Code ceasing to apply the operator shall serve notice on any third party supplier supplying equipment to the communications site requesting the removal of such equipment and shall use its best endeavours, to the full extent permitted by law, to ensure the removal of such equipment but the operator shall not itself be obliged to remove such equipment nor can it guarantee removal by the third party" (para.31).

Consideration - The principles involved in carrying out a valuation exercise were well known, *EE Ltd v Islington LBC [2019] UKUT 53 (LC), [2019] 2 P. & C.R. 13, [2019] 2 WLUK 262*, *Gray v Inland Revenue Commissioners [1994] S.T.C. 360, [1994] 2 WLUK 137*, *Trocette Property Co Ltd v Greater London Council and Southwark London Borough Council* [1974] R.V.R. 306, *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] UKUT 107 (LC), [2019] R.V.R. 247, [2019] 4 WLUK 81*, *applied*. The appropriate starting point was the real market for the site, which was existing use or use as a telecommunications site, and comparisons with sites used other than for telecommunications purposes were irrelevant. Further, the electronic telecommunications comparables were not accepted as providing a good guide as to what ought to happen in the present case, however, the effect of the agreement on the site provider must be taken into account, which include the surrender of possession and use of part of his land for a period of 10 years, unrestricted access to that land over a route of significant length in the ownership of and maintained by the respondent, the installation of equipment on the site, the possible exercise of the aforementioned tree lopping right, a requirement for his co-operation in the granting of wayleaves to third parties for no financial gain, and the possibility of equipment being left on his land after the operators have departed. In the absence of convincing comparative evidence of other transactions, an assessment of the risks and obligations which the agreement imposes on the respondent was an appropriate method of deciding consideration. Those risks and obligations were likely to be more onerous in the installation and set up phase of the operation and on that basis, a consideration of £1,500 would be fixed for the first year and an annual payment of £600 in later years (paras 69-76, 78, 82).

Compensation - Compensation ought to include damage caused in the exercise of code rights, having regard to para.25(1) of the Code. In the absence of agreement, that could be the subject of a further application to the Tribunal when the damage has been sustained, having regard to para.25(2)(b). As to the adequacy of the sum offered for professional fees, a distinction was between valuation and legal fees. There was no reason to cap those at an arbitrary level for which no justification was offered, equally, the present tribunal was in no position to assess how much had reasonably been incurred by the respondent in terms of pre-litigation legal expenses, and taxation was the only appropriate means of assessment (paras 84-85).