"The process of deactivation involves disconnecting the electricity supply and removing the electronic equipment from the cabinets and the antennae from the masts."

Are de-activated telecommunications stations liable for rates?

The London Borough of Enfield has been testing the water

There are **telecommunications base stations** throughout the land. They essentially consist of **electronic receiving and transmitting equipment** contained in one or more cabinets and **masts supporting antennae**. They are erected on private land under private treaty with the site owner or, in the alternative, in the street, by the power to undertake street works, including the power *"to install electronic communications apparatus"*, given by **paragraph 9** of the **Telecommunications Code**.

As a result of the merger of certain telecommunications companies, a number of telecommunications base stations have become surplus to requirements and have been deactivated. The process of deactivation involves disconnecting the electricity supply and removing the electronic equipment from the cabinets and the antennae from the masts. The empty cabinets and the masts are not always removed from the site following the removal of the active equipment. In the case of **private leased sites**, the operator must then surrender the site to the site owner or landlord to prevent further rent accruing. Since the decommissioning process is entirely driven by **financial** considerations, the telecom companies have been assiduous in ensuring that, on private sites, the decommissioning process is completed as expeditiously as possible, so that rent is no longer payable. Where possible, on the payment of a small fee, the operator will agree to sign over the decommissioned mast and compound to the site owner or landlord, rather than completely clear the site. However, on occasion, a private site will be cleared entirely.

The situation on **streetwork sites** is entirely different. There no rent is payable and there is simply **no financial incentive** to remove the plant and equipment from the streetworks sites. As a result, the telecom companies, having disconnected the electricity supply and stripped out the valuable equipment, are content to leave the cabinets and masts in the street. Two issues arise:

1. Is the decommissioned mast site with a mast and empty equipment cabinets remaining in situ still a hereditament subject to an entry in the Rating List?
2. Are non-domestic rates payable in respect of those deactivated streetworks sites?

Question 1: Occupation that created the **hereditament** was the use of the mast to transmit wireless signals. That cannot be in dispute. However, the **non-rateable active equipment**, namely the aerials and the electronic equipment in the cabinets, are **tenant's chattels**, not forming part of the hereditament or the valuation. It is assumed that the tenant, fresh to the scene, brings the non-rateable plant and machinery to the site when the tenancy commences. Removal of the non-rateable plant and machinery does not therefore destroy the landlord's hereditament – it being still capable of occupation, vacant and to let.

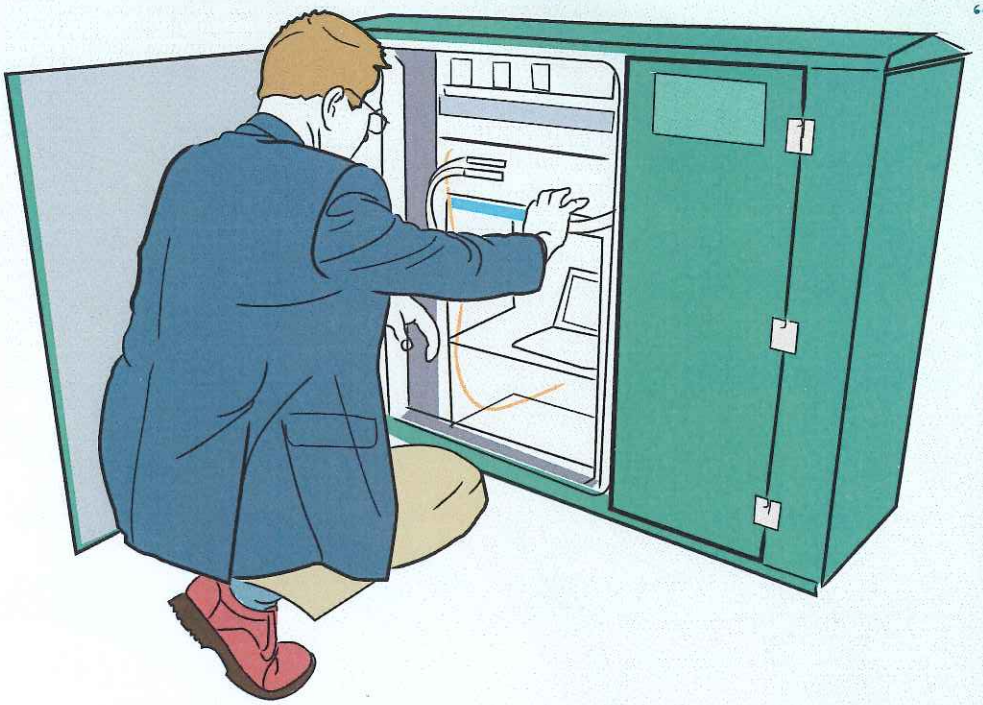
The removal of the rateable electricity supply and the rateable telecommunication cabling will be a **material change in circumstances** that affects the occupation of the site. However, it must be assumed that a landlord could and would put the site into repair by reconnecting the electricity and providing telecommunications cables, providing it is economic to do so. This is an economic test of **reasonableness of repair**. Once a hereditament has been created, it cannot easily be destroyed by removing non-rateable plant and machinery, disconnecting the power supply and removing the telecommunications cabling, if it is economic to put back the rateable items into repair. Of course, the complete clearance of the site by removing the mast and the equipment cabinet would destroy the mast site hereditament, and the **Rating List entry** should then be deleted.

The VO has received proposals to delete decommissioned masts, but has resisted them, unless the site has been totally cleared. It is VO policy not to delete decommissioned masts, if the mast and cabinet are still physically there.

Question 2: The majority of billing authorities have accepted the telecom companies' arguments that rates are not payable on **decommissioned mast sites**. A number, including the **London Borough of Enfield**, have held out and demanded the payment of rates. Matters came to a head earlier this year when Enfield sought liability orders in the local Magistrates Court.

All the sites, the subject of the liability orders, appeared in the local Rating List. It is understood that is the position in most billing authorities. It was Enfield's case that, in respect of the sites, the telecom operator (**Hutchison3g**) was liable, as occupier, to pay non-domestic rates under the provisions of **section 43** of the **Local Government Finance Act 1988**, or alternatively under the provisions of **section 45** of the LGFA for unoccupied hereditaments. In those circumstances, liability orders should be made.

As far as occupation is concerned, Enfield argued that there was **actual**, **exclusive** and **permanent occupation** of the sites. Was there also **beneficial occupation**? Enfield argued that there was. It was Enfield's case that the occupation of the streetworks sites was of **value** and **benefit** to Hutchison as occupier, regardless of the fact that the sites in question could no longer be used for transmitting or receiving telecommunications signals. It was clear from Hutchinson's own evidence that the telecommunications paraphernalia remaining on the land had been intentionally left there for periods of up to three years following decommissioning, as part of a cost-cutting exercise. Moreover, no evidence was presented to the court to suggest that there was any current programme



"Enfield argued that, as a matter of fact, the cabinets on site could properly be described as buildings, as that word was ordinarily understood in the English language."

for the removal of the cabins, cabinets and antenna supports from the sites. Because no rent was payable, Hutchison was content for those items to remain on the street. Thus, the value to Hutchison of occupying the hereditaments was that it saved them the cost of dismantling the sites, given as approximately £6,000 per site. Enfield argued that they were equivalent to sites used for **storage purposes**.

Hutchison disagreed. They said that the sites were no longer beneficially occupied. Additionally, they relied upon **section 65 (5)** of the LGFA:

"A hereditament which is not in use shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of there being kept in or on the hereditament plant, machinery or equipment:

(a) which was used in or on the hereditament when it was last in use, or

(b) which is intended for use in or on the hereditament."

We note in passing that the word '**use**' appearing in section 65 (5) should be given its normal everyday meaning. It is not the same as the word '**occupation**' appearing in **section 43 (1)**: see **Public Safety Charitable Trust v Milton Keynes Council and others [2013] EWWHC 1237 (Admin)**.

There was an issue between Enfield and Hutchison as to whether section 65 (5) was applicable. Hutchison argued that it fitted **precisely** the facts of the case, and that, as a result, the presence on the site of the cabinets and masts, which were indisputably plant, machinery or equipment which were used on the hereditaments when they were last in use, could not amount to rateable occupation.

Enfield disagreed. It argued that the purpose of section 65 (5) was to address cases such as **British Telecommunications plc v Kennet DC4**, where the House of Lords had held that a telephone exchange in the process of being fitted with telephone equipment was then in rateable occupation.

Enfield submitted that the provision was intended to cover, and should be construed as covering, a fairly short period during which plant, machinery or equipment was being installed, for example in a factory prior to its becoming operational or was being removed from the factory during a decommissioning process. As a matter of fact and degree, section 65 (5) should not be construed so as to apply to cases such as those before the court, where the equipment had simply been left in situ for periods of up to three years following decommissioning.

District Judge McPhee found for Hutchison both on the issue of **beneficial occupation** and on the issue of the **applicability of section 65 (5)**. He held that, at the time of deactivation, Hutchison was no longer in beneficial occupation of any site, since, by the removal of the power source and the telecommunications equipment, the remaining cabinets and masts were incapable of functioning to Hutchison's benefit without reactivation and reinstallation. Hutchison had simply left behind *"their worthless clutter"*, which the District Judge described as, *"not on the face of it the most attractive position for a responsible company to take"*.

Alternatively, he found that, if he was wrong on the issue of beneficial occupation, then Hutchison were not in law in rateable occupation of any site because of section 65 (5), the cabinets and masts being within the meaning of '**plant, machinery and equipment**'. The words of the statute were plain, and there was no need for a purposive construction. The District Judge's task was clear – *"It is to apply the clear and unambiguous letter of the law to my decision"*. So applied, the statute covered the facts of the cases before him.

The question of whether rates were payable on the unoccupied non-domestic hereditaments turned on whether any of them consisted, *"of, or of part of, any building, together with any land ordinarily used or intended for use for the purposes of the building or part."* Enfield argued that, as a matter of fact, the cabinets on site could properly be described as **buildings**, as that word was ordinarily understood in the English language. District Judge McPhee disagreed and, in this respect, we have to accept that Enfield's argument was weak. He found that the largest cabinet had a volume of less than one cubic metre, and the others were smaller. In ordinary usage they would be known as **boxes**, **cabinets** or **street furniture**. But they would not be referred to as buildings (see **Regulations 2 & 3 of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008**).

The VO considers the cabinets to be rateable as **chattels** and not as plant and machinery, as cabinets are not listed in the plant and machinery regulations. As a result, each of the applications for liability orders was dismissed.

By way of a footnote, local authorities concerned about disused telecom equipment abandoned on their streets might like to make use of **paragraph 22** of the Telecommunications Code – *"...where the operator has a right conferred by or in accordance with this code for the statutory purposes to keep electronic communications apparatus installed on, under or over any land, he is not entitled to keep that apparatus so installed if, at a time when the apparatus is not, or is no longer, used for the purposes of the operator's network, there is no reasonable likelihood that it will be so used."*

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