

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

*ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – terms of agreement –
consequences of failure to engage in the travelling draft procedure*

BETWEEN:

(1) EE LIMITED
(2) HUTCHISON 3G UK LIMITED

Claimants

and

(1) ROBERT CHARLES COOPER
(2) COLIN MICHAEL SHIRES

Respondents

**Re: Windmill Farm
Burned Road
Shelf
Halifax**

.

Judge Elizabeth Cooke

Mr Toby Boncey for the Claimants, instructed by Winckworth Sherwood

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Introduction

1. The claimants are mobile telephone companies. They have made a reference under paragraph 26 of Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code (“the Code”). They seek interim rights under the Code (“Code rights”) to enter land owned by the respondents in order to carry out a survey to determine whether it is suitable for the installation of telecommunications equipment.
2. I heard the application for interim rights on 3 July 2020 by remote video conferencing platform; the claimants were represented by Mr Toby Boncey of counsel, to whom I am grateful. The respondents did not attend and were not represented. I decided to proceed with the hearing, being satisfied pursuant to rule 49 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 that reasonable steps have been taken to notify the respondents of the hearing and that it is in the interests of justice to proceed.
3. The claimants have provided evidence in support of their case in the form of a witness statement by Mr Philip Sturgeon, a Regional Property Surveyor employed by Mobile Broadband Network Limited, and by Ms Sabrina Cader the claimants’ solicitor. Ms Cader’s evidence relates to the service of the paragraph 26 notices, and Mr Sturgeon’s to the claimants’ need for the site. I accept the truth of all that they say.

The law

4. The Code regulates the legal relationship between “operators” who provide electronic communications networks or infrastructure, and those whose land they use. Central to the Code is the principle that “Code rights” can only be conferred upon an operator by agreement between the operator and the occupier of the land concerned (paragraph 9).
5. Paragraph 26 of the Code enables the Tribunal to impose upon an operator and the occupier of land an agreement that confers rights under the Code upon the operator on an interim basis, that is, until a specified date or the occurrence of a specified event. The Tribunal may impose such an agreement if the parties have agreed to the order being made or if the Tribunal thinks:

“that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met”.

6. Paragraph 21 sets out that test as follows:

“(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.

(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.

(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.

(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.”

7. The central role played in the Code by the occupier of land raises a conundrum where land is unoccupied. Paragraph 105 of the Code, so far as relevant, says this:

“(1) References in this code to an occupier of land are to the occupier of the land for the time being. ...

(5) Sub-paragraph (6) applies in relation to land which—

(a) is unoccupied, and

(b) is not a street in England and Wales or Northern Ireland or a road in Scotland.

(6) References in this code to an occupier of land, in relation to land within sub-paragraph (5), are to—

(a) the person (if any) who for the time being exercises powers of management or control over the land, or

(b) if there is no person within paragraph (a), to every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land.

The factual background

8. I understand from the evidence of Mr Sturgeon and Ms Cader that the claimants currently occupy an electronic communications site at Green Land Farm, Soaper Lane, Halifax, but that they anticipate having to move from that site because they hold it on a licence agreement terminable on 12 months’ notice. They have been endeavouring to find a replacement site, and have identified Windmill Farm as a possibility. Mr Sturgeon has provided ample evidence of the position of the farm and the coverage that it will provide, and that it will be a good replacement site for the claimants to use when they have to leave

Green Lane Farm. I accept that evidence, and I accept that there would be a public benefit if the claimants were to be able to survey the land.

9. The claimants' agent wrote to the respondents, who are the registered proprietors of the land, at their address for service as recorded on the Land Register (an address in Barnsley), on four occasions between July and November 2019, asking for access to survey the land. No response was received although the first two letters were returned undelivered.
10. Notices under paragraph 26 of the Code were served on the respondents by signed-for post on 6 February 2020, and Ms Cader has produced the receipts that show that they were signed for by "Charles". The notices were accompanied by a letter that referred to "correspondence to date between our client's agent, WHP Telecoms and you regarding a proposed survey", and said "We understand that discussions have stalled." There had been no "correspondence", which implies an exchange of communication, and there had been no discussions; this was a standard-form letter sent without thought, and a reasonable recipient would have been confused by it.
11. The draft agreement annexed to the notices would confer on the claimants a right to vehicular and pedestrian access to the land on an unlimited number of occasions within a three month period, with an unlimited number of "employees, agents, independent contractors, telecommunication link providers and permitted assigns ... with such materials, machinery tools, plant and equipment as the Operator considers reasonably necessary".
12. No response was received to the notices, and accordingly on 19 May 2020 the claimants made a reference to the Tribunal.
13. I have no evidence about the land itself, save for a copy of the registered title which indicates that there are buildings on the land. The Notice of reference refers to the land as "vacant land" but the Statement of case and the witness statements say nothing about it apart from its potential suitability for electronic communications equipment.
14. Mr Boncey explained at the hearing that the claimants rely upon paragraphs 105 (5) and (6); they say that the land is unoccupied, and that therefore references in the Code to "occupier" are to be taken to be references to the registered proprietors, pursuant to sub-paragraph (6).

The submissions made at the hearing

15. I asked Mr Boncey at the hearing what evidence there was before me that the land was unoccupied. He took instructions and explained that there are dilapidated stables on the land, and a dilapidated farmhouse, and that the claimants' agent had knocked on the door of the house in September and November 2019 and got no answer. Mr Boncey's instructions were that the land was unlikely to be occupied.

16. I have no evidence to that effect. Nor would I have been able to find that the land was unoccupied on the basis of two attempts to knock on the door, one of them nearly a year ago. The term “vacant land” used in the Notice of Reference is not apt to describe land on which a house stands, unless perhaps it is derelict which has not been suggested here.
17. Had I been able to find that the land was unoccupied I would not have been able to find that the claimants had identified and served everyone whose interest would be prejudiced by the imposition of Code rights, as paragraph 105(6) requires, because the register of title indicates not only that there are registered proprietors but also that there is a mortgagee and that there is a person with the benefit of a restriction over the land.
18. Had I been able to find that everyone relevant under paragraph 105(6) had been identified and served I would have had great difficulty in finding that there was a good arguable case that the test in paragraph 21 had been satisfied, in the absence of any information at all about the respondents. The test in paragraph 21(3) requires me to balance prejudice with public benefit. I accept that the conferral of the interim rights would give rise to a public benefit, but the range of rights sought as set out at paragraph 11 above would cause – if exercised to the full – considerable prejudice, and in the absence of any evidence about the respondents or about the land I would not be able to find a good arguable case that the public benefit outweighed the prejudice to the occupiers of the land.
19. I accept that it would not be impossible to impose an agreement conferring interim rights – on a carefully limited and realistic basis - where the proper respondent had been identified and had made no response to enquiries, to notices, and to the reference itself. But it is unlikely that the Tribunal would do so unless far more had been done to contact the occupier than has been done in this case, where there has not even been an attempt to knock on the respondents’ door.

Conclusion

20. In the absence of evidence about the land or about the respondents the application for interim rights is refused. There is no application under paragraph 20 of the Code and that therefore brings the reference to an end.

Judge Elizabeth Cooke

7 July 2020