

## Electronic Communications Code

The Upper Tribunal determines Preliminary Issues on a long-standing issue that plagued the Old Code on ownership of apparatus, reinforces the scope of Code powers for certain Code operators and discusses the extent of Code terms.

Carlos Pierce and Tina Middleton look at the recent decision in *Cornerstone Telecommunications Infrastructure Limited v Richard Gregory Keast* [2019] UKUT 0116(LC) under the Electronic Communications Code ("the Code").

### What was the case about?

The Code gives Code operators certain rights over land. This includes the rights to install and keep installed electronic communications apparatus ("Apparatus") on, under or over land.

Vodafone, a Code operator, currently occupies land at Penrose Farm, Cornwall pursuant to the terms of a lease. That lease had contractually expired, but its terms are continuing by virtue of the Landlord and Tenant Act 1954.

Cornerstone, also a Code operator, provides the passive infrastructure that enables mobile phone operators to deliver electronic communications services to the public. Owned equally by Vodafone and Telefonica, it sought a renewal of Vodafone's agreement from Mr Richard Gregory Keast (the owner of the land).

In a Preliminary Hearing as part of paragraph 20 proceedings under the Code, the landowner argued the following in resisting a Code agreement in Cornerstone's name:

1. that Cornerstone was seeking rights over Apparatus that was already installed upon the land rather than the land itself thereby taking it outside the remit of the Code (ECA Issue);
2. that Cornerstone's code powers were limited to the provision of conduits (tubes, pipes etc) rather than masts and cabins and therefore preventing it from obtaining the rights sought (Code Powers Issue)
3. there was an alleged discrepancy between the paragraph 20 notice and the application made to the Tribunal which invalidated the application (Application Issue); and
4. that Cornerstone was seeking terms that the Tribunal did not have jurisdiction to confer and thereby invalidating Cornerstone's paragraph 20 notice (Terms Issue).

It was further argued that ownership of the mast had reverted to the landowner as it had become part of the land (Ownership Issue).

## Decision

The judge dismissed all of the landowner's arguments and found in favour of Cornerstone.

## Ownership Issue

It is well known amongst property lawyers that anything that is attached to land with a sufficient degree of permanence becomes part of the land.<sup>1</sup> So, the argument goes, when a Code operator installs its mast on the landowner's land, that mast becomes part of the land and therefore belongs to the landowner. Easy right?

Not quite. Both the old Code<sup>2</sup> and the new Code<sup>3</sup> contain provisions that prevent that from happening; a position that was affirmed here when, in declaring that the operator continues to own the mast, the Tribunal explained that:

*"..the effect of paragraph 101 of the Code is that [Apparatus] installed pursuant to Code rights, however firmly affixed to land, does not by virtue only of that attachment become land...<sup>4</sup>"*

This is a welcome decision for both operators and landowners alike. It provides code operators with comfort that it can continue to invest in its networks without fear of losing their valuable Apparatus whereas landowners can rest assured that the operator is responsible for, and bears the costs of, removing masts from their land.<sup>5</sup>

## ECA Issue (aka "the battle of the cheeses")

The landowner argued that, if the Apparatus belonged to Vodafone, rather than the landowner, then Cornerstone was only entitled to "swiss cheese" i.e. it could only have rights to land which did not have Apparatus installed upon it<sup>6</sup> (creating "holes" or "no-go" areas in the land).

Cornerstone argued that it did not want "swiss cheese" but "cheddar;" it wanted rights over all the land sought including that land which had Apparatus installed upon it.<sup>7</sup>

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<sup>1</sup> *Elitestone v Morris* [1997] 1 W.L.R 687, per Lord Lloyd at para 691

<sup>2</sup> Paragraph 27(4) of the Telecommunications Act 1984 as amended by the Communications Act 2003

<sup>3</sup> Paragraph 101 of Schedule 3A to the Communications Act 2003

<sup>4</sup> Paragraph 45 of the judgment

<sup>5</sup> Paragraph 43 of the judgment

<sup>6</sup> Paragraph 46 of the judgment

<sup>7</sup> Paragraph 47 of the judgment

The judge favoured the cheddar approach, explaining that the presence of Vodafone's Apparatus did not prevent Cornerstone from seeking code rights over the same land. What it did prevent however is Cornerstone from using that Apparatus without Vodafone's consent.<sup>8</sup>

This judgment will be of particular interest to practitioners following the decision in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] UKUT 0107 where the judge in that case decided that Cornerstone couldn't seek a Code agreement from the landowner, but should have sought it from Vodafone, as it was the occupier.

## Code Powers Issue

Under the old code there were two types of Code operators:

- (i) those that provided a network; and
- (ii) those that provided a system of conduits.

Cornerstone's Ofcom direction under s106 of the Communications Act 2003 was for the provision of a system of conduits.

The introduction of the new Code however deleted the reference to "conduits" and substituted it for "infrastructure". The question was whether Cornerstone should now be treated as providing a system of infrastructure. The Tribunal confirmed that it should<sup>9</sup>. It explained that the amendments made by Parliament<sup>10</sup> meant that:

*"...operators [did not] .... have to apply for a fresh direction, after the amendment, to enable them to carry on providing other infrastructure. [Cornerstone] had all it needed under the old Code and has all it needs now."<sup>11</sup>*

## Application Issue

The question arose as to whether the different wording used to describe the "land" in the paragraph 20 notice and the application itself invalidated the notice. The Tribunal, in dismissing the landowner's argument explained:

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<sup>8</sup> Paragraphs 48-49 of the judgment

<sup>9</sup> Paragraphs 87-94 of the judgment

<sup>10</sup> By virtue of Schedule 3 of the Digital Economy Act 2017 and Regulation 3(2) of the Electronic Communications Code (Transitional Provisions) Regulations 2017

<sup>11</sup> Paragraph 97 of the judgment

*"...there is no substance in this preliminary issue. To suggest that the [application] seeks rights that are different from those sought in the paragraph 20 notice because they relate to a smaller area of land, in the face of the clear terms of paragraph 12 [of the application] and of the draft agreement itself, is incorrect and to suggest that the Respondent could have been misled is fanciful.<sup>12</sup>"*

This judgment will give solicitors tasked with both preparing notices and applications and receiving them, with useful guidance as to the validity of such documents.

## Terms Issue

Lastly, in granting an agreement pursuant to paragraph 20 of the Code, the Tribunal will impose Code rights<sup>13</sup> and terms<sup>14</sup>.

Notwithstanding this, it was argued, on behalf of the landowner, that the terms that Cornerstone was seeking were terms that the Tribunal did not have jurisdiction to confer such as the right to restrict the landowner's access to the site or the obligation upon the landowner not to interfere with the site<sup>15</sup>. In dismissing this argument, the Tribunal explained that this was not a question of jurisdiction but discretion:

*"All the terms of the draft agreement are in principle within the jurisdiction conferred by paragraph 23, but all are a matter of discretion. They may or may not be granted in due course but none of them is out of bounds.<sup>16</sup>"*

The judge also gave a warning that:

*"In the light of the breadth of the Tribunal's discretion it will not generally be useful or cost-effective for respondents to argue this jurisdiction point as a preliminary issue.<sup>17</sup>"*

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<sup>12</sup> paragraph 26 of the judgment

<sup>13</sup> One or more of the rights listed in paragraph 3 of the Code

<sup>14</sup> See for example paragraph 23 of the Code

<sup>15</sup> Paragraph 54 of the judgment

<sup>16</sup> Paragraph 55 of the judgment

<sup>17</sup> Paragraph 61 of the judgment

### Key Points

- Ownership of apparatus (including masts) does not pass to the landowner when such apparatus was installed pursuant to Code rights.
- An operator can seek Code rights over land even if there is existing electronic communications apparatus installed on the land.
- Code operators whose Ofcom Code powers direction prior to the introduction of the Code was for the purposes of providing a “system of conduits” are now treated as having Code powers for the provision of a “system of infrastructure”.
- The Tribunal has jurisdiction to impose the terms that the operator seeks but whether such terms will be imposed will depend on the Tribunal’s discretion.
- In the battle of the cheeses, Cheddar came out on top..!

### Final Word

This clarity is welcomed for landowners and operators. It:

- finally puts to bed an argument that plagued the old Code by determining that apparatus does not become part of the land and continues to be owned by the operator;
- ensures that a specific class of Code operators can continue to operate their businesses against the backdrop of the Code without having to make a fresh application to Ofcom for code powers; and
- should hopefully help facilitate discussions between operators and landowners regarding terms for Code agreements.

At Cornerstone, we are always willing to have a discussion with landowners and their advisors on terms.

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