

Insights

OPERATOR FAILS IN ATTEMPT TO SECURE A NEW TELECOMS CODE AGREEMENT, AS TRIBUNAL WEIGHS UP “PUBLIC BENEFIT” OF TELECOMS AND PREJUDICE TO THE LANDOWNER

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The Upper Tribunal has provided welcome clarity on when a landowner may resist the imposition of a new “full” agreement under the Electronic Communications Code in *Cornerstone Telecommunications Infrastructure Ltd v University of the Arts London* [2020] UKUT 0248 (LC).

Background

At the centre of the case was the University of Art’s Elephant and Castle campus – the London College of Communications. The site is part of a wider redevelopment in the area. The University was not undertaking any redevelopment of the site itself, but had entered into a contract whereby a developer would build a new London College of Communications elsewhere on the development site. Upon practical completion of the new building, the University would sell and lease back its current building for 3 years, to afford it an opportunity to fit out and move into its new building. The lease provided for an 18 months’ rent free period, followed by a yearly rent of £3 million, and a break option exercisable at any time, conditional on the University providing vacant possession (including free from telecoms equipment) to the developer. The significant increase in rent after 18 months was to incentivise the University to fit out its new building and move out of its current building as quickly as possible, to enable the developer to demolish and redevelop that part of the site.

Decision

The operator unsuccessfully applied to the Tribunal for the imposition of a Code agreement in respect of the rooftop site at the University’s current building. Applying the test for a new Code agreement, the Tribunal found that the prejudice that would be caused to the University by granting a Code agreement was incapable of being adequately compensated by money and that the public

benefit did not outweigh the prejudice (of imposing a new Code agreement) to the University. Central to the Tribunal's decision was the risk that, upon expiry of the Code agreement, the operator would not vacate the site voluntarily, and that litigation would be required to get the operator to leave the site, particularly bearing in mind the fact that litigation had been required to force the same operator to leave other parts of the development site. Further, the University could suffer drastic consequences (breach of contract and the threat of an injunction from the developer) if it was unable to give vacant possession of the site to the developer due to the presence of operators on its current building. Consequently, the significant potential prejudice to the developer of allowing the operator on site under a new Code agreement outweighed the public benefit of a new electronic communications site at this particular location, and the Tribunal refused to impose a new Code agreement.

Interim Orders

Whilst not central to the dispute at hand, the court signalled its approval that interim Code agreements could be used to provide rights to operators for sites pending redevelopment. Interim Code agreements require Tribunal approval, and allow a site provider to side-step the requirement to give 18 months' notice, and rely on a statutory ground, to terminate a Code agreement. On the same site in question, the Tribunal had approved a 5-year interim Code agreement with a different operator. Landowners and operators alike will be comforted by confirmation that interim Code agreements can be used for as long as five years for sites that are pending redevelopment.

What does this mean?

All cases are fact sensitive, so caution should be exercised before drawing too many principles from the case. The facts of this case were unusual, as the University was not the developer and it was facing a real financial cliff edge if it was unable to give vacant possession of its existing building to the developer upon or before expiry of the rent free period under the future lease. However, it is common for site providers to face the threat of an operator remaining in situ and litigation being required in order to obtain possession. Where redevelopment is likely to go ahead, and the existence of a Code agreement could cause genuine prejudice to a site provider, it seems the Tribunal will take practical decisions.

The case will go down as a success for site providers and landowners against the backdrop of numerous operator wins under the highly-contested Telecoms Code.

Evidently, there is still some bad blood between telecoms operators and site providers. The Tribunal criticised the parties for the acrimonious manner in which the case had been handled, and commented that the parties had behaved *"as if they are enemies"*.

The case also provided some welcome guidance on other terms that may form the basis of a Code agreement. However, there remain a lot of unresolved issues under the Telecoms Code, and we can expect to see much more litigation on the interpretation of the Code and how it works in practice.

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