UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – terms of agreement – consequences of failure to engage in the travelling draft procedure

BETWEEN:

(1) EE LIMITED **Appellants**
(2) HUTCHISON 3G UK LIMITED

and

TRUSTEES OF THE MEYRICK 1968 COMBINED TRUST **Respondent**

Re: Cat Plantation
Ringwood Road,
Hinton,
Hampshire.

Judge Elizabeth Cooke and A J Trott FRICS

Determination on written representations

Graham Read QC for the Claimant, in structed by DWF Law LLP
Wayne Clark for the respondents, instructed by Eversheds Sutherland International LLP

Introduction

1. The claimants are mobile telephone companies. They have made a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code"). They seek rights under the Code ("Code Rights") to maintain and operate their mast on the Cat Plantation site on the Hinton Estate, which the respondents hold as trustees of the Meyrick 1968 Combined Trust. The respondents sought to resist the imposition of Code Rights on the basis that they intended to redevelop the site, pursuant to paragraph 21(5) of the Code, but in its decision of 9 July 2019, [2019] UKUT 164 (LC), the Tribunal rejected that argument.

2. Following that decision the respondents do not seek to resist the imposition of Code Rights on any other basis, and so the Tribunal will make an order under paragraph 20 imposing on the parties an agreement that confers Code Rights on the claimants. The only remaining dispute between the parties is the terms of the agreement to be imposed. A hearing was listed on 24 and 25 March 2020 for the Tribunal to determine the terms.

3. On 17 March 2020 the claimants' solicitors wrote to the Tribunal to suggest that in view of the limited extent of the dispute between the parties the terms of the agreement should be decided on the basis of written representations, with the parties to submit their representations on 18 March 2020 and their responses to each other's representations on 23 March 2020. The Tribunal agreed and that procedure was followed; accordingly the decision to determine the outstanding issues on the basis of written representations was made because there was so little left in dispute, and not because of the current pandemic emergency. We are grateful to Mr Read QC for the claimants and to Mr Clark for the respondents for their written submissions.

The determination by the Tribunal of the terms of the agreement conferring Code rights

4. Paragraph 23 of the Code makes provision for the terms of the agreement to be imposed ("the Code agreement"), as follows:

> "(1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.
>
> (2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).
>
> (3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).
>
> (4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).

(5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—

(a) occupy the land in question,

(b) own interests in that land, or

(c) are from time to time on that land.

(6) Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement.

(7) The terms of the agreement must include terms specifying for how long the code right conferred by the agreement is exercisable.

(8) The court must determine whether the terms of the agreement should include a term—

(a) permitting termination of the agreement (and, if so, in what circumstances);

(b) enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates (and, if so, in what circumstances)."

5. The Tribunal does not, of course, start with a blank slate in determining the terms of the Code agreement. By the time a reference is made to the Tribunal, the operator will have given notice to the occupier of the land, under paragraph 20 of the Code, "setting out the code right, and all of the other terms of the agreement that the operator seeks" (paragraph 20(2)(a)). In practice the operator will do this by appending a draft agreement to the notice. Then on commencement of the reference the operator will have served its Notice of Reference upon the occupier, again appending the draft agreement.

6. Where Code rights are sought over a new site the reference must be determined within six months of receipt by the Tribunal, in accordance with regulation 3(2), Electronic Communications and Wireless Telegraphy Regulations 2011. The present reference is not a new site and that regulation does not apply; but like all references under the Code it involves the public interest in the provision of electronic communications and should be dealt with as expeditiously as possible. The Tribunal requires a high degree of co-operation from the parties and is particularly unsympathetic to tactics designed to delay the resolution of the dispute.

7. Where the terms of the agreement are in dispute the Tribunal gives directions designed to narrow down the issues between the parties and to make best use of the Tribunal's resources. The directions set a date for provision of a travelling draft agreement by the operator (which is likely to match the draft already served but will not necessarily do so, particularly if as in this case some time has passed since the service of the paragraph 20 notice), for the

respondent to serve comments and suggested amendments, and for the claimant then to return a further copy to the respondents with its comments. The old custom of amendments in coloured ink on a paper copy that travels physically between the parties has given way to tracked changes on an electronic copy but the idea is the same. Following that process the parties are then required to enter without prejudice negotiations, and then before the hearing to provide the tribunal with a schedule of points still in dispute.

8. In *EE Limited and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 53 (LC) the Tribunal gave directions, with the consent of the parties, in the form explained above. The respondent did not return the travelling draft and refused to comment on it, relying instead on the observations made by its expert witness on the form of agreement that it was prepared to accept. As a result the respondent lost the opportunity to comment upon or require amendments to the terms of the draft. In paragraphs 23 and 24 of its decision the Tribunal (the Deputy President and AJ Trott FRICS) said this:

> "23. Where a party fails to co-operate with the Tribunal to such an extent that the Tribunal is unable to deal with the proceedings fairly and justly the Tribunal has power under rule 8(3)(b) of The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to strike out the whole or part of that party's case. We consider that the respondent's failure in this case falls within that description. The Tribunal cannot force parties to agree, but it can require them clearly to state their case so that it can identify and determine the matters in dispute within the time limit fixed by Parliament.
>
> 24. For these reasons we indicated at the start of the hearing that the respondent would not be permitted to call evidence or make submissions on the terms of the agreement (as opposed to the consideration and compensation payable)."

9. As noted above, the present reference is not one to which the six months' time limit applies. But it must nevertheless be dealt with fairly, justly and expeditiously and we take a serious view of any failure to comply with directions or to frustrate the process.

The procedural background to the present dispute

10. Directions were given by the Tribunal with the consent of the parties on 26 September 2019 which included the following:

> 3. "The Claimants shall serve a copy of the travelling draft of the Code agreement with any comments on the Respondents by 4pm on **29 October 2019**.
>
> 4. The Respondents shall serve a copy of the travelling draft of the Code agreement with any comments or suggested amendments on the Claimants by 4pm on **19 November 2019**.

5. The Claimants shall return a copy of the travelling draft to the Respondents with any further comments by 4pm on **26 November 2019.**

…

7. The preparations for the further hearing shall be as follows:

i. A paginated and indexed supplementary bundle (including the draft code agreement) is to be filed no later than 14 days before the hearing, together with a schedule of any points in the agreement that are not agreed and the reasons for disagreement."

11. In compliance with paragraph 3 the claimants served a draft lease upon the respondents some days before the 19 October deadline. In an email dated 19 November 2019 the respondents' solicitors confirmed that they had no further comments on the travelling draft; we take it that some amendments had been requested before that, because on 25 November the claimants' solicitors served a further copy of the draft "in which I have accepted all the amendments" but with two further small amendments. Those amendments were to Section 13 of the lease.

12. Section 13 is headed "Equipment Specification"; it lists the equipment that the claimants may keep at the site. It reads as follows, with the final amendments underlined:

1 x 1.8m high stockproof compound fence

1 x 22.5 high monopole

1 x antenna – (1836mm x 160.02. x 83.82mm)

2 x antennas – (2060mm x 196mm x 122mm)

3 x antennas – (1974 x 301 x 181)

9 x MHA's

1 x Equipment cabinet (770 x 770 x 1650)

1 x Equipment cabinet (750 x 600 x 2100)

1 x Equipment cabinet (1200 x 800 x 1300)

1 x Equipment cabinet (600 x 410 x 1200)

1 x meter cabinet (1000 x 400 x 1100)

1 x 450 wide <u>trunking,</u> cable tray & support poles

18 x feeder cables

1 x 300mm wide floor mounted cable tray

Surface mounted 50x50mm Davis trunking

<u>Associated and ancillary equipment</u>

13. The respondents made no response to those final amendments. On 27 February 2020 the claimants' solicitors wrote to them suggesting that since those amendments were the only terms of the agreement still in issue the Tribunal should be asked to decide the terms on the basis of written representations. In the absence of a response to that letter the claimants' solicitors wrote to the Tribunal on 17 March 2020, the day before skeleton arguments were to be filed for the hearing, as we set out above in paragraph 3. They enclosed a schedule of disputed terms which set out only those two amendments made to Section 13, those being the only outstanding issues on the travelling draft, no response having been received to those terms for just under four months since 25 November 2019.

14. Later that day at 12:51 the respondents' solicitors wrote to the Tribunal in the following terms:

> "We can confirm that the only remaining issues between the parties which require resolution by the Tribunal are:
>
> 1. the Electronic communications equipment the Claimant wishes to install on site; and
>
> 2. the ability to upgrade that equipment.
>
> There is no contested valuation evidence which the Tribunal will be required to deal with.
>
> It is for this reason that the parties were proposing that the Tribunal may wish to deal with this by written submissions."

15. That was not the state of play so far as the travelling draft was concerned, where the only outstanding issues were the two small final amendments set out above. Mr Read QC's written submissions of 18 March 2020 express concern that the respondents might be seeking to raise new issues.

16. And indeed in their written submissions of 18 March 2020 the respondents set out three issues of which there is no hint in the travelling draft,

17. The first is about the list of equipment set out in Section 13. The respondents seek additional assurances that the list set out there corresponds to what was specified in the paragraph 20 notices served by the claimants, and which was said by the claimants to correspond with what is already on the site. They seek an additional condition on the Tribunal's order, requiring that what is listed in Section 13 should correspond with what is there already; and they want a photographic record of what is now on site so that additional equipment cannot be introduced later on the basis that it is listed in Section 13.

18. The respondents told the claimants on 19 November 2019 that they had no further comments on the travelling draft. Any concerns about Section 13 should have been recorded by way of

comments on the travelling draft; the respondents did not do that, and it is not open to them now to make fresh comments on Section 13. The claimants were entitled after 19 November 2019 to understand that Section 13 was accepted as it then stood and that the respondents had not further comments upon it. The Tribunal will not hear further comment upon it now.

19. It is convenient to turn next to the third issue raised by Mr Clark for the respondents, which is a requirement for additional wording to clause 5.1.1 which relates to the right to upgrade equipment. That additional wording should have been inserted by the respondents in the travelling draft. It is not open to them to require fresh drafting amendments now and the clause 5.1.1 will remain as it stands.

20. The second issue requires additional wording in Section 13 which would qualify the words "Associated and ancillary equipment".

21. That wording, along with the extra word "trunking" was introduced by the claimants in the final iteration of the travelling draft on 25 November 2019. The claimants' solicitor explained that she had asked her client to confirm the detail for the equipment specification, and that the claimants had asked for the additional word "trunking", and then for the extra final phrase "to reflect the fact that there will inevitably be some small items/parts of equipment that are not detailed in the equipment specification and we need to ensure that they are accounted for."

22. The bundle provided to the Tribunal in connection with this final determination includes copy correspondence which shows that on 3 December 2019 the claimants' solicitors asked the respondents' if the draft was now approved. On 27 February 2020 they wrote again as set out in paragraph 13 above, and the respondents' solicitors replied that they were taking instructions. The claimants' solicitors chased again on 3 and 4 March 2020 and met with the same response. When the claimants' solicitors wrote to the Tribunal on 17 March 2020 suggesting a paper determination, they had still not heard back from the respondents' solicitors.

23. We take the view that in failing to respond to the final amendments to the draft, sent to the respondents on 25 November 2019, and in failing to express any response to those amendments until 18 March 2020 in their written submissions to the Tribunal, the respondents have sought to delay the resolution of the reference and to hijack the final determination by raising issues that should have been raised months ago. Had comments been made upon the final amendments within a reasonable time of 25 November 2019 we would have been prepared to engage with those comments, but we are not willing to decide an issue raised deliberately at the last minute. This is vexatious conduct and the Tribunal will not indulge it.

24. Accordingly the only issue we have to decide is whether the two small final amendments highlighted in our paragraph 12 above should be included in the lease.

The two terms now in issue in the draft lease

25. Paragraph 23(1) provides that the Tribunal is to impose "an agreement which gives effect to the code right sought by the operator with such modifications as [the Tribunal] thinks appropriate." In the light of the very narrow issues remaining between the parties, most of the provisions of paragraph 23 do not need to be considered; the draft agreement makes provision, for example, for consideration as paragraph 23 requires. We accept that they are in dispute, since no comment was made on the draft in its final form including those amendments.

26. The respondents have given no indication as to why the addition of the "trunking," might be unacceptable to them and that word will be inserted.

27. As to the final more general words, as explained above the respondents would like to add a qualification to them. Had the respondents replied to the final iteration of the travelling draft within a reasonable time after 25 November 2019 and suggested the qualifying wording that they now seek the Tribunal would have been willing to consider that suggestion but in the circumstances it is not.

28. Therefore the issue is simply whether the wording should be included or excluded. We accept, of course, that the terms of the agreement must minimise the loss or damage caused to the respondents in accordance with paragraph 23(5); but we accept the claimants' solicitor's explanation for the inclusion of the general wording, which is perfectly sensible, and we think that in light of that it would be unhelpful and indeed unnecessary to delete it.

29. Mr Read QC in his written submissions of 23 March 2020 points out that in the previous lease of the site to the claimants' predecessors, made in 2004, the equipment specification included the words "associated apparatus". In the heads of terms agreed between the present parties in November 2017 the list of equipment included the words "any equipment ancillary thereto". And in the draft agreement the definition of the words "Equipment" at clause 5.1.1, to which the respondents have made no objection, reads

> "the equipment set ot in the Equipment Specification at Section 13 belonging to the Tenant together with any support structures associated cabling fixings and ancillary apparatus and equipment."

30. In light of that, why the respondents are suddenly troubled by the addition of the words "Associated and ancillary equipment" is a mystery, and those words will be added as a final item to Section 13.

31. We expect that counsel for the parties will agree the terms of an order and submit it to the Tribunal in draft.

32. Under rule 10(6)(e), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended, the Tribunal has full power to award costs in references under the Code. The

parties may now make submissions on costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Dated 3 April 2020

Judge Elizabeth Cooke A J Trott FRICS

Addendum on costs

33. We have received submissions on costs from both parties.

34. The claimants say they were successful in both Tribunal judgments[1] and submit that they should be awarded their full costs on the indemnity basis because the respondents' conduct was wholly unreasonable.

35. The respondents accept that they should be required to pay the claimants' costs, but they say they should pay on the standard basis.

36. Both parties agree there should be a detailed assessment of costs in the event the parties cannot agree the amount of the claimants' costs.

37. Both recognise that the award of indemnity costs is exceptional and reflects unreasonable conduct to a high degree. There must be something in the respondents' conduct of the action or in the general circumstances of the case that take it out of the norm. Mr Clark in his submissions for the respondents cites cases which confirm that principle and we think that no further discussion of the law is called for.

The claimants' arguments in support of an award on the indemnity basis

38. The claimants say the respondents' case under paragraph 21(5) of the Code was entirely unsuccessful. This was the central element of the respondents' case and involved extensive evidence over a four-day hearing. It was completely rejected by the Tribunal which said the respondents' redevelopment proposal was "not a viable plan" and found that it was "wholly implausible that the Respondents… would waste their resources on it". The Tribunal said that even if there was a need for the provision of FWA broadband on the Estate "there is considerable evidence that this is not the only way to meet it, nor indeed the best way." It concluded that "in reality the redevelopment plans are conceived in order to defeat the claim for Code rights."[2] The claimants say that the respondents' objective was not a bona fide redevelopment plan but instead a device to circumvent the restrictions on the amount of consideration contained in paragraph 24 of the Code.

39. Following the first judgment the respondents simply discarded many of the arguments they had previously put forward, such as their valuation expert's claim for consideration and compensation of £6,500pa and £4.6m respectively. In the agreement which the Tribunal ordered on the second judgment the parties had agreed a single "site payment" of £575pa.

40. The claimants say the respondents' case turned on the nature of their true intention for the purposes of paragraph 21(5) of the Code and that they had given deliberately opaque evidence. The claimants cite several examples from the first judgment where the Tribunal

[1] [2019] UKUT 0164 (LC) dated 9 July 2019; [2020] UKUT 0105 (LC) dated 3 April 2020.
[2] Paragraphs 145 and 146 of the first judgment.

found this to be true and they submit that a party which goes out of its way to be deliberately opaque and to mislead the Tribunal should be penalised by indemnity costs.

41. As to the second judgment, the claimants describe the respondents' conduct as unsatisfactory and disingenuous. The late introduction of three new points in the respondents' submissions to the Tribunal on 18 March 2020 was a serious disregard of the procedure set out in the Tribunal's directions dated 26 September 2019 and was identified by the Tribunal in paragraph 23 of its second judgment as being vexatious conduct. The claimants submit that where a party's conduct causes another party to incur substantial costs the Tribunal should not permit the latter to be prejudiced on costs and should signal the Tribunal's displeasure about such an abuse of process by an award of indemnity costs.

The respondents' submissions

42. The respondents submit that for indemnity costs to be awarded it is not enough for a party's claim to be weak; it must be hopeless from the outset. They point out that their case had been supported by substantial expert and factual evidence and was not weak or speculative. They argue that it is important not to consider the matter with hindsight and to avoid thinking the result was inevitable. The Tribunal found at paragraph 86 of its first judgment that the respondents had a reasonable prospect of being able by themselves to bring about their development scheme. It found against them on whether they had a firm, settled and unconditional intention to put their current scheme into effect, but they say that there was nothing unusual in a party failing to establish intention and nothing that should sound in indemnity costs.

43. As for the Tribunal's second judgment the respondents said they had failed to respond to the draft agreement in a timely fashion and as a result their comments were held by the Tribunal to have been made too late. Their case was essentially dismissed for being out of time rather than being "out of the norm". The award of indemnity costs is exceptional and should only be made where conduct is unreasonable to a high degree; it is not appropriate where, as here, the respondents' conduct was merely wrong or misguided in hindsight. It would be wrong to award indemnity costs against the respondents and thereby deny them the ability to question the reasonableness and proportionality of the claimants' costs.

Discussion

44. We agree with the respondents that the fact that the claimants had a resounding success does not of itself justify the award of indemnity costs. There must be something extra, in terms of unreasonable behaviour to a high degree and/or in the general circumstances of the case, that takes the conduct of the respondents out of the norm.

45. As the claimants say, much of the evidence adduced by the respondents was kept deliberately opaque and rather than elucidate the true nature of their intentions it only served to prevent the Tribunal from discerning what those intentions were. At times it hindered our attempts to establish the respondents' intentions and the claimants accurately record in paragraph 18 of their submissions examples of our scepticism about the respondents' case.

46. Scepticism hardened into disbelief when it became clear during the hearing that the respondents had misled the local planning authority and attempted to mislead the Tribunal about the results of the questionnaire which was said to demonstrate the need for better broadband on the Estate. The questionnaire was difficult to interpret and presented in an opaque fashion; we had to insist on the production of further documents to establish the true position. This evidence troubled us for a number of reasons which we set out at paragraphs 128 and 129 of our first judgment and at paragraph 132 we said:

> "We agree with the Claimants that the questionnaire goes nowhere near justifying the original or current scheme [of redevelopment]… As we noted above, this evidence has been produced to justify the alleged intention, rather than having been sought at an early stage to inform a decision-making process. Accordingly the construction put upon these data for the Respondents does not bear scrutiny… [135] We have to go further than that and say that the responses have been misrepresented by the Respondents…"

47. Deliberately misrepresenting evidence to the Tribunal is egregious conduct and lies well outside the acceptable norm.

48. Moreover, we found the respondents' proposed scheme of development to be seriously uneconomic and the prospect of the respondents wasting their resources on it to be wholly implausible. The redevelopment plans were conceived as a smoke screen in order to defeat the claim for Code rights.

49. Accordingly, the respondents' conduct – not only their misrepresentation of their evidence but the whole basis of their case - was unreasonable to a high degree.

50. Turning to our second judgment we found that by delaying its response to the claimants' final amendments to the draft agreement until 18 March 2020 the respondents had sought to delay the resolution of the reference and to highjack the final determination by raising new issues at the last moment. This was not simply a case of "a party being criticised for failing to respond in time" as suggested by the claimants. This was cynical conduct with mischievous intent which we found to be vexatious and unacceptable. Such conduct is unreasonable to a high degree and out of the norm.

51. We therefore award the claimants their costs of the reference on the indemnity basis, such costs, if not agreed, to be the subject of a detailed assessment by the Registrar.

Dated 7 May 2020

Judge Elizabeth Cooke A J Trott FRICS