UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 183 (LC)
Case Number: TCR/266/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – COSTS – access for inspection of potential site - operator claiming full Code rights on interim basis for MSV – building owner and head lessee refusing access – agreement reached at door of tribunal – respondents adjudged successful parties - costs of reference disproportionate – limited to £5,000 per respondent

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

(1) CENTRAL SAINT GILES GENERAL PARTNER LIMITED
(2) CLARION HOUSING ASSOCIATION LIMITED

Respondents

Re: Matilda Apartments,
4 Earnshaw Street,
London WC2

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice
on
24 May 2019

Oliver Radley-Gardner, instructed by TLT LLP, for the claimant
Julian Greenhill, instructed by CMS Cameron McKenna Nabarro Olswang LLP, for the first respondent
Stephanie Lovegrove, instructed by Weightmans LLP, for the second respondent

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The following cases are referred to in this decision:

Cornerstone Telecommunications Infrastructure v The University of London [2018] UKUT 356

Cornerstone Telecommunications Infrastructure v Keast [2019] UKUT 116 (LC)

1. In *Cornerstone Telecommunications Infrastructure v The University of London* [2018] UKUT 356, decided on 30 October 2018, the Tribunal concluded that the right to enter a building to undertake a non-intrusive survey to determine whether the roof of the building might provide a suitable site for electronic communications apparatus was capable of being a Code right within the scope of paragraph 3 of the Electronic Communications Code. On the evidence in that case the Tribunal was satisfied that it was appropriate to impose an agreement on the parties providing for access to be allowed for such a survey. It is disappointing to find that, six month later, an almost identical dispute between well-resourced and expertly advised parties has come before the Tribunal for determination this afternoon.

2. In the event, the parties have reached an agreement which will enable the claimant to obtain the access it has requested, on terms acceptable to the respondent owners and occupiers of the relevant building. I am nevertheless giving this short judgment to deal with unresolved issues of costs. I also wish to emphasise the importance the Tribunal places on discouraging senseless disputes of this sort, and to put down a marker that the conduct which this case illustrates, over-reaching on one side and obstruction on the other, is disproportionate, inappropriate, and unacceptable. The Tribunal will do what it can to ensure such conduct is not allowed to become a recurring feature of Code disputes concerning new sites. There are legitimate matters to argue about in such cases, and nothing in this decision is intended to discourage those from being raised, but whether a small number of surveyors is permitted to go on a rooftop for a few hours on two or three occasions to establish whether it is even suitable for the installation of apparatus ought not to be one of them.

3. Although they have reached agreement on access, the parties have not agreed who should pay the costs of this reference, and that remains the only matter requiring the decision of the Tribunal. Considering the subject of the dispute, those costs are staggering. In aggregate they exceed £100,000 and include the costs of three highly reputable firms of solicitors and three counsel, one in silk. Lengthy witness statements have been filed, that of the first respondent's witness (according to its statement of costs) having cost £13,000 to prepare; skeleton arguments have been drafted, and a weighty hearing bundle and files of authorities have been lodged.

4. The new Code regime is intended to facilitate the provision of telecommunications services without delay and at limited cost. The preparatory stages of the installation of new equipment (at least if the site itself is a new one) will almost always require a survey, conducted over a period of a few weeks and involving a small number of visits by a limited group of individuals, before a decision can be taken about the suitability of the site. If those preparatory stages are allowed to become the occasion for preliminary trials of strength involving legal firepower on the scale deployed in this reference there is a serious risk of the objectives of the Code being frustrated.

5. In order to deal with the question of costs it is necessary to explain the circumstances in which the dispute came to be referred to the Tribunal.

6. The reference concerns a building known as Matilda Apartments at Earnshaw Street, WC2. It is part of the Central Saint Giles complex which comprises striking modern buildings designed by the renowned Italian architect, Renzo Piano, most of which are used for offices and restaurants. In contrast, Matilda Apartments is a residential block providing low cost housing in 53 flats let to assured tenants.

7. The freehold of the building, together with the rest of the Central Saint Giles complex, belongs to the first respondent, Central Saint Giles General Partner Limited. The flats and common parts of the building, but not the roof, are leased to the second respondent, Clarion Housing Association Limited.

8. The claimant, Cornerstone Telecommunications Infrastructure Limited, is, as its name implies, a provider of infrastructure for electronic communications networks. It is an "operator" for the purpose of the Code. That status gives it an entitlement to acquire Code rights over land belonging to other people, provided certain conditions are met. One such right is the right to install electronic communications apparatus and, as the Tribunal held in the *University of London* case, a component of that right is the right to enter land to determine whether it is suitable for such installations.

9. The claimant first sought access to the roof of Matilda Apartments in February 2018 when it became clear that it would lose an important site nearby where a building which hosts its apparatus is due to be demolished and redeveloped. Initial contact between the claimant and the first respondent's agents seems to have been ineffective and was not pursued.

10. Contact was later resumed in a productive exchange of correspondence between the agents for the claimant and the first respondent. These exchanges were initiated by a letter of 13 November 2018 in which the claimant's agent requested access for a survey and explained that it would be required on approximately three occasions within a four-week period. A detailed site survey and access request form explained who it was intended should undertake the survey and what access and facilities were required. Details were provided of the apparatus that would be used during the survey, which comprises panoramic photographic equipment and measuring tools. The site survey form also included a space for the agent to describe the apparatus potentially intended to be located on the site, but the agent provided no relevant information other than to state that this was "subject to survey". The claimant's inability to provide information about the apparatus it might ultimately wish to install did not prevent the first respondent's agents from agreeing that access would be provided.

11. Matters became rather more difficult when the parties' solicitors became involved. The issue over which they appear to have fallen out was the extent of an indemnity to be offered by the claimant to the first respondent. The claimant wished to cap the indemnity against any claims which might arise out of its exercise of rights in the Building at a figure of £1 million but the first respondent insisted on an indemnity of £10 million. Those positions are apparent from the subsequent open correspondence although they were initially set out in without prejudice exchanges which I have declined to look at it. In any event it is apparent that that was the real disagreement between the parties. Although the respondents have sought to justify their concern to obtain an indemnity of that magnitude by describing all sorts of risks which might eventuate, their fears are difficult to reconcile with the very limited duration and purpose of the access which was proposed.

12. When stalemate had been reached over the detailed terms on which access would be allowed, on 26 February 2019 the claimant gave notices to the first respondent and (apparently involving it for the first time) the second respondent under paragraph 26(3) of the Code seeking interim rights. The Tribunal has previously explained the basic structure of the Code, including the nature of interim rights, at some length, including in the *University of London* case, and it is not necessary to do so again for the purpose of this decision.

13. The notice served on the first respondent sought different rights from those which had been discussed and agreed in principle at the end of November 2018. The draft agreement which the claimant now asked the respondents to enter into provided not simply for a right of access to carry out an "MSV" (a "multi-skilled visit", the industry jargon for a site inspection to ascertain the suitability of a new site) but conferred in addition what Mr Greenhill QC, who appears for the first respondent, has referred to as "the full panoply of Code rights" for a period of 28 days. In other words, the interim rights sought by the claimant's notices referred to each and every one of the Code rights described in paragraph 3 of the Code, including the right to install apparatus (which remained undefined in the notice itself, but which may include masts, dishes, antennae and supporting structures of all descriptions) and to keep it installed on the building.

14. The covering letter from the claimant's solicitors acknowledged the breadth of the request, and explained that the claimant's intention in seeking the full range of Code rights was not meant to be oppressive. The request was said to have been framed in wide terms because it was impossible at that stage for the claimants to predict with certainty exactly what works would need to be carried out by them or their agents and which of the Code rights those works might be found to be related. In other words, the breadth of the claimant's drafting was inspired by an abundance of caution, and by a concern to protect itself from objections to its MSV based on a legalistic interpretation of any less comprehensive agreement. Nevertheless, its attempts to reassure the recipients of the notices that its request was not intended to be oppressive suggest that the claimant appreciated that, on paper at least, the much more extensive rights it now sought were potentially alarming to the respondents.

15. The Central Saint Martin's complex as a whole is, as the first respondent has emphasised in its evidence, a group of iconic buildings of high quality (although it is not clear whether the Matilda Apartment building justifies that description). In any event, the first respondent is understandably keen to preserve its buildings and to prevent anyone from doing work on them without proper notice and an opportunity for it to consider the consequences.

16. Communication between the claimant and the second respondent appears to have been very limited and to have commenced with the service of the notice asking for full Code rights. The particular Code right which appears most to have alarmed the second respondent was the right "to interfere with or obstruct a means of access to or from the land" in paragraph 3(h) of the Code which it was concerned might cause difficulty for its tenants if a lift or staircase was obstructed by the claimant's presence.

17. Fortunately, the parties have reached agreement this afternoon. The agreement will allow access for the claimant's multi-skilled visit while making it clear that no permanent installation of equipment of any sort is permitted and emphasising, although this was clear from the draft agreement itself, that access is only required for the purposes of the MSV to assess the suitability of the site. In return, the claimant has conceded the £10million indemnity sought by the first respondent.

18. The position the parties take on costs is as follows.

19. For the claimants, Mr Radley-Gardner submits that they have succeeded in the reference. They have obtained a Code agreement allowing them to have access for the MSV which they say they have always made clear is all that they require at this stage. It was necessary for

them to come to the Tribunal to achieve that and they therefore seek their costs against the first respondent. They do not ask for an order against the second respondent, but resist any suggestion that they should be responsible for its cost.

20. Mr Greenhill QC for the first respondent asks for an order that the claimant pays his client's costs. They had agreed in November 2018 to allow access for a multi-skilled visit and had been prepared to agree the original terms for that visit which were put forward. Nothing had been said then about the claimant requiring rights to install apparatus. The only issue at that stage was the level of the indemnity which has been agreed today at the level which the first respondent had always sought. When the first respondent received the claimant's notice it replied in a letter from its solicitors dated 28 March 2018, reiterating that it did not object to the claimant accessing the land for an MSV but could not understand why a request was now being made for the right to install apparatus. I agree with Mr Greenhill's submission that that reaction was a perfectly reasonable one in the circumstances, but rather than waiting for an explanation the letter proceeded to adopt a confrontational tone and to make a number of unnecessary demands for technical information. The first respondent demanded to know in detail how the claimant intended to demonstrate satisfaction of the qualifying conditions for imposition of a Code agreement and about the specification of the apparatus which the claimant wished to install, which the claimant clearly could not provide until it had carried out the proposed survey. Those were details which the parties' agents had not felt it necessary to consider when agreement had earlier been reached in principle. The first respondent's solicitors' insistence on them and the claimant's equally obdurate refusal to retreat from its unnecessarily comprehensive claims resulted in a stand-off which was only resolved at the door of the Tribunal.

21. For the second respondent Ms Lovegrove also sought her costs against the claimant. She points out that her client did not receive the initial letter of 13 November 2018 explaining what the MSV was and detailing the limited equipment which would be required. Mr Fountains (its head of asset management) made a number of attempts to contact the claimant by telephone and left messages which were not responded to. They were left on the sidelines until they received the notice at the end of February which appeared to demand the right to obstruct access through the building with potentially adverse consequences for the housing association's tenants. Very soon after the notice the proceedings themselves commenced.

22. The position taken by the housing association in correspondence and in its evidence has been that it could not grant access for so long as the first respondent was refusing it; that suggestion does not seem to me to be a correct reading of the second respondent's covenants, but if it was believed to be correct it is difficult to see why it was necessary for the second respondent to incur the costs of separate representation. Its position in the proceedings has been to piggy-back on the arguments of the first respondent, and it has been prepared to agree the same terms, having obtained an assurance from the claimant that the inspection will not interfere with any of the occupational tenants or require entry to their flats.

23. In light of the agreement which has been reached I have come to the conclusion that the successful parties in the reference are the first and second respondents.

24. The fact that agreement has been reached means that I have not had to determine the arguments on which the respondents relied to resist the imposition of a Code agreement in principle. They included arguments concerning the sufficiency of the claimant's evidence and

points about the validity of its initial notice similar to those about which the Tribunal has already expressed scepticism in *Cornerstone Telecommunications Infrastructure v Keast* [2019] UKUT 116 (LC). The Tribunal is not attracted to excessively technical arguments about the form of Code notices where no question of jurisdiction is engaged. A substantial part of the first respondent's evidence is directed to those sorts of arguments, while other parts provide information about the building which is very interesting but not terribly relevant to the dispute. The respondents having conceded the imposition of an agreement the claimant must be taken to have had the better of those arguments.

25. The arguments about whether an agreement should be imposed or not have really been window dressing, and there have been two real issues dividing the parties. The first was the level of the indemnity. The second was the manner in which the rights of access which everyone was ultimately content for the claimant to have should be expressed, and in particular whether they should include additional rights which it demanded as a matter of policy rather than because they were required in this case.

26. The claimant has conceded on the issue of the indemnity.

27. The dispute over the manner in which the rights should be expressed was provoked by the claimant but, in my judgment, has been taken to a wholly unnecessary level by the first respondent. The claimant refused steadfastly to place any limit on the rights which it required over the roof of the building other than to say that those rights were only required for the purpose of the multi-skilled visit for a period of 28 days. That left the respondents in a position of some uncertainty. I accept that there was room for some legitimate doubt, but had the first respondent thought about it, it cannot have had any genuine fear that the claimant would install telecommunications apparatus on the roof of the building for a period of only 28 days. The technical arguments advanced in the witness statement of Mr Fuller, the first respondent's witness, was that the claimant's preliminary notice was fatally ambiguous precisely because it would be impossible for it to install and maintain apparatus in the short period covered by the proposed agreement. In my judgment the first respondent's position in correspondence in demanding technical information and maintaining that the claimant was asking for something wholly unreasonable, was at best obtuse, and at worst deliberately obstructive. But responsibility for the confusion, and in large part for the subsequent confrontation, must fall on the claimant. The access it needed was not out of the ordinary in any way. Perhaps because it genuinely anticipated the risk of problems, or because it has chosen to adopt an inflexible and uncompromising approach where it meets resistance, it appears to me that the claimant first asked for too much and then refused to modify its demands, thereby provoking an entirely unnecessary dispute.

28. In my judgment the respondents are the successful parties in the reference and in principle are entitled to their costs. On the other hand, they have conceded the principle which they disputed at length in their pleadings and skeleton arguments. Additionally, the manner in which the proceedings have been conducted on all sides has been wholly disproportionate to the dispute. Responsibility for that falls on both the claimant and the respondents.

29. While I am therefore going to make an order that both respondents' costs of the reference should be paid by the claimant, they should not have the whole of their costs. The first respondent raised issues which were completely unnecessary, and which have not been

pursued. The second respondent has hitched itself to the arguments of the first respondent and must take the consequences.

30. I have considered the detailed statements of costs provided by all three parties. Having done so I am satisfied that the appropriate order in this case is that the claimant should pay £5,000 towards the costs of each of the respondents. I consider that to be a proportionate sum for the resolution of the issues on which, in light of the agreement reached, the respondents can be considered to have been successful. I appreciate that it is very much less than either of the respondents has incurred in this reference. But they need not have incurred nearly as much as they have. The Tribunal wishes it to be known by other parties who refuse access to their land or buildings for surveys that, whatever the outcome, they cannot expect to recover costs on the scale incurred by the parties in these proceedings. Equally, the Tribunal wishes to make it clear to operators, as it has done in the past, that they cannot simply demand unquestioning cooperation from property owners. The claimant's wooing of potential site providers has become a little less rough, but it's technique still has a long way to go.

31. The order the Tribunal makes is therefore that the claimant will pay a contribution towards both respondents' costs which I summarily assess in the sum of £5,000 each.

Martin Rodger QC
Deputy Chamber President

Transcript approved 7 June 2019