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The Electronic Communications Code – Is the tide turning in favour of landowners?

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While that code was initially seen to have favoured the telecoms operators some new cases are starting to change that balance and Chris Deveraux, telecoms expert, at Browne Jacobson explains how these new cases can help you in dealing with the telecoms providers operating from your site.

The Electronic Communications Code contained within the Digital Economy Act 2017 ("New Code") came into force on 28 December 2017 and replaced the previous code within the Telecommunications Act 1984. Here, we review some of the recent caselaw from which points have emerged in favour of landowners, following a period of momentum in favour of telecoms operators.

Cornerstone Telecommunications Infrastructure Limited ("CTIL") -v- Ashlock & AP Wireless

Failure to use the Correct Procedure for

Renewal

A key change brought about by the New Code is to remove telecoms leases entered into after 28 December 2017 from the ambit of the Landlord and Tenant Act 1954 ("**1954 Act**"). It was possible to exclude agreements under the old code from having security of tenure under the 1954 Act; however, parties often did not agree to this. The application of the 1954 Act together with the previous Telecoms Code served to add confusion as to which rules prevailed in particular circumstances. The New Code includes 'transitional provisions' which provide that a more limited range of code rights apply to subsisting arrangements rather than the wider range of rights under the New Code. In this case, an agreement dating back to 2002 had been transferred from Vodafone to CTIL (a joint venture between Vodafone and Telefonica/O2).

In November 2019, the Upper Tribunal (Lands Chamber) confirmed that it did not have jurisdiction to renew code rights where the original agreement pre-dated the New Code. As a result, CTIL would have to direct its claim to the County Court for a renewal under the 1954 Act and, at the appropriate time, serve notice pursuant to Part 5 of the New Code. The key significance of this for landowners is in relation to valuation of 'rent' to be paid under the renewal agreement. Assessment of rent under the 1954 Act is, in broad terms, an assessment of 'open market rent', whereas assessment under the New Code specifically excludes any special value the site may have to a telecoms operator and will often produce a significantly lower figure. This case served to indicate that a court may take into account factors from both the old and new basis of valuation and renewal when determining the rent and terms for tenancies renewed under the 1954 Act, which could lead to a better rental income and potentially less onerous terms than those prescribed in the New Code.

Vodafone -v- Hanover Capital

Better results for landowner in Renewal under the Landlord and Tenant Act 1954

In August 2020, the County Court made the first determination of terms for renewal agreement under the 1954 Act since the introduction of the New Code and in particular it considered valuation of rent and the contractual term. The outcome was largely successful for the landowner given that the Court accepted that the operator's rights under the code should be taken into account when considering valuation. However, the Court also held that on the facts of this case, there should be an assumption that a competitive bidding process would take place and that the site would be of potential interest to other telecoms operators. The result of this was that instead of rigidly applying the basis of valuation under the New Code and a rent of £2,250 per annum, the landowner

achieved £5,750 per annum. Further, whereas Vodafone sought a three-year term with a rolling break, the landlord achieved a ten-year term subject to a rolling break exercisable after five years.

CTIL -v- University of Arts London

Successful Opposition to the Grant of New Code Rights

In the 1 September 2020 judgment in this case, the landowner successfully defeated the telecoms operator's attempt to obtain code rights for a new agreement.

In terms of requests for new arrangements (as opposed to renewals), where parties have not been able to agree terms then a court may impose the New Code on a landowner where:

> i) financial compensation is adequate to overcome any prejudice caused to the landowner (the New Code prevents the site owner from making a profit out of the deal); and
> ii) the public benefit to the New Code rights being granted outweighs prejudice to the landowner.

Generally, however, a Tribunal will not impose New Code rights where the site owner intends to redevelop the site or neighbouring land, and could not do so if New Code rights were imposed.

In this case, the university had entered into a sale and lease-back arrangement with a developer, pursuant to which it had a rolling break option. For 18 months, the university would pay nil rent; however, after that period rent would increase to £3 million per annum. Crucially, the university's break option was conditional upon handing back vacant possession of the site, unencumbered by telecoms apparatus. Therefore, if CTIL were to be granted code rights in the particular circumstances, the university would not have sufficient control in order to exercise its break option and may need to resort to litigation to remove CTIL. Further, the university would likely suffer damage to its relationship with the developer and reputational damage, not least with their 5,000 students using the site. These aspects, combined with the £3 million per annum rent liability, were considered by the Tribunal as "too much to ask" of the university if New Code rights were to be granted. It is important to note, however, that the Tribunal did acknowledge the level of prejudice to a landowner needs to be "very high indeed" to outweigh the public benefit and the determination was made on the specific facts of the case.

In conclusion, while the New Code remains very much in favour of operators, the above cases indicate the potential benefit of bespoke legal advice and that, in particular circumstances, points arise in favour of landowners from which it can be possible to protect future site redevelopment prospects and achieve better terms on renewals.

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