

Court of Appeal Decision - Electronic Communications Code

Right to carry out Surveys is a Code Right and the Interim Rights Procedure under Paragraph 26 can be used independently

Carlos Pierce and **Tina Middleton** look at the recent Court of Appeal decision in *The University of London v Cornerstone Telecommunications Infrastructure Limited* [2019] EWCA Civ 2075

Key Issues

The key issues to be decided on an appeal brought by the University of London (UoL) against the decision by the Upper Tribunal (Lands Chamber) (UT) made on 30 October 2018 were:

- Is the right to carry out a survey a Code Right – the Upper Tribunal said that it was under paragraphs 3(a) and/or 3(d) of the Code; and
- Can an operator use the paragraph 26 interim rights procedure independently of a full paragraph 20 hearing – the UT said that it could.

The appeal brought by UoL sought to challenge the UT's decision.

What was the case about?

The Electronic Communications Code gives code operators certain rights over land. This includes the right to install electronic communications apparatus ("**Apparatus**") on under or over land and the right to carry out works on that land.

Prior to installing Apparatus on land, operators will carry out a survey, known in the industry as a multi-skilled visit ("**MSV**"). The MSV is an important and essential part of the acquisition process. Designed to protect both landowners and operators, it allows operators to assess whether the land is suitable for the installation and operation of Apparatus including:

- whether the site is workable from a design, build and management perspective;
- whether the site is structurally suitable for the Apparatus;
- town and country planning issues;
- the proximity of fibre backhaul or identification of a microwave line of sight; and
- whether access can be facilitated easily.

As the Upper Tribunal (Lands Chamber) (**UT**) explained:

"It stands to reason that an appreciation of what else might occupy a space and some understanding of the construction of a building would both be required before a means of fixing antennae or other equipment to it could be designed. In reality, the cost of commissioning an installation would not be incurred without first determining whether the required coverage could be achieved."
(paragraph 74 of the UT judgment)

If the land is deemed unsuitable, the operator will walk away.

However, despite the essential part that MSVs play, the word "survey" does not appear in the list of Code Rights and the question arose: was the right to carry out an MSV a Code Right? This is an important question recognised by the Court of Appeal:

"One of the avowed purposes of the Code was to reduce the price payable by operators for the acquisition of code rights Landowners stand to receive much less for the conferring of rights under the Code. They

therefore prefer to operate outside the Code where they can. This is the commercial consideration underlying this appeal."

(para 8 of the Court of Appeal judgment)

Facts of the case

Having lost a site close to Paddington Station, London and seeing a nearby site at St Mary's Hospital struggle to cope with the extra demand for services, Cornerstone needed a new site near Paddington Station and approached the UoL for permission to carry out an MSV at Lillian Penson Hall (a student accommodation building). Access was however refused; the University didn't want apparatus to be installed on its land and were advised that the right to survey/carry out an MSV was not a Code Right.

The parties were at an impasse. Unable to secure a consensual agreement, Cornerstone served a notice seeking an 'Interim Agreement' under paragraph 26 of the Code permitting access and subsequently made an application to the UT.

In handing down its decision on 30 October 2018 the UT agreed with Cornerstone that:

1. the paragraph 26 interim rights procedure could be used as an independent procedure without the need for the operator to resort to paragraph 20 of the Code for permanent rights; and
2. the right to survey was a Code Right falling within paragraphs 3(a) and/or 3(d) of the Code.

Decision

In dismissing the UoL's appeal, and upholding the UT's decision, the Court of Appeal – with the Master of the Rolls Sir Terence Etherton presiding - decided that:

1. the right to carry out a survey is a Code Right falling solely under paragraph 3(d) of the Code.

In reaching its conclusion the Court of Appeal explained that:

"...the policy underlying the Code is such that Parliament must be taken to have intended that national coverage by electronic communications equipment would be facilitated by code rights. It must also be taken to have intended that apparatus would be installed on suitable sites; and to have known that an assessment of suitability would be required before a final decision on installation was made.

Court of Appeal also said:

The legislative context points strongly, in our judgment, to the conclusion that an MSV is within the phrase "any works on the land for or in connection with the installation of electronic communications apparatus" whether or not a final decision to install electronic communications apparatus has yet been made."

(paragraph 55 of the judgment)

2. the interim rights procedure under paragraph 26 can be used independently, with the Court of Appeal explaining that:

"We consider it improbable that Parliament would have legislated in such a way as to require an application to be made under paragraph 20 when there was no practical reason to do so. It would both cause the parties to incur unnecessary costs and also divert the resources of the UT."

(paragraph 82 of the judgment)

Other insights from the Court of Appeal

In arriving at its decision, the Court of Appeal also helpfully clarified some of the confusion that has resulted from the Court of Appeal's recent decision in *Cornerstone Telecommunications Infrastructure Limited and Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755 namely that:

1. Interim and temporary rights can only be conferred by an order by the UT;
2. "...paragraph 27 [Temporary code rights] applies where there is already electronic communications apparatus on the land; whereas paragraph 26 [Interim code rights] applies whether or not there is apparatus on the land" (paragraph 74 of the judgment)
3. "...the application under paragraph 20 and the application under paragraph 27 are inextricably linked" (paragraph 72 of the judgment)

Practical Effect - what does the decision mean?

In effect – nothing changes - as the Court of Appeal reinforced the decision made by the UT.

In practice, operators should continue to agree access for surveys on a consensual basis. If access is refused, reference might be made to this case, which could become a cost issue for any UT application.

Further, the procedure paragraph 26 is designed to give operators fast and quick access to sites. This means that, where parties cannot agree terms within a reasonable timeframe paragraph 26 could be used for:

- access to land for MSVs;
- where there is a need to build a site in the interim
- Special event sites such as festival sites

Final Word

This was a keenly awaited decision.

A right to carry out a survey is one of the key tenets of how the industry works. Prior to the new Code, MSVs were accepted as market norms and were well understood by both operators and landowners.

It seems logical therefore that the Code, which was introduced to speed up the roll-out of apparatus, should contain, within it, a right to assess whether a site is suitable.

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