SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 24
XA49/22

Lord Justice Clerk
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

MARKS AND SPENCER PLC

Appellant

against

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Respondent

Appellants: Upton; DWF Solicitors
Respondent: Thomson KC, Massaro; Burness Paul LLP

13 June 2023

Introduction

[1] This is an appeal against a decision of the Lands Tribunal for Scotland dated 27 July 2022, imposing on the appellant an agreement granting the respondent's application for Code rights under para 20 of the Electronic Communications Code contained in Schedule 3A to the Communications Act 2003.

Background

[2] The respondent is an "operator" for the purposes of the Electronic Communications Code. It identified property owned and occupied (59 Princes Street, Edinburgh), and property tenanted (60 Princes Street, Edinburgh), by the appellant as a suitable place to install communications apparatus. Where no agreement about such installation is reached, the Code provides that the court may impose an Agreement where certain conditions relating to compensation and public benefit are met. The terms of any Agreement should be those appropriate for ensuring that the least possible loss and damage is caused to certain persons or interests. The appellant declined to agree terms, and in April 2021 the respondent applied to the Lands Tribunal for Scotland for an order under the Code.

[3] In resisting the application, the appellant maintained that the prejudice which it would suffer was open-ended, unknown and unquantifiable and thus could not be adequately compensated by money. This was for a number of reasons concerning (i) structural considerations and the goods lifts, (ii) the electrical supply, (iii) electro-magnetic field exclusion zones, (iv) loadings on Rose Street Lane South, and (v) access and security. The focus of this appeal is on item (iii).

[4] The Tribunal concluded that there would be significant public benefit in the making of an order, that compensation could be assessed on an adequate basis and that there was no prejudice which outweighed the public benefit. On 6 July 2021 the Tribunal issued a determination in these terms along with a draft agreement reflecting adjusted wording which it deemed necessary in light of submissions made to it. Before the Tribunal could make the agreement subject to a formal order there were two matters which required to be resolved, one in respect of certain issues regarding item (v), access and security, and the other concerning the landlords of the tenanted premises.

[5] In early 2022 the respondent applied for a final order. The Tribunal received written submissions in respect of the motion in advance of a hearing on 13 July 2022. Oral submissions were made at the hearing. The Tribunal retired to consider its decision on the two outstanding issues. It returned to give its decision. At that point counsel for the appellant interjected to submit that it wished the Tribunal to consider a further matter. He submitted that the appellant's staff and contractors were members of the public rather than occupationally exposed workers, and that they would be prohibited from accessing certain rooftop equipment within the Public Exclusion Zone. The Tribunal declined to consider that submission, indicating that it had already dealt in its opinion of 6 July 2021 with all of the ICNIRP issues which had been put in issue. The two outstanding matters which remained to be addressed at the hearing in July 2022 did not include any ICNIRP issue.

[6] Exposure to electro-magnetic fields is regulated and subject to limits. The exposure guidelines adopted by the United Kingdom have been developed by the International Commission on Non-Ionizing Radiation Protection. The ICNIRP defines two exposure limits: "occupational" which applies to individuals who are exposed in the course of their work and "public" for all non-work related exposure. There are thus two exclusion zones subject to differing regulation: occupational exclusion zones and public exclusion zones. Only certain employees, Occupationally Exposed Workers, are permitted to enter the PEZ. OEWs are not deemed to be at greater risk than members of the public, provided that appropriate screening and training is provided.

[7] The appellant challenges the Tribunal's decision on the basis that it erred in stating that it had addressed all ICNIRP issues in its decision of 6 July 2021. It had not done so. Alternatively, insofar as it had purported to do so, its decision was vitiated having been reached without crucial evidence, namely plans showing the location of the PEZ.

Submissions for the appellant

[8] The Tribunal erred in refusing the appellant's objection to the Agreement on the basis that all ICNIRP issues had been determined by its opinion dated 6 July 2021. It was only when the PEZ had been disclosed that the appellant became aware that it extended to areas in which the appellant's personnel would need to be present to maintain refrigeration and other plant. The submission which the appellant made on 13 July 2022 that its staff and contractors were not OEWs and would be unable to enter the PEZ could not have been raised or determined on 6 July 2021 because at that time the appellant had not been informed of the extent of the PEZ. If the Tribunal had proceeded on the basis that the appellant's staff and contractors were OEWs, it had been ill-founded. In deciding that it had addressed all ICNIRP issues without giving the appellant a further opportunity to address the implications of the drawings, the Tribunal erred in law.

[9] Alternatively, *esto* the Tribunal had addressed all ICNIRP issues in its opinion of 6 July 2021 (which was denied), it had erred by doing so in the absence of crucial evidence, namely the extent of the PEZ, to which absence the appellant had repeatedly objected.

Submissions for the respondent

[10] The Tribunal considered that the terms of the Agreement, taken together with an obligation on the respondent to produce PEZ plans, was sufficient to comply with the ICNIRP Guidelines. At no time prior to the Tribunal's decision dated 6 July 2021 did the appellant raise in correspondence that it considered that its staff and contractors were not OEWs and that the PEZ might hinder its own operations. Its stated concern about the PEZ was to ensure the safety of persons in surrounding premises. The Tribunal's decision on 6

July 2021 determined all issues in dispute between the parties subject only to the two "mechanical" issues.

[11] At the hearing in July 2022 the appellants sought to introduce a new issue. The Tribunal was entitled to refuse the appellant's submissions where it had already dealt in its decision of 6 July 2021 with all of the ICNIRP issues which had been raised by the appellant. Prior to the interjection on 13 July 2022 it had not been suggested that the appellant's staff and contractors were not OEWs but members of the public. It was incorrect to argue that the objection made by the appellants could not have been made earlier. The appellant always knew that the PEZ would be wider than the OEZ. It did not argue that the extent of the PEZ could interfere with its activities. The new submission had come far too late in the day - after evidence had been led, submissions heard, and the Tribunal's ruling on the ICNIRP issues had been made. As a matter of elementary procedural fairness the Tribunal had been right to decline to re-open those issues.

Analysis and decision

[12] The issue with which this appeal is concerned relates to the exclusion zones, and in specifically, the PEZ. In a Note dated 5 September 2022 explaining the events of, and leading to, the hearing of 13 July, the Tribunal records the additional oral submission made to it on behalf of the appellants:

> "[8] At the 13 July hearing, the respondent added to their written submissions about ICNIRP exclusion zones. Amongst other things the respondent argued that their contractors could be caught, not only by the occupational exposure limits but also by the more stringent public exposure distances from the equipment, and would thus be prevented from attending the respondent's equipment on the roof".

On that basis the appellants further sought to resist the making of the order, or at least sought to obtain an adjustment to its terms. The Tribunal refused to address this issue,

noting that it had already dealt with the ICNIRP issues in its opinion of 6 July 2021. It clearly had done so, but the appellant maintains that it had not done so comprehensively, claiming that there was an outstanding issue regarding the PEZ, and the alleged inability of the appellant's staff to access that zone for maintenance purposes, on the assertion by the appellant that staff accessing the zone for that purpose would be members of the public not OEWs. It is not necessary for this court to determine the issue whether the relevant staff and contractors are OEWs or members of the public; the key question is whether that had been a live issue before the Tribunal in respect of the ICNIRP issues raised at the time.

[13] We are satisfied that this issue was not raised by the appellant at the time of the original hearing. In submissions to the Tribunal the appellant indicated that access to certain equipment located on the roof would be required at all times, but there was at no stage a clear submission that the staff who would be engaged in doing so would not be OEWs and had to be viewed as members of the public. Parties both produced written submissions dated 31 May 2021, and revised 5 June 2021. In the written submissions on the substantive matter the appellant asserted, under the heading of general prejudice, that unless the PEZ was identified and compatible with adjacent public uses, including any associated with the immediately adjacent hotel, there was no guarantee that the proposal was compatible with the health and safety of the public. It was not acceptable to require the respondent to provide a site which could constitute a hazard to the health and safety of nearby of members of the public, such as hotel staff and guests. The submissions stated that it could not be known that there was no hazard to persons present in the surrounding premises and public spaces. Under the heading "RF Operational Exclusions Zones" it was contended that this zone required to be such that the appellant's staff could obtain access to all necessary equipment at all time. It was not submitted that there was any such difficulty

regarding the PEZ. Under the heading "RF PEZ" the submission again focussed on adjacent property: the concern was with potential hazard to "persons present in the surrounding premises and public places".

[14] It is quite clear that the focus of the appellant's argument was on the adjacent hotel, and members of the public likely to be present there. The implicit basis of the submissions, taken together, was that the appellant's staff would be OEWs - in other words, they would be able to enter the PEZ but not the OEZ. This is entirely consistent with what was recorded by the Tribunal at paras 45 and 47 of its determination.

[15] The Tribunal noted that the respondent had produced plans of the OEZ and noted that these did not appear to show any potential for hindrance of the appellant's operations. So far as the PEZ is concerned, the Tribunal at para 47 stated "We were not clear why employees of the respondent would need to use the drawings." The submission made for the appellant is recorded:

> "[I]t was drawn to their attention that the antennae are in direct line and height with a hotel at a fairly short distance – perhaps 20 to 30 metres away. So it is likely members of the public will be in the vicinity of the operator's equipment. ...we think that an organisation such as the [appellant] could not risk reputational damage by 'accepting' a consideration, no matter how small, for the use of their premises which does not demonstrably comply with the exclusion zones."

[16] The Tribunal required the respondent to furnish both OEZ and PEZ plans in Part 7 of the Agreement. The reason for doing so was plainly associated with the alleged risk to ordinary members of the public located in the adjacent hotel, and the associated reputational risk which might be posed for the appellant. It was not based on any assertion that members of the appellant's staff were not, or would not be, OEWs and thus not allowed to enter the PEZ.

[17] In its supplementary written submissions the respondent clearly asserted that:

> "workers (including non-telecoms workers) accessing a rooftop where electronic communications equipment is located, where access is restricted, signage is in place and hazard information has been provided are not members of the general public. Accordingly the workers and contractors of the [appellant] are classed as workers".

It continued:

> "[The appellant's] staff and contractors, can undertake work tasks at normal roof standing level without entering into the occupational exclusion zone. Hence the occupational zone does not inhibit the ability to maintain plant or equipment on the roof."

[18] This submission was not contradicted anywhere by the appellant. It was pointed out that this supplementary submission had been received on the last day for lodging submissions, but it is inconceivable to us that had this truly been a matter at issue the appellant would not have sought to make it clear that this issue was not a matter of agreement. As it was the Tribunal proceeded, and was entitled to proceed, on the basis that the employees in question would be OEWs and that no issue arose regarding their access to the PEZ.

[19] On 13 December 2021 the respondent produced drawings showing the extent of the PEZ. The written submissions for the appellant for the hearing on 13 July 2022 raised certain issues regarding the drawings, including a submission that the need to observe the exclusion zones would cause significant practical difficulties and inconvenience for access to roof-top plant. They did not assert that there was any occupational reason why their staff and contractors could not enter the PEZ. Moreover, this issue was not originally raised in oral submissions on 13 July 2022. After hearing oral submissions, the Tribunal retired to consider its decision on the two outstanding matters. It was only when it reconvened to issue that decision that counsel for the appellant belatedly raised the issue which is at the heart of this appeal.

[20] The appellant sought to persuade us that this issue could not properly have been raised prior to it having sight of the PEZ. That is patently incorrect. The issue of concern for members of the public on an adjacent building was raised on a hypothetical basis. It would have been perfectly straightforward for the appellant to raise an issue regarding its staff in a similar way. Indeed, if its position truly was that its staff would not be OEWs, it is extremely difficult to understand why the approach taken was confined to the hotel. The obvious answer is that both parties proceeded on the basis that the appellant's staff and contractors were OEWs and that there was no live issue regarding their access to the PEZ.

[21] In the whole circumstances we are satisfied that the Tribunal did not err in law and that the appeal must be refused. In its opinion of 6 July 2021 the Tribunal duly decided all of the ICNIRP matters which had been put in issue. It was fully entitled to decline to entertain the new issue which the appellant sought to introduce belatedly. If it had agreed to permit the late raising of the new issue it is likely that the Tribunal would have had to hear further evidence and submissions, which would have delayed the making of an order. That would have been undesirable, firstly because of the Tribunal's obligation to determine applications within 6 months of receipt (Electronic Communications and Wireless Telegraph Regulations 2011, reg 3(2)), and secondly, because it would have penalised the respondent for the appellant's failure.