

Hold the line

The promise of extra income may tempt landowners to agree to the installation of telecoms apparatus, but there are many potential problems that should be considered before entering such an agreement, says **Ben Brayford**

The opportunity for landowners to earn additional income by agreeing to the installation of telecoms apparatus such as mobile phone masts on their property is often a welcome one, putting empty roof space or other vacant land to good use.

However, before entering into an agreement with a telecoms operator, or indeed buying property subject to such an agreement, the landowner should be aware of the potential issues that may arise if it ever wishes to require the operator to remove the apparatus; for example, to permit redevelopment.

As a result of the provisions of the Electronic Communications Code the telecoms operator will benefit from a form of security of tenure that will enable it to retain its apparatus on site following the expiry of any agreement. As such it may prove difficult to require the operator to remove its apparatus once the agreement has come to an end.

What is the code?

The Electronic Communications Code appears in schedule 2 of the Telecommunications Act 1984 (as amended by schedule 3 of the Communications Act 2003). The code offers favourable rights to telecoms operators to install and retain electronic communications apparatus and infrastructure (such as mobile phone masts, underground cables and other telecoms apparatus) on a landowner's property.

In order to benefit from code rights, the telecoms operator must be licensed by Ofcom, which keeps a register of those to whom the code applies, available on its website. All of the main landline and mobile operators enjoy code powers, although not all telecoms companies will necessarily have the benefit of the code.

Before an operator can install apparatus on a given piece of land it must first obtain the written agreement of the owner of that land (technically speaking the occupier as opposed to the freehold owner). If the owner proves unwilling or reluctant to enter into an agreement with the operator then the operator can, under paragraph 5 of the code, seek a court order granting it the rights it has requested.

The court will make such an order if it is satisfied that any prejudice caused by the order: (a) can be adequately compensated by payment of money to the owner; or (b) will be outweighed by the benefit to those who would obtain access to the electronic communications network.

On the face of it, therefore, given that only one of these elements needs to be satisfied, the odds appear to be stacked in the favour of the operator – although there has been little case law to provide guidance on the subject. In practice operators seem to prefer to negotiate an agreement and have to date been relatively reluctant to go to court to force owners to grant them rights under the code. If the court does make an order it will usually set out the terms

and conditions on which basis the rights are granted and the level of compensation payable to the owner.

Once the agreement has been entered into, there are only two ways in which an owner can seek the removal of an operator's apparatus under the code. These are set out in paragraphs 20 and 21 of the code.

Relocation of apparatus

Following the installation of apparatus, an owner may serve notice under paragraph 20 requiring the operator to 'alter' (i.e. relocate) the apparatus provided that the alteration is necessary to enable the owner to carry out an 'improvement' to the property. For the purposes of the code, an improvement includes development and change of use.

Paragraph 20 can be operated at any time during the term of an agreement irrespective of the agreement's contractual provisions. Paragraph 20 cannot be contracted out of and will apply even where the agreement expressly prohibits any form of relocation. The paragraph 20 mechanism requires the owner to first serve notice on the operator who will then have 28 days to serve a counter-notice if it wishes to oppose the relocation. If the operator does serve a counter-notice then the owner will have to apply for a court order.

Generally speaking if the operator objects to the relocation, the owner will find it difficult to insist on the apparatus being relocated since the court will only order the apparatus to be moved if the relocation is:

“The order, if it is granted, will usually require the owner to reimburse the operator’s expenses in carrying out the relocation. Costs will of course vary from case to case, but can exceed £50,000”

(a) necessary (rather than just desirable); and (b) will not substantially interfere with the service that the operator is providing.

Potentially, therefore, unless the operator has some form of back-up equipment available nearby, it will be hard for the owner to satisfy the second limb of this test. In addition, the order, if it is granted, will usually require the owner to reimburse the operator’s expenses in carrying out the relocation. Costs will of course vary greatly from case to case, but can, depending on the apparatus in question, exceed £50,000.

However, the wording of the code leaves open the possibility of overriding paragraph 20 by including a ‘lift and shift’ clause in the agreement. Such a clause should allow the owner to require the operator to relocate its apparatus on the terms set

out in the agreement without having to resort to the paragraph 20 procedure and a potential court application. Furthermore, the agreement can provide that the owner will not be responsible for the operator’s relocation costs.

Removal of apparatus

In contrast to paragraph 20, paragraph 21 only applies where the agreement has ended (either on the exercise of a break or at the expiry of the term). However, notwithstanding the end of the agreement, if the owner wants an operator to remove its apparatus from the site the owner must follow the procedure set out in paragraph 21.

It is not possible for the operator and the owner to contract out of paragraph 21 and

any provision in the agreement attempting to do so will be ineffective. Therefore, regardless of what the agreement may say about the operator removing its apparatus at the end of the term, the owner will still have to serve a notice under paragraph 21 to achieve this.

The operator will then have 28 days in which it can serve a counter-notice (the standard prescribed form of notices can be found on the Ofcom website). The counter-notice will state what steps the operator is taking to obtain a right to retain the apparatus on the land.

The court will only make an order for the removal of the apparatus if it is satisfied that the operator is not taking appropriate steps to obtain the rights it needs to keep the apparatus on site (essentially a paragraph 5 application); is being unduly slow in taking such steps; or that the rights it is seeking will not secure the retention of the apparatus (i.e. the operator’s paragraph 5 application will fail). As you will see, this then brings us back to the paragraph 5 considerations discussed above.

In practice the most constructive (and

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possibly least expensive) way for owners to terminate these agreements is by negotiation. In general operators like to have between 12 and 24 months to relocate apparatus as matters such as planning and technical requirements take time to resolve. As a rule operators will endeavour not to stand in the way of a redevelopment, not least because of the compensation they might have to pay (as a result of their successful paragraph 5 application) if the redevelopment is sterilised as a result of their continued occupation. However, as competition for sites increases, it may be that operators will become increasingly likely to rely on their paragraph 21 rights.

Clashing legislation

In addition to paragraph 21, the owner must also consider the implications under the Landlord and Tenant Act 1954. Unfortunately the code and the 1954 Act do not sit well together.

While there is no case law on the subject, it is commonly thought that an operator would be considered to be a tenant occupying, via its apparatus, for the

purpose of a business and therefore benefit from security of tenure under the 1954 Act.

Under the code, paragraph 21 applies where an owner is "entitled to require the removal" of apparatus. In respect of a licence or a contracted out lease, therefore, the position is simple. However, where a lease falls within the 1954 Act, an operator may argue that, until the tenant's application for a renewal lease is finally disposed of, the owner is not entitled to require the removal of the apparatus and consequently cannot commence paragraph 21 proceedings.

There is, however, a further problem. In order to oppose the renewal of the tenancy under the 1954 Act, the landlord will usually rely on ground (f) (development) or (g) (own occupation). It can therefore also be argued that an operator's paragraph 21 rights mean that a landlord would not be able to show the court that it had a reasonable prospect of developing or occupying the property until the paragraph 21 application was determined!

Clearly, to avoid this circularity, owners will argue to the contrary, that a paragraph

21 application can be submitted once the contractual term has come to an end, but before a section 25 application is determined. However, given that a section 25 notice is not per se a right to require removal, but a right to have the question of whether the tenant's 1954 Act continuation rights should be brought to an end, it is questionable whether this approach would succeed. The safest course is always to ensure that any lease to an operator is contracted out of the 1954 Act.

While the potential income from telecoms apparatus may make them an attractive opportunity, the potential difficulty involved in obtaining vacant possession may well outweigh the financial gains. Before entering into such agreements landowners should therefore carefully consider the long-term implications.



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