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What To Do About London's Roof Tops
By
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More than a few are eyeing the value of rooftops on residential tower blocks of flats.

According to *The Economist* (23 March 2019) London has (only) 360 high-rise buildings of 20 storeys or more. But one does not need anything quite as high. Knight Frank, the auctioneers, estimated (15 November 2017[1]) that there are 23,000 buildings in Zones 1 and 2 alone that are suitable for rooftop development; casually adding that the airspace has a potential value of £51bn from 41,000 dwellings – without altering the skyline. Not entirely uncoincidentally –the latest National Planning Policy Framework[2] (February 2019) resolved to "support opportunities to use the airspace above existing residential and commercial premises for new homes" whilst the government announced (31 January 2019[3]) a £9m funding deal with Apex Airspace Developments to develop 78 rooftop homes within three years.

Councils then are not alone in wondering about the value of the rooftops of the housing stock. One publicly ruminated, in 2015[4], renting its rooftops to telecom companies, and investing the money gained back into public services, including giving free Wi-Fi to its 74 tenants' halls from across the borough. The value, sadly, is – reportedly - a fraction of they once were, even if Wi-Fi

[1] https://www.knightfrank.com/blog/2017/11/15/more-than-40000-new-homes-could-be-built-on-londons-roofs
[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810197/NPPF_Feb_2019_revised.pdf, para 119
[3] https://www.localgov.co.uk/Funding-deal-agreed-to-build-homes-on-Londons-rooftops/46796
[4] https://www.localgov.co.uk/London-council-could-rent-its-rooftops-to-telecoms-companies/39527

is as cheap as chips. Anecdotally, telcos offer are now offering in the region of a few thousand for compensation and consideration to install a mast on a rooftop; in the only recently reported judgment where money was an issue, *EE Ltd & Hutchison 3G UK Ltd v London Borough Of Islington*, the Upper Tribunal directed interim rent of £2,551 pending an application for full rights to install and maintain a telecommunications mast.

By (unhappy) coincidence more recently, local authorities, in London and elsewhere, are understandably reminding themselves that there is no value that is high enough to compete with their duty to ensure the safety of residents. Whilst that was always given the highest priority the Grenfell disaster of 2017 has brought safety – and the prospect of letting powerful electronic equipment onto its tower blocks – into sharp relief.

The focus of attention is the Electronic Communications Code. Introduced to regulate telco access to private land, it was recast in 2017, since when a series of judgments in the Court of Appeal and Upper Tribunal have set the tone for an entirely new regime, that is proving a bitter pill to swallow for authorities with invariably prime, and ideal cell-site mast locations.

Bubbling away within and without the Lands Chamber of the Upper Tribunal are several cases that will further test the rights of telecommunication operators to pick and choose the places where to install and maintain a mast, against the right of landowners, including local authorities to oppose their installation.

The Code

The Code, within the general scheme of Part 2 of the Communications Act 2003, is made enforceable by S.106 of the 2003 Act in favour of any telecommunications operator registered with OFCOM. It grants operators statutory rights to facilitate the creation and operation of their networks. The Code regulates the installation and maintenance of communications network equipment by operators on land and buildings owned (or occupied) by another person who is not in the business of telecommunications. It codifies rights, procedures and standards (collectively "Code Rights") that accrue to an operator either by way of agreement with a landowner (Part 2 of the Code), or the court may impose an agreement pursuant to Paragraph 20, Schedule 3A, on the application of an operator (Part 4 of the Code). A Code right may only

be exercised for one of the statutory purposes specified in paragraph 4, namely, for providing an operator's network, or for providing an infrastructure system.

When the court is called to upon to determine an application it examines if two conditions are met, within paragraph 21 of the Code:

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

b) *The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.*

The Code has been judicially examined by way of written judgment by the Upper Tribunal on several occasions, and the Court of Appeal twice. The general approach taken is Code Rights should be interpreted widely (*Cornerstone Telecommunications Infrastructure Limited v The University of London [2018] UKUT 0356 ("University of London")*) . It is a self-contained code (*The University of London v Cornerstone Telecommunications Infrastructure Limited [2019] EWCA Civ 2075*), whose provisions are to be to be interpreted consistently with each other as a scheme of arrangement but in accordance with general law (*Evolution (Shinfield) LLP v British Telecommunications Plc [2019] UKUT 127 (LC)* and to some extent *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755 ("Compton Beaychamp;).* Finally the scheme imposes a duty on parties to co-operate and act sensibly on the question of terms (*EE Limited and ano v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 0053 (LC) ("EE Ltd 2")*) The other decision, which does not add materially to this jurisprudence, is the first instance decision in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd ([2019] UKUT 107 (LC).*

Code of Conduct

In addition to Communications Code, there is a more informal Code of Conduct (or "code of practice") mandated by paragraph 103 of the (statutory) Code, to be published by OFCOM to deal with "any matter relating to the operation of" the Code. Its full status within the determination of either a good arguable case or a final order has not been fully explored. It does

not have the express status of, say, employment codes of practice adopted by government, which are (by dint of statute) admissible in proceedings. The fact that they govern conduct leading up to an order imposing an agreement strongly suggests that they are relevant to a determination at the interim stage to assess whether there is a good arguable case, which is linked to prejudice and public interest.

It includes guidance as follows:

> *1.1 Once it has been determined that new Apparatus is required in a given area, the Operator should identify various options for new sites and survey possible solutions based on technical and planning considerations.*
>
> *1.2 When a suitable location has been identified for the installation of apparatus, the Operator should proceed to secure any necessary consents for the site, in accordance with relevant regulations, consulting with the Local Planning Authority, and other parties, where required, and any applicable guidelines or codes of practice.*

The Code of Conduct may also leverage planning considerations. Beyond the immediate application of the 2003 Act and the Code, the installation of apparatus is regulated by The Town and Country Planning (General Permitted Development) (England) Order 2015; Part 16 of Schedule permits the installation by Code operators of apparatus unless one of the exceptions apply for building-based equipment or, for instance, near an aerodrome. None of the decisions to date have involved any discussion of planning legislation to any material degree. and this may be because there is limited scope for it to create a cogent argument.

Interim Code Rights

Optionally, an operator may apply for an interim order imposing an agreement, which has been exercised in order to grant access to assess suitability of a prospective location to host a mast. The leading decision on this point, *University of London,* determined that access limited to determine suitability of a location, and not to install, was an implied Code Right.

*University of Londo*n concerned an application to install a mast on the respondent's Lillian Penson Hall. There is little in the judgment to describe the features of the Hall, but it appears that the

building housed, i.e. was the residence for, several hundred students for whose welfare the University was responsible, in an area that was generally residential, and was a similar height to the building being demolished.

The Upper Tribunal (Martin Rodger QC, Deputy Chamber President) found as a fact at [74] that no electronic communications apparatus could be installed without a preliminary MSV. It then identified the right of access to survey as a unenumerated Code Right, within paragraph 3(a) or, failing that, paragraph 3(d). An application for access could be made on an interim basis. The UT then went on to apply the two stage test and it was taken without dispute that the standard to apply in the case of an interim application was "a good arguable" case as mentioned in paragraph 26(3)(b) of the Code.

The applicant satisfied both conditions on that basis. The University had been proposing that it would charge the operator £400 per person per visit to supervise access, which indicated that is prejudice could be compensated by money. Meanwhile, and coincidentally with the Council's scenario, the operator in that case needed to relocate its mast from a nearby building that was due to be demolished which fact suggests that there was both demand and public interest. There was a certain amount of cross examination and submission about the availability of alternative sites which might be used by the claimant instead of the University's Building, but the UT judge rejected that evidence as directly relevant to the paragraph 21 test to be applied by the Tribunal.

The University's appeal was dismissed, although in the interim the MSV had taken place. The court (Etherton MR, Lewison and Arnold LJJ) agreed that it is necessarily implicit in a right to install electronic communications equipment that the operator may enter the land to carry out the installation. The need to conduct a survey necessarily required access. They found 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.*"

Compensation and Consideration

In *EE Ltd and another v L.B. Islington [2018] UKUT 361 (LC) ("EE Ltd 1")* the operator also wanted to install and operate electronic communications apparatus on the roof of a residential block of flats owned by the London Borough of Islington (LBI). The operator secured interim access rights to survey the building, after a contested hearing, subject to a condition that no intrusive works be carried out until planning permission was granted. It was acknowledged that the interim order did not pre-empt any entitlement to a permanent agreement, although Islington eventually abandoned any opposition to it, reserving its position with regard to the terms of the agreement. Its opportunity to do the latter was prevented by failing to comply with case management directions that the parties negotiate the agreement in principle; Islington basically did not engage. This meant it could only make submissions on consideration and compensation payable.

There is a detailed analysis in the judgment (Martin Rodger QC, Deputy Chamber President and A J Trott FRICS) of how to value consideration and compensation in Code applications. Consideration was determined on the basis of the value of the rights alone taking into "no network provision", but equally not assuming that the price agreed would be a nominal one, unless that in reality there would be no willing buyer who would pay more than a nominal amount. In the end the UT took the nominal amount as the starting point and then inflated it to what a willing buyer would agree to pay to exercise the rights.

Under the Code, the court shall determine the consideration (paragraphs 23 and 24) and may determine the compensation (paragraph 25) payable by the operator to the occupier. Both are predicated on the power to impose a Code Rights Agreement under paragraph 20. The power to impose an interim agreement (paragraph 26) may also be subject to a terms as to consideration and compensation.

In relation to consideration, per paragraph 24(1) of the Code, the amount payable must represent the market value of the relevant person's agreement to confer or be bound by the code right conferred - by the agreement - which will in the case of interim agreement must necessarily limited to access to survey the site. Although there is power to make it payable in instalments, on the occurrence of an event, or at any time, consideration is a necessary condition of conferring a Code Right and must be quantified at that time. The Code (at paragraph 34(13))

provides for backdating of consideration but only in the case of application to terminate (paragraphs 31 to 32) or amend (paragraph 33).

In *EE Ltd,* the Upper Tribunal directed payment on account, with the appropriate consideration to be determined when deciding the paragraph 20 application for full Code Rights. However that was an application for both full Code Rights and an interim order, and thus might be considered appropriate in such cases, but not appropriate when only considering solely an interim application.

Compensation is discretionary (per paragraph 25 of the Code), and can be made at at time. It appears to be linked to the first condition and prejudice that "can be adequately compensated by money", but this may not be mutually exclusive. All the same if the supervisory fees were deemed to be compensation then the operator has a valid point. However what might be considered to be prejudice that can be compensated by money was treated in *EE Limited* 2 as matters to taken into account as consideration .

In *EE Ltd 2*, the Upper Tribunal determined that the power to award compensation is flexible, but not limitless. The judgment identifies a number of heads of claim (for compensation) that should be reflected in the value for consideration: this includes diminution in value, noise and nuisance, and wear and tear, although where they are excessive (or where they occur later and were unforeseeable) then it may be possible to claim compensation in addition.

Similarly, in the case of "*Costs incurred by the respondent in shadowing the claimants 'compliance with their own obligations*", which as my instructions identify would include costs of access arrangements, supervised attendance on site, safety audits and safety equipment. Likewise these should be taken into account as consideration, but to the extent they exceed the management function then they are not recoverable as compensation.

A help sheet is available on request.

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