

# Communication breakdown

15 April 2016

## **Thekla Fellas and Wayne Clarke review a case that exposed flaws in the Electronic Communications Code and examine the proposed new code**

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It is agreed by both practitioners and judges who deal with the [Electronic Communications Code](#) (the code) that it is unclear and provides little or no certainty for landlords or operators. There is little case law available to assist interpretation of the code, and what there is does not provide much guidance. An unreported case at Cambridge County Court in 2015 highlighted the problems with the current code and has sparked debate in the legal press about a landlord's ability to serve a notice under paragraph 21 of the code for removal of electronic apparatus where Part II of the [Landlord and Tenant Act 1954](#) (the 1954 Act) applies.

### **Crest Nicholson v Arqiva**

In *Crest Nicholson (Operations) Ltd v Arqiva Services Ltd and others* [2015], Deputy District Judge Dack at a case management conference struck out part of the landlord's claim which sought removal of the operator's apparatus under paragraph 21.

The issue centred on the meaning of the words in paragraph 21 "is for the time being entitled to require the removal". The judge held that those words required the server of the notice, at the date of service, to establish an immediate right to require removal of the apparatus. Thus, a paragraph 21 notice could not be served prior to the expiry of the contractual term. This was the case even though the landowner had served a section 25 notice pursuant to the 1954 Act opposing renewal on the grounds of redevelopment, and it was clear that the landlord would be able to satisfy the redevelopment ground. The decision was being appealed when the case was settled, with Arqiva and the operators vacating before the end of the contractual term and making a significant contribution to Crest's costs. We are therefore left with a non-binding decision.

*The purpose of paragraph 21 is to ensure that the person with the legal right to seek removal of the equipment from the land does not do so without having first served a notice on the operator. Its purpose is not, effectively, to extend an operator's right to remain on the land...*

The difficulty with this decision is that if the Deputy District Judge was correct in his views, a landlord wishing to redevelop its land would never be able to serve a paragraph 21 notice in respect of a lease which has security under the 1954 Act. This is because on the Deputy District Judge's finding the 1954 Act issues would have to be determined first. However the landlord would not be able to prove the redevelopment ground unless the landlord is able to remove the equipment. In order to remove the equipment, the landlord would have to serve a paragraph 21 notice seeking removal of the equipment, but cannot do so until the 1954 Act issues have been resolved.

This is nonsensical. The purpose of paragraph 21 is to ensure that the person with the legal right to seek removal of the equipment from the land does not do so without having first served a notice on the operator. Its purpose is not, effectively, to extend an operator's right to remain on the land, because those rights are dealt with under paragraphs 5 and 6 of the code. By giving notice, the operator has an opportunity to seek to have a new agreement imposed (under paragraph 5) and, if necessary, temporary rights as well (under paragraph 6).

A more sensible interpretation therefore seems to be that the phrase "for the time being" simply describes or identifies the person who has the entitlement to seek removal, not the time at which removal is sought. The identity of the person may change, in the same way that only the person who qualifies as competent landlord can serve the section 25 notice under the 1954 Act. Thus the person having the entitlement for the time being to require removal pursuant to that Act may change depending on who is the competent landlord.

This interpretation is in fact supported by paragraph 6 which refers to "any person ? that ? is entitled to require the removal of that apparatus but, by virtue of paragraph 21 below, is not entitled to enforce its removal". No mention is made of the person having to have the immediate right to require removal, which suggests it is the identity of the person that is relevant rather than the timing of removal.

## New code

A completely new code is currently being consulted on, although it is unlikely to be enacted before the end of 2016, at the earliest. Under the proposed new code, operators will have almost unrestricted rights, and once they are on a site will be extremely difficult to remove. Some of the key points to be aware of under the new code are as follows.

- **Code rights and persons to be bound:** code rights are defined and include: installing and keeping apparatus, access, connecting to a power supply, and interfering with or obstructing a right of access. The persons to be bound by any of the code rights include: occupiers granting the code right, successors to those occupiers, those deriving title from the occupier or their successor, and any other person who has agreed to be bound. This means that a superior landlord who has not agreed to be bound by the code rights will not be bound.
- **Assignment, upgrading and sharing of apparatus:** under the new code, any new agreement cannot prevent, limit or impose conditions on an assignment to another operator (although an authorised guarantee agreement will be allowed), neither can it restrict or limit any upgrading or sharing of apparatus where such change has no more than a minimal adverse impact on the appearance of the site and no additional burden on the landowner.
- **Imposition of an agreement:** the balancing test for the court in deciding whether to impose an agreement has changed from "no person should unreasonably be denied access to an electronic communications network or electronic communications services" under the current code, to "the public interest in access to a choice of high-quality communication services" under the new code.
- **Terms of an agreement:** where an agreement is imposed, it must include terms for consideration to be paid. While stated to be market value, this actually disregards whether a particular site is the only suitable site; it only takes into account the value of the site to the operator; and disregards the value to the landowner and the rights to assign, share and upgrade the apparatus. A landowner will also be entitled to compensation, which includes the diminution in the value of the land. However, this is defined under the new code as the same test as for the compulsory purchase of any interest in land.
- **Notices:** where Ofcom has prescribed a form of notice this must be used, otherwise the notice will be invalid for the purposes of the new code. This is both for operators and any notices given by others.

- **1954 Act:** agreements will be excluded from the security provisions of the 1954 Act but will continue under the new code at the end of the contractual term.
- **Terminating a new code agreement:** agreements under the new code can only be brought to an end by a landlord giving at least 18 months' written notice on one or more of the grounds specified in the new code. If a notice has been given, the new code agreement will come to an end, unless:
  - the operator served a counter-notice within 3 months ? an extension from the current 28 days; and
  - the operator issues proceedings within 3 months of service of the counter notice; a total period of 6 months.
- **Grounds for termination:** the specified grounds are: substantial breaches; persistent delays in making payments; the landowner intends to redevelop all or part of the land or any neighbouring land; or the test for the imposition of agreement is not met.

## **Intention to redevelop**

In practice, the only real ground on which one could rely is the intention to redevelop. Under the new code, it is difficult to see what substantial breaches there could be because the operators can assign, upgrade and share without any restrictions.

Likewise for persistent delays in making payments ? because rents are usually paid annually and are effectively going to be at less than the market value, it is unlikely that those amounts would not be paid. In any event, to be able to prove a persistent delay in making payments, a site provider would have to wait years to demonstrate a course of events to substantiate this ground.

In respect of the test for imposition not being fulfilled, this is going to be highly unlikely where you have more than one operator on site. It is interesting to note that "own use" is not a ground on which a site provider can seek possession; this could be difficult in rural areas.

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## **Further information**

Related competencies include: [Landlord and Tenant](#)

This feature was taken from the RICS *Property journal* (March/April 2016)