

EE Ltd and Hutchinson 3G UK Ltd v the Trustees of Meyrick 1968 Combined Trust of Meyrick Estate Management [2019] UKUT 164 (LC)

Landowners were unable to show that they had a genuine intention to redevelop land to enable them to oppose the imposition of code rights under the Electronic Communications Code 2017.

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Facts

The contractual terms of existing mast leases on a site owned by the respondents (the Trustees) had expired and negotiations for new leases had proved inconclusive.

The claimants (EE) served notice on the Trustees under paragraph 20 of the Electronic Communications Code 2017 (the Code) requiring the Trustees to confer new code rights on EE. The Trustees resisted on the basis of paragraph 21(5) of the Code. This provides that a court may not order the imposition of code rights:

“if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate.....and could not reasonably do so if the order were made.”

The Trustees wanted to replace EE's existing masts with their own masts. The reason for this was because, under the Code, rights can only be acquired over land and the definition of “land” in the Code specifically excludes electronic communication apparatus. This meant that if the Trustees erected their own masts, those masts would not be subject to code rights and so the Trustees could negotiate rent and terms outside of the Code (which, because of the way code rights are valued under the Code, would inevitably lead to higher rents).

Issue

Did the Trustees have a genuine intention to carry out their works?

Decision

Although the Trustees had planning permission for their new masts and resources to pay for those masts, the Upper Tribunal (Lands Chamber) decided that they did not have a firm, settled and unconditional intention to do the works.

The Trustees claimed that they wanted better broadband on their estate, but they had not approached their providers to discuss improvements to the service and the new masts were not the only (or even the best) way of improving their broadband. Also, because EE were not prepared to use the Trustees' masts for operational and commercial reasons, it appeared likely that the scheme would prejudice access to mobile coverage as well. So it was wholly implausible that the Trustees, who owed fiduciary duties to their beneficiaries, would waste their resources on such a scheme. It was clear that the Trustees' redevelopment plans were purely an attempt to frustrate EE's application for the imposition of code rights.

Points to note/consider

1. This is the first reported case on the use of the redevelopment ground to oppose the imposition of code rights under the Code. The judge rejected the argument that the Upper Tribunal was bound by the case-law that applies where a landlord opposes the grant of a new lease on the basis of the ground contained in section 30(1)(f) of the Landlord and Tenant Act 1954. However, she did accept that ground (f) principles should apply where relevant.
2. Applying ground (f) principles here meant that the Trustees had to satisfy a two-stage test. They had to show both a reasonable prospect of being able to carry out the works (an objective test) and a firm, settled and unconditional intention to carry out the works at the date of the hearing (a subjective test). In this case, the Trustees were able to satisfy the objective test, but not the subjective one.

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