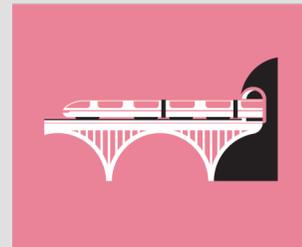


# *NEW ENIGMAS UNDER THE CODE: THE ELECTRONIC COMMUNICATIONS CODE AFTER ABOUT A YEAR AND A QUARTER*

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# The Origins of Mobile Internet Access



THE GOOD OLD DAYS



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# The Electronic Communications Code (General Regime) in One Slide (Not Comprehensive)...

- The Code allows **Operators** to obtain **Code Rights** over **Land** to install **Electronic Communications Apparatus** on that **Land** and do various other things.
- An **Occupier** can voluntarily confer a Code Right by a **Code Agreement** under Part II of the Code.
- An involuntary **Occupier** can have a **Code Agreement** imposed upon it by the Upper Tribunal under Part IV of the Code if the **Operator** operates a notice procedure, and can then satisfy the statutory test for imposition.
- Whether under Part II (voluntary) or Part IV (involuntary), a post-28/12/17 **Code Agreement** for full **Code Rights** can only be terminated by operating a '54 Act-esque procedure under Part V of the Code. This requires an 18 month notice of termination, and the **Site Provider** (an **Occupier** who is party to a **Code Agreement**) must make out a statutory ground for termination.
- Once terminated, the **Electronic Communications Apparatus** can only be forcibly removed under Part VI by a person with an interest in land giving reasonable notice.



.... Actually Not Quite, in Two Slides (or So). Sorry. (to be honest there's a book in this)

- In addition, an **Operator** can seek short-term rights on one of two bases - under an **Interim Right** (paragraph 26), allowing it to get on land quickly for the first time, or under a **Temporary Right** (paragraph 27), allowing it to acquire rights to kit already on land until the status of that kit has finally been resolved.
- Imposed agreements (final, interim or temporary) are subject to a statutory valuation hypothesis for **consideration** (paragraph 24), and **compensation** (paragraphs 25 and 84-85).
- Imposed agreements of are subject to a control over terms by the Upper Tribunal.



So...

- Now we all understand the structure of the General Regime.

# Where to Go?

- **Important Point of Practice #1: Jurisdiction**
- New Code claims are started and heard by the Upper Tribunal.
- There are a few important rules about jurisdiction that you should be aware of under *The Electronic Communications Code (Jurisdiction) Regulations 2017* (powers of Tribunal to County Court; in practice many Tribunal judges are also County Court judges in any event)
- **Beware:** the Upper Tribunal has no jurisdiction over old code claims:

*Elite Embroidery Ltd v Virgin Media Ltd* (ELECTRONIC COMMUNICATIONS CODE – JURISDICTION) [2018] UKUT 364 (LC)  
(compensation sought under New Code despite fact that there was no right conferred under the New Code; Claim struck out under the Tribunal's rules)

- Except perhaps when it needs to determine a question under the old code to see if it has any jurisdiction under the new one!



# What to Do?

- A claim under the Code for a new right is initiated by an operator (paragraph 20(3)).
- A claim for an order terminating a code right is also initiated by the operator (under paragraph 32(1)(b) and (4)).
- A claim to remove apparatus is initiated by the person seeking removal (paragraph 40(6)).
- Upper Tribunal (Lands Chamber) Practice Note: Electronic Communications: Code disputes should be referred to the Tribunal using the forms and procedures applicable to references under Part 5 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (esp. rules 28 and 29)
- In effect, the usual course is:
  - Notice of reference with a full statement of case is given by Claimant;
  - Notice of response under paragraph 29 giving limited reasons is sent by Respondent;
  - A case management hearing is set up quite quickly (weeks), and the Respondent will have prepared a statement of case by then, or will be ordered to provide one shortly thereafter.
  - CMH covers directions.
  - The forms are not really customised for Code claim; good idea to refer to this in the covering letter for administration purpose.



# How to Do?

- **Important Point of Practice #2**

- The Upper Tribunal emphasises the need for parties to be co-operative in litigation before it. It is serious about the overriding objective.
- The Upper Tribunal is under a statutory duty which the parties are not allowed to waive to resolve claims to install apparatus within six (6) months - litigation can move at a brisk pace. See paragraph 97 Code:

*Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 ([SI 2011/1210](#)) makes provision about the time within which certain applications to the court under this code must be determined.*

- As a failure to comply with regulation 3 is a breach *by the tribunal*, it does not take kindly to delays caused by mucking about.
- The Tribunal takes the view that in cases where there is no installation proposed, the six month rule does not apply.
- The Upper Tribunal likes to be told whether the six month rule is in play at the outset.
- The Upper Tribunal is a specialist tribunal. Full cases involving valuation will involve a panel with a legal member (usually, but not invariably, the Deputy President at the moment) and a valuer member.



## Three Areas of Dispute under the Code

- The new Code has produced more cases in 18 months than the Old Code did in 33 and a bit years.
- The new Code is a good bit longer and in places more complicated than the old one
- The new Code throws up construction problems as it beds in
- Legislating for fast-moving technology is challenging
- The new Code has disrupted established market practices, and we have to adapt to the new landscape.
- Three enigmas to consider lightly on the morning of the day after the PLA dinner:
  - Interim Rights - the Mouse that Roared
  - Imposition of Terms - What's the Limit?
  - Consideration - the 64,000 dollar question? Or the 64 dollar question?



# Issue One: Interim Rights: The Mouse that Roared

- Interim Rights: Paragraph 26 of the Code
- (1) An operator may apply to the court for **an order which imposes on the operator and a person, on an interim basis, an agreement** between them which
  - (a) **confers a code right** on the operator, or
  - (b) **provides for a code right to bind that person.**
- (2) An order under this paragraph imposes an agreement on the operator and a person on an interim basis if **it provides for them to be bound by the agreement—**
  - (a) **for the period specified in the order, or**
  - (b) **until the occurrence of an event specified in the order.**
- (3) The court may make an order under this paragraph **if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis** and—
  - (a) the operator and that person have **agreed** to the making of the order and the terms of the agreement imposed by it, or
  - (b) the court 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.**



# Interim Rights: The Mouse that Roared

- Two key cases:
  1. *Cornerstone Telecommunications Infrastructure Ltd v The University Of London* (ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – access to buildings) [2018] UKUT 356 (LC)
  2. *EE Ltd & Hutchison 3G UK Ltd v London Borough Of Islington* (ELECTRONIC COMMUNICATIONS CODE – INTERIM RIGHTS) [2018] UKUT 0361 (LC)



# Interim Rights: The Mouse that Roared

- Key Issues
- What rights are there within paragraph 3?
- Is paragraph 26 or is it capable of being invoked independently?
- How does the test under paragraph 26 work?



## Issue Two: Imposition of Terms: What's the Limit?

- This area has attracted the most ire in the Tribunal
- Parties are expected to negotiate with one another and, if acting sensibly, ought to be able to agree most terms without recourse to the Tribunal without good reason.
- The Tribunal is not there to draft contracts for the parties
- Failure to comply with a direction may lead to adoption of the other side's terms!



# Imposition of Terms: What's the Limit?

- Step One: The Notice

*The operator may give the relevant person a notice in writing—*

*(c) setting out the code right, and all of the other terms of the agreement that the operator seeks”*

- Step 2: Agreement (or not)

The Tribunal can be applied to if (inter alia)

*“the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right”*

- Step 3: the Powers of the Tribunal

*“An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.”*

*“An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to subparagraphs (3) to (8).”*



# Imposition of Terms: What's the Limit?

- Step 3 (continued)

(3) *The terms of the agreement must include terms as to the **payment of consideration** by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).*

(4) *Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).*

(5) *The terms of the agreement must include **the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—***

(a) *occupy the land in question,*

(b) *own interests in that land, or*

*I are from time to time on that land.*

(6) *Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement.*

(7) *The terms of the agreement **must include terms specifying for how long the code right conferred by the agreement is exercisable.***

(8) *The court must determine whether the terms of the agreement should include a term—*

(a) ***permitting termination of the agreement** (and, if so, in what circumstances);*

(b) ***enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates** (and, if so, in what circumstances).*



## Imposition of Terms: What's the Limit?

- Can any terms be requested?
- Can a lease be asked for?
- What happens if the parties cannot agree a term?



## Issue Four: Consideration - the 64,000 dollar question? Or the 64 dollar question?

- Law Com 336, DCMS and the shift to no-scheme
- The market expectations vs the market reality



## Consideration - the 64,000 dollar question? Or the 64 dollar question?

- Paragraph 24:

24 (1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 20 must be an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be).

(2) For this purpose the market value of a person's agreement to confer or be bound by a code right is, subject to sub-paragraph (3), the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement—

(a) in a transaction at arm's length,

(b) on the basis that the buyer and seller were acting

prudently and with full knowledge of the transaction, and on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.



## Consideration - the 64,000 dollar question? Or the 64 dollar question?

- (3) The market value must be assessed on these assumptions—
- (a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network
  - (b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;
  - (c) that the right in all other respects corresponds to the code right;
  - (d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.



## Consideration - the 64,000 dollar question? Or the 64 dollar question?

- Valuation of rooftops:

*EE Ltd & Anor v London Borough Of Islington* (Electronic Communications Code - Consideration - Compensation - Inner London residential rooftop site) [2019] UKUT 53 (LC)

- Permissible valuation methodology
- Impermissible valuation methodology
  - Old code transactions
  - Other regimes
  - The Linda Evangelista Valuation Hypothesis: “*We don't wake up for less than \$10,000 a day*”.



You are hereby released  
(I am happy to answer questions)



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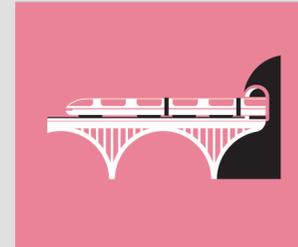
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