Neutral Citation Number: [2019] EWCA Civ 2075

Case No: C1/2019/0379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Mr Martin Rodger QC, Deputy Chamber President
TCR/56/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE ARNOLD

- -

Between :

THE UNIVERSITY OF LONDON	**Appellant**
- and -	
CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED	**Respondent**

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- -

MR WAYNE CLARK & MR JONATHAN WILLS (instructed by **Eversheds Sutherland International LLP**) for the **Appellant**
MR JONATHAN SEITLER QC & MR OLIVER RADLEY-GARDNER (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date : 12th November 2019

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lord Justice Arnold:

The issues

1. The first issue on this appeal is whether the Upper Tribunal (the "UT") has power under the Electronic Communications Code ("the Code") in Schedule 3A to the Communications Act 2003 ("the 2003 Act") to impose on the occupier of a building an agreement permitting access to that building by an operator for the purpose of determining whether it is suitable for the installation of electronic communications apparatus. The UT (Martin Rodger QC, Deputy President) answered that question "yes". The second issue is whether such a right may be free standing and time limited. The UT also answered that question "yes". The decision of the UT is at [2018] UKUT 0356 (LC), [2019] JPL 324. This appeal is brought with the permission of the UT.

The facts

2. The University of London owns and occupies a hall of residence called Lillian Penson Hall opposite Paddington Station. Cornerstone Telecommunications Infrastructure Ltd is a company owned jointly by Telefonica UK Ltd and Vodafone Ltd. Cornerstone installs and maintains electronic communications apparatus which it makes available to its two shareholders. It is an "operator" for the purposes of the Code.

3. Following the loss of a site for electronic communications apparatus in Eastbourne Terrace, Paddington, Cornerstone was looking for another suitable site in the vicinity of Paddington Station. It has identified Lillian Penson Hall as likely to be the most suitable site. It wanted to have a right of access to the roof of the building by different professionals to carry out a survey and other non-intrusive investigations in order to establish whether the site was indeed as suitable as its desk-top assessments suggested. Such an inspection and investigation is called a "multi-skilled visit" (or MSV) in the industry. On 17 May 2018 it served notice on the University. The notice was expressed to be given under paragraph 26 of the Code. Paragraph 6 of the notice listed all the code rights that Cornerstone sought but that was qualified in the covering letter accompanying the notice, which stated:

> "... for the avoidance of doubt, [Cornerstone] seeks the conferral of Code Rights to access the site for survey purposes only, although it reserves rights to seek the conferral of additional Code Rights should the land prove fit for purpose."

4. The University refused to grant Cornerstone that right. As the UT explained at [5], Cornerstone was not seeking any permanent right to install electronic communications apparatus. If, however, the site were found to be suitable, it was likely to make a further application in new proceedings for the imposition of an agreement.

5. At the date of the hearing before the UT it was, therefore, impossible to say whether Cornerstone would wish to install electronic communications apparatus on the roof of the building. That would depend on the outcome of the MSV. The UT found as a fact at [74] that no electronic communications apparatus could be installed without a

preliminary MSV. The cost of commissioning an installation would not be incurred without first determining whether the required coverage could be achieved.

6. We were told that since the hearing before the UT the MSV has taken place. We were not told its outcome. What, therefore, remains in issue are the costs of the application; and the clarification of the law for the future.

Background to the Code

7. Lewison LJ described the background to the Code in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755:

> "[2] Until the enactment of the Code, an operator of electronic communications equipment was entitled to acquire rights under Schedule 2 to the Telecommunications Act 1984. There was wide dissatisfaction with that code for a number of reasons. First, it was complex and extremely difficult to understand. Second, it was outdated. Third, there was evidence of concern that it was making the rollout of electronic communications equipment more difficult. These three features were noted by the Law Commission in its report (The Electronic Communications Code Law Com Report 336 paras 1.9 to 1.11). Both in its consultation paper and in its final report the Law Commission took the view that reform could not be achieved simply by amendment. Instead, it took the view that:
>
> "... the advantages of this review will only be felt if the revised Code is drafted from a "clean sheet of paper"; there is no point in merely amending the 2003 Code."
>
> [3] It was part of the government's strategy to achieve widespread coverage of the country by imposing obligations on operators by way of licence conditions. The government also intended to reform the electronic communications code to help operators to extend their networks, to make mast-sharing easier and infrastructure deployment and maintenance cheaper. Following the Law Commission's report, the code now in force was introduced by the Digital Economy Act 2017, which inserted section 106 and Schedule 3A to the Communications Act 2003."

8. One of the avowed purposes of the Code was to reduce the price payable by operators for the acquisition of code rights. That was done by requiring the consideration for any such rights to be assessed in a "no network" world. Landowners stand to receive much less for the conferring of rights under the Code. They therefore prefer to operate outside the Code where they can. That is the commercial consideration underlying this appeal.

The statutory framework

9. The Code deals with the acquisition, exercise and termination of "code rights". "Code rights" are defined in paragraph 3 of the Code. They are:

> "a right for the statutory purposes—
>
> (a) to install electronic communications apparatus on, under or over the land,
>
> (b) to keep installed electronic communications apparatus which is on, under or over the land,
>
> (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,
>
> (d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,
>
> (e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,
>
> (f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,
>
> (g) to connect to a power supply,
>
> (h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or
>
> (i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus."

10. Paragraph 4 of the Code defines "the statutory purposes" as being, in relation to an operator, (a) the purposes of providing the operator's network, or (b) the purposes of providing an infrastructure system.

11. Under paragraph 9 of the Code a code right in respect of land may be conferred by agreement between the occupier of the land and an operator. Paragraph 10 explains who else may be bound by such a right. If the operator and the occupier do not reach agreement, then the operator may apply for an order imposing an agreement. This is dealt with by Part 4 of the Code. Paragraph 20 provides as follows, so far as relevant:

> "(2) The operator may give the relevant person a notice in writing—

(a) setting out the code right, and all of the other terms of the agreement that the operator seeks, and

(b) stating that the operator seeks the person's agreement to those terms.

(3) The operator may apply to the court for an order under this paragraph if—

(a) the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or

(b) at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.

(4) An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which—

(a) confers the code right on the operator, or

(b) provides for the code right to bind the relevant person."

12. Although the paragraph refers to the court, in fact proceedings must be begun in the UT: see Electronic Communications Code (Jurisdiction) Regulations 2017. We therefore refer to the UT in the remainder of this judgment, except where quoting the Code itself.

13. Paragraph 21 sets out the test that the UT must apply in deciding whether to impose an agreement. It provides:

"(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.

(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.

(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.

(4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.

(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any

> neighbouring land, and could not reasonably do so if the order were made."

14. Paragraph 23 governs the terms of an agreement imposed by the UT. The operator starts the process under paragraph 20 (2) by setting out the proposed terms of the agreement. Paragraph 23 (1) gives the UT power to modify those terms. The agreement must contain terms as to the payment of consideration by the operator, which is assessed in accordance with paragraph 24: paragraph 23 (3), (4). It must also contain terms to ensure the least possible loss and damage is caused by the exercise of the code right: paragraph 23 (5). Finally, so far as relevant for present purposes, the terms of the agreement must specify "for how long" the code right is exercisable: paragraph 23 (7).

15. Paragraph 24 deals with the payment of the consideration. In particular, paragraph 24 (4) states that the terms of the agreement may provide for the consideration (calculated in accordance with paragraph 24(1)-(3)) to be paid (a) as a lump sum or periodically; (b) on the occurrence of a specified event or events; or (c) at such other time as the UT may direct. In addition to the consideration payable under paragraph 24, paragraph 25 deals with compensation for loss and damage sustained or to be sustained as a result of the exercise of code rights. An order for compensation may be made either at the time the agreement is imposed; or at any time afterwards: paragraph 25 (2).

16. Paragraph 26, which is headed "Interim code rights", provides as follows (so far as material):

> "(1) An operator may apply to the court for an order which imposes on the operator and a person, on an interim basis, an agreement between them which—
>
> (a) confers a code right on the operator, or
>
> (b) provides for a code right to bind that person.
>
> (2) An order under this paragraph imposes an agreement on the operator and a person on an interim basis if it provides for them to be bound by the agreement—
>
> (a) for the period specified in the order, or
>
> (b) until the occurrence of an event specified in the order.
>
> (3) The court may make an order under this paragraph if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis and—
>
> (a) the operator and that person have agreed to the making of the order and the terms of the agreement imposed by it, or

(b) the court thinks that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met.

(4) Subject to sub-paragraphs (5) and (6), the following provisions apply in relation to an order under this paragraph and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it—

(a) paragraph 20(3) (time at which operator may apply for agreement to be imposed);

(b) paragraph 22 (effect of agreement imposed under paragraph 20);

(c) paragraph 23 (terms of agreement imposed under paragraph 20);

(d) paragraph 24 (payment of consideration);

(e) paragraph 25 (payment of compensation);

(f) paragraph 84 (compensation where agreement imposed).

(5) The court may make an order under this paragraph even though the period mentioned in paragraph 20(3)(a) has not elapsed (and paragraph 20(3)(b) does not apply) if the court thinks that the order should be made as a matter of urgency.

(6) Paragraphs 23, 24 and 25 apply by virtue of sub-paragraph (4) as if—

(a) references to the relevant person were to the person mentioned in sub-paragraph (1) of this paragraph, and

(b) the duty in paragraph 23 to include terms as to the payment of consideration to that person in an agreement were a power to do so.

(7) Sub-paragraph (8) applies if—

(a) an order has been made under this paragraph imposing an agreement relating to a code right on an operator and a person in respect of any land, and

(b) the period specified under sub-paragraph (2)(a) has expired or, as the case may be, the event specified under sub-paragraph (2)(b) has occurred without (in either case) an agreement relating to the code right having been imposed on the person by order under paragraph 20.

> (8) From the time when the period expires or the event occurs, that person has the right, subject to and in accordance with Part 6 of this code, to require the operator to remove any electronic communications apparatus placed on the land under the agreement imposed under this paragraph."

17. Paragraph 27, which is headed "Temporary code rights" provides as follows, so far as material:

> "(1) This paragraph applies where—
>
> (a) an operator gives a notice under paragraph 20(2) to a person in respect of any land,
>
> (b) the notice also requires that person's agreement on a temporary basis in respect of a right which is to be exercisable (in whole or in part) in relation to electronic communications apparatus which is already installed on, under or over the land, and
>
> (c) the person has the right to require the removal of the apparatus in accordance with paragraph 37 or as mentioned in paragraph 40(1) but the operator is not for the time being required to remove the apparatus.
>
> (2) The court may, on the application of the operator, impose on the operator and the person an agreement between them which confers on the operator, or provides for the person to be bound by, such temporary code rights as appear to the court reasonably necessary for securing the objective in sub-paragraph (3).
>
> (3) That objective is that, until the proceedings under paragraph 20 and any proceedings under paragraph 40 are determined, the service provided by the operator's network is maintained and the apparatus is properly adjusted and kept in repair."

18. Part 5 of the Code deals with the termination of agreements conferring code rights (a "code agreement"). Paragraph 30 provides for the continuation of code rights even after the code right ceases to be exercisable. In essence the code agreement will be continued automatically under paragraph 30 (2). We refer to this as security of tenure. This does not, however, apply to a code right conferred either by paragraph 26 or by paragraph 27: paragraph 30 (3). It is critical to note, therefore, that, unlike a code right conferred by agreement or by an agreement imposed under paragraph 20, an interim right conferred by paragraph 26 does not attract security of tenure. Paragraph 31 provides for the giving of a notice of at least 18 months specifying one of the grounds set out in paragraph 31(4). The operator may give a counter-notice pursuant to paragraph 32. If it does, it may then apply to the UT under paragraph 32. On such an application paragraph 34 gives the UT a wide variety of possible orders that it can make. These include providing for the continuation of the code rights; for

modification of code rights, and for ordering the entry into a new agreement conferring code rights.

19. Part 6 of the Code deals with the right to require removal of electronic communications apparatus. One way of doing so is by notice under paragraph 40. A landowner or occupier may give the operator notice requiring removal of the apparatus with a reasonable period. If no agreement is reached within 28 days the landowner or occupier may apply to the UT for an order requiring the apparatus to be removed (or authorising the landowner to sell it). Paragraph 40 (8) provides that the UT may not make an order "if an application under paragraph 20 (3) has been made in relation to the apparatus and has not been determined."

20. Paragraph 100 prohibits contracting out of Parts 3 to 6 of the Code.

The reference

21. On 17 May 2018 Cornerstone's solicitors gave the University notice under paragraph 26 of the Code seeking interim code rights. No agreement having been reached, on 16 July 2018 Cornerstone applied to the UT for an order conferring upon it:

> "... the ability to enter and inspect the Land so as to verify its assessment that the Land is suitable for the installation and operation of electronic communications equipment apparatus and provide permanent and consistent network capacity and mobile phone coverage in the area of Paddington Station."

22. The UT decided (a) that the right sought was a code right; and (b) that Cornerstone was entitled to seek an interim right without also seeking a permanent right.

23. The University challenges both those conclusions.

Is the right sought a code right?

24. The UT held that the right sought by Cornerstone was either a code right within paragraph 3 (a) or, failing that, within paragraph 3 (d). As to paragraph 3 (a) the Deputy President said:

> "[72] Focussing then on language, it seems to me that the right conferred by para.3(a) to install apparatus on over or under land must include a right to enter on the land and to carry out each step required to achieve the permitted installation. The fact that no mention is there made of "entry" or of any specific works (such as excavation or tunnelling) does not support the conclusion that no right of entry has been conferred or that works were not envisaged as being an essential part of the process of installation permitted by para.(a). The inclusion of a specific right, at para. (f), to enter land to inspect, maintain etc, apparatus already on that land does not make it any less clear that para.(a) was intended to include a right of entry to install.
>
> [73] In the same way as a right of entry is clearly included in the right to install under para.3(a), so must the taking of other

> necessary steps be included, since otherwise the grant of the right would be illusory. This does not involve implying additional rights, nor any departure from the presumption that private property rights will not be infringed without clear words, but is simply a matter of giving full effect to the language in which the right has been described. The right to "install" is intended to permit an operation involving a series of distinct steps and the single word is sufficient to connote, as a component of the right, each of those steps."

25. At paragraph [74] the Deputy President found as a fact, as mentioned above, that no electronic communications could be installed without an MSV being undertaken; and he further concluded that:

> "... an agreement conferring the right to install equipment necessarily entitles an operator to undertake preparatory surveys required as a prelude to the installation itself. As a matter of ordinary meaning, such surveys, and a right of access to carry them out, are part of the right "to install" under para. 3(a)."

26. As far as paragraph 3 (d) was concerned, the Deputy President accepted that "works" would normally be understood to mean the provision of infrastructure by physical operations, rather than measuring and recording the characteristics of a site. In the light of the purposes of the Code, however, he held that there was no reason to confine its meaning to that extent. He concluded, therefore, at [76]:

> ""Install" connotes a variety of tasks or works undertaken for the purpose of providing equipment on a site; "works in connection with the installation" connotes a still wider range of activities. Although expressed as separate rights, these paragraphs are obviously intended to be complementary and, between them, to describe all of the steps necessary to the installation of apparatus."

27. The starting point for the University's argument, advanced by Mr Clark, is that there were pre-existing provisions enabling an operator to enter land about which Parliament must be taken to have known; and which have not been reproduced or incorporated into the Code. Since Parliament has omitted to incorporate or reproduce these rights in the Code, the inference is that it did not intend such rights to be code rights.

28. The first of these provisions is contained in Schedule 4 to the Communications Act 2003. Schedule 4 is given force by section 118 which provides:

> "Schedule 4 (which provides for compulsory acquisition of land by the provider of an electronic communications network in whose case the electronic communications code applies and for entry on land by persons nominated by such a provider) shall have effect."

29. Schedule 4 is headed:

> "Compulsory Purchase and Entry for Exploratory Purposes"

30. Paragraph 3 of that Schedule empowers the Secretary of State to authorise the compulsory acquisition of land by an operator. Paragraph 6 provides (so far as material):

> "(1) A person—
>
> (a) nominated by a code operator, and
>
> (b) duly authorised in writing by the Secretary of State,
>
> may, at any reasonable time, enter upon and survey land in England and Wales for the purpose of ascertaining whether the land would be suitable for use by the code operator for, or in connection with, the establishment or running of the operator's network.
>
> (2) This paragraph does not apply in relation to land covered by buildings or used as a garden or pleasure ground."

31. There are a number of points to make about this right. First, a code operator is defined by paragraph 1 of that Schedule. That definition is much more prescriptive than in the Code (as to which, see paragraph 2 and section 106 of the 2003 Act): it does not extend to infrastructure providers as opposed to network providers. The right of access would not therefore be available to many operators under the Code. Second, this right of access would not apply to a building such as Lillian Penson Hall. It would not therefore be available across the whole range of land potentially affected by the Code. Third, it would be time-consuming for a code operator within the definition in Schedule 4 to have to apply to the Secretary of State every time it wished to survey open land. Fourth, the matters to which the Secretary of State must consider in deciding whether to authorise the entry and survey, which are specified in paragraph 2 of Schedule 4, differ from the relevant criteria that the UT is required to apply, either under paragraph 21 or under paragraph 26 of the Code. Fifth, the existence of this right was not considered by the Law Commission or by the government in formulating its policy. We do not consider that the existence of this right (even if it is not limited to cases of potential compulsory purchase) can be taken to be a right applicable to the Code. Mr Clark relied on the existence of this right for another purpose as well. It existed as a template or precedent which could have been adapted to fit the Code; but it was not. The omission must be taken to be deliberate.

32. The second pre-existing provision is to be found in the Communications (Access to Infrastructure) Regulations 2016. These regulations concern the provision of access to infrastructure by an infrastructure operator to a network provider. An infrastructure provider is not limited to operators of electronic communications networks. The term extends to operators providing utilities (e.g. gas, water or sewerage) and to transport utilities (e.g. railways, roads, ports and airports). Regulation 5 (1) provides:

> "(1) A network provider may make a request to an infrastructure operator for an on-site survey of elements of the operator's physical infrastructure provided the request—
>
> (a) is in writing;
>
> (b) specifies the elements of the operator's infrastructure to which the request relates; and
>
> (c) is made with a view to deploying elements of a high-speed electronic communications network to which the elements to be surveyed are relevant."

33. Regulation 5 (4) specifies grounds on which the operator may refuse the request. It is plain that these regulations do not apply to private landowners. Once again, they would not be adequate for most operators under the Code.

34. We do not regard this argument as a strong pointer towards the correct interpretation of the Code. As the Law Commission said, the Code was to be drafted on a "clean sheet of paper". The Code was thus designed to be, so far as possible, a self-contained Code; and the answer to the first question raised by this appeal must be found within the words of the Code itself.

35. Allied to this point was Mr Clark's point that the question of conferring a right of inspection for the purposes of an MSV was raised in the consultations which followed the Law Commission's own consultation paper and preceded its final report. The UT set out the factual material at [70]. Since the Law Commission's final report did not deal with that question, we cannot draw any inferences from that omission.

A right to install

36. Mr Clark's next argument is that the meaning of "install" does not include a right of access to see whether land is suitable for the installation of electronic communications equipment. The Oxford English Dictionary defines "install" as:

> "To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use:"

37. The placing of apparatus is different from surveying a site to decide whether it is suitable for installing apparatus.

38. In his skeleton argument (although not in oral submissions) Mr Clark also referred us to the decision of the Manitoba Court of Appeal in *Winnipeg v Brian Investments Ltd* [1953] 1 DLR 270. That case concerned property taxation in the city of Winnipeg. The tax was originally levied on land and buildings. But an amendment to the legislation provided that the word "building" included:

> "any chattel installed or attached or intended to be installed or attached in or to any structure or land."

39. The question for the court was whether chattels unattached to the land or building (in that case bowling alleys) fell within the scope of the definition. As Coyne JA put it:

> "The question is whether those words are sufficient in themselves and without more to completely subvert the existing law in respect of taxation of real estate and personal property, particularly of bowling alleys, and to reverse the underlying and prevailing general policy and impose upon the building owner taxation in respect of personal property belonging to a tenant, brought on as such by him for his use while tenant and removable by him as such."

40. The argument for the city was that the words covered any chattel brought into a building. Not surprisingly the court rejected that ambitious argument. In the course of his judgment Coyne JA said:

> "Again, "installed" is not a word of art nor a word of precision. Indefiniteness gives it, as it gives any word, a chameleon-like character so that associate words show through and give their colour and meaning to it. It is not necessary here, however, to decide just what the word "installed" means. Unless it is perfectly clear that it means what the city contends, the city's argument cannot be upheld."

41. Although he went on to consider what "install" might mean, it is clear in our view that the thrust of his judgment was that unattached chattels were not installed for the purposes of the legislation under consideration. He did not purport to give a general definition of the word; and indeed he stressed that cases decided on different legislation were not helpful. We do not consider that Mr Clark gains any real support from that case.

42. Mr Clark's strongest point is that some of the code rights expressly mention rights of access and inspection. Paragraph 3 (c) describes a right "to inspect ... electronic communications apparatus" rather than the land itself. Paragraph 3 (f) describes a right "to enter the land to inspect ... any electronic communications apparatus." Again, it does not refer to inspecting the land itself. Moreover, both these paragraphs presuppose that the apparatus has already been installed on land. They do not contemplate an inspection to decide whether or not to install it.

43. We agree with the Deputy President that it is necessarily implicit in a right to install electronic communications equipment that the operator may enter the land to carry out the installation. If an operator could not enter the land to install the equipment, the right to install would be nugatory. Mr Clark accepted that this was so.

44. What, however, is more doubtful is whether a right to install electronic communications equipment carries with it a right to assess the suitability of the site. The point can be tested this way. Suppose that an operator carries out an MSV in order to assess the suitability of a site. The MSV reveals that the site is not suitable. So no electronic communications equipment is installed. It seems to us to be very difficult (if not impossible) to interpret the word "install" to cover a case in which, as a result of the MSV, there is no installation.

Works in connection with the installation

45. It is clear that the MSV will be carried out in connection with the potential installation of electronic communications apparatus. Two points therefore arise under this head:

i) Is the word "works" wide enough to encompass an MSV?

ii) If so, does the MSV amount to works "in connection with the installation of electronic communications equipment"?

46. The word "works" can bear a variety of meanings, dependent on context. In some contexts it will be limited to operations in the nature of construction, repair or engineering operations. In other contexts, however, it will bear a different meaning. The works of William Shakespeare, for example, are primarily mental or creative rather than physical processes (even though they may be written down). Charitable works may amount to no more than alms-giving.

47. The context in the present case is a Code designed to facilitate the provision of electronic communications apparatus in the public interest. It is not necessary for the "works" in paragraph 3(d) to amount to the installation of electronic communications equipment, because that right is already encompassed within paragraph 3 (a). So the right under paragraph 3 (d) must be wider. Nor is it necessary that the works be "for" the installation of such equipment, because the Code uses the phrase "for or in connection with". It is enough that they are "in connection" with that installation. The width of the definition is emphasised by the phrase "any works". Where the legislation uses an imprecise word, a court is entitled to place strong reliance on the legislative purpose underpinning the legislation. That purpose is undoubtedly to facilitate the improvement of electronic communications throughout the country. That purpose cannot be sensibly achieved unless operators can acquire (compulsorily if need be) the right to assess the suitability of potential sites. The UT took the same view. As the Deputy President put it at [77]:

> "It is apparent from the Code itself (for example from paragraph 21(4) which identifies "the public interest in access to a choice of high quality electronic communications services") that the Code is not simply concerned with the better regulation of private rights. Its objective is the speedy and economical delivery of communications networks in the public interest. It simply cannot have been intended that, before an operator may insist on the acquisition of Code rights in consideration of payments assessed on a favourable "no network" basis, it must first negotiate outside the scope of the Code to acquire a right of entry to undertake essential preliminary surveys. The ransom position which site owners would enjoy on that interpretation of the Code, and their ability to insist on sharing in the economic value of the operator's network which paragraph 24 denies them, are both contrary to the principles on which the Code has been designed."

48. We agree. In addition, Mr Clark accepted that if the MSV were to include intrusive work (e.g. the taking of core samples of concrete or the temporary removal of a roof

covering) then those operations would amount to "works". That would have the paradoxical consequence that operators would be encouraged to carry out intrusive works as part of an MSV; and that an MSV causing the least inconvenience to an occupier could not be authorised by the UT. That is contrary at least to the spirit of paragraph 23 (5).

49. Mr Clark drew our attention to references to "works" in the definition of "street work rights" in paragraph 59 of the Code and in the definition of "tidal water rights" in paragraph 63 of the Code but we do not consider that they provide any assistance.

50. We therefore consider that the operations necessary to carry out an MSV, even if non-intrusive, do amount to "works" for the purpose of the Code.

51. Would it make any difference if the MSV concluded that the site was not suitable? We do not consider that it would. Something may be "connected with" a future event even if it is uncertain whether that event will ever happen. That is illustrated in a context that is far removed from the present one. In *Johnson v Johnson* [1952] P 47 the question was whether a commissioner had power to give leave to present a divorce petition before three years had elapsed from the date of the marriage. Under the Judicature Act 1925 a commissioner had power to "to try and determine matrimonial causes of any prescribed class and any matters arising out of or connected with any such causes." It had been held that unless and until a petition had been presented there was no matrimonial cause on foot; and that a precursor to a potential such cause could not be connected with it. This court overruled that decision. Somervell LJ said at 50:

> "... regarded as an ordinary English expression I think I would have said ... that "connected with" can naturally be used to describe a relation with a contemplated event which is still [in the future]."

52. Somervell LJ then referred to Canadian authority which supported his interpretation. The Canadian case concerned a tax assessment, the details of which do not matter. Somervell LJ continued:

> "Of course, it may be that it was plain that there was going to be an assessment, whereas when an application is made under section 1 (1) it is not plain that there is going to be a cause, because the court may refuse to grant leave under the proviso; but, nevertheless, I have myself found what was stated [by the Canadian court] very helpful in deciding this case."

53. Accordingly, the fact that there was no certainty that there ever would be a matrimonial cause was no obstacle. Jenkins LJ, having agreed with Somervell LJ, said at 53:

> "There may be difficulty in speaking of a matter as "arising out of" a cause not yet on foot, but I for my part see no reason whatever why an application such as this should not be "connected with" the proposed matrimonial cause."

54. Hodson LJ also agreed.

55. Accordingly, depending on context, something may be "in connection with" a future uncertain event. In our view, as we have said, the policy underlying the Code is such that Parliament must be taken to have intended that national coverage by electronic communications equipment would be facilitated by code rights. It must also be taken to have intended that apparatus would be installed on suitable sites; and to have known that an assessment of suitability would be required before a final decision on installation was made. It may be that works are works "for" the installation of electronic communications apparatus only if a decision has been made to install it; but the phrase "in connection with" goes wider. The legislative context points strongly, in our judgment, to the conclusion that an MSV is within the phrase "any works on the land for or in connection with the installation of electronic communications apparatus" whether or not a final decision to install electronic communications apparatus has yet been made.

56. We hold, therefore, that Cornerstone is seeking a code right within paragraph 3 (d) of the Code.

Consequences of a code right

57. The list of code rights in paragraph 3 of the Code is not a list of the rights that an operator is compelled to have. It is a list of the various rights that an operator may choose to have. It is, therefore, open to an operator to limit its request to only one or some of the list of code rights. If, as we consider, the right to carry out an MSV is a code right, it follows that an operator may ask the occupier to confer that right alone under paragraph 9 of the Code. If the occupier refuses to do so, the operator may apply to the UT under paragraph 20 for the imposition of an agreement to that effect.

58. By that route an operator will be entitled (if the test under paragraph 21 is satisfied) to acquire the right to carry out an MSV even if the occupier objects.

59. That, however, leaves open the question whether, instead of applying under paragraph 20, an operator may apply under paragraph 26 alone for the conferring of an interim right to carry out an MSV. Mr Clark contends that an application under paragraph 26 must be parasitic on an application under paragraph 20. Mr Seitler QC, on the other hand, contends that an operator has a choice whether to proceed under paragraph 20 or under paragraph 26.

60. From the perspective of the operator, there are a number of reasons for choosing to proceed under paragraph 26 alone. First, an application under paragraph 26 is generally determined summarily on the papers, whereas a full hearing under paragraph 20 is likely to involve oral and expert evidence. Accordingly, an application under paragraph 26 alone is likely to be cheaper for all parties. Second, if the MSV reveals that the site is not suitable, the operator has no further need for further code rights in an agreement imposed under paragraph 20. From the perspective of the occupier, the principal consideration on which Mr Clark relied was that the occupier ought not to be deprived of its right to argue that an interim right should never have been granted. The only practical consequence of that, however, would be that a full scale hearing would be required simply to decide who should pay the costs.

Can a right to carry out an MSV be free standing?

61. Cornerstone's application to the UT was made under paragraph 26 of the Code. That paragraph gives the UT power to impose an agreement conferring a code right on an interim basis. Paragraph 26 (2) provides for the imposition of an agreement binding the parties for the period specified in the agreement or until the occurrence of a specified event.

62. The Law Commission's intention, in recommending the power to grant interim rights, was to enable early access for the purpose of exercising code rights while any dispute about the compensation payable for or other terms of a full-blown agreement was resolved. That is clear from paragraphs 9.50 and 9.51 of their report. As the Law Commission put it in paragraph 9.61 of their report:

> "We have concluded that the revised Code should allow early access for Code Operators, but only on an interim basis. We recommend that this should be achieved by enabling Code Operators, *when making an application for Code Rights under the revised Code*, to apply to the Lands Chamber for an interim order for access pending the resolution of disputes over payment. Such orders would only be granted on terms that give the landowner the right to vacant possession if a final order in favour of the Code Operator is not made before the expiry of the interim order." (Emphasis added)

63. At paragraph 9.63 the Commission said:

> "... the objective of the interim order would be to enable access pending determination of valuation issues, and so the final hearing would resolve the question of consideration (and payment would then be backdated with interest to the date of the interim order)."

64. At paragraph 9.67 it set out its recommendation:

> "We recommend that the revised Code should enable the Lands Chamber of the Upper Tribunal to make an order conferring Code Rights on an interim basis, either by consent, or where the Code Operator has made out a good arguable case that the test for the imposition of Code Rights is satisfied. Such orders may include terms as to compensation and as to interim consideration; they must provide that if the test for the imposition of Code Rights is not satisfied at a final hearing (or the Code Operator discontinues the proceedings) the landowner will have an immediate right to enforce removal of any electronic communications apparatus placed on the land pursuant to the interim order."

65. The government appears to have taken a similar view. The Executive Summary in the policy document published by the Department of Culture, Media and Sport in May 2016 stated:

> "To promote greater efficiency, the new Code will also contain provisions that allow fast interim access to sites for communications providers in appropriate circumstances. This will enable operators to access sites more quickly, even while valuation is still being resolved. Government does, however, have a clear policy to only introduce new powers of entry in exceptional circumstances. Having reviewed the evidence very carefully, it was decided that at present criminal penalties for denial of access and *associated stronger powers of entry are not warranted.*" (Emphasis added)

66. The explanatory notes which accompanied the Digital Economy Act 2017 state at paragraph 422:

> "Paragraph 26 provides that an operator may apply for "interim code rights". This enables code rights to be granted on an interim basis *pending the parties reaching, or the court imposing, a final agreement.* Rights may be granted on an interim basis either (a) where the parties agree to the making of the order, and the terms of the interim agreement (which may be the case, for example, where the only issue not agreed between them is the consideration to be paid); or (b) when the court considers that there is a good arguable case that the interim code right will be made permanent at a final hearing." (Emphasis added)

67. It is, in our view, fair to say that these statements of policy (both before and after the enactment of the Code) support the view that paragraph 26 was primarily intended to fill the gap between the making of an application under paragraph 20 and its final determination. The question for us, however, is whether the Code as actually drafted goes further. Neither statements of policy nor explanatory notes can dictate the proper interpretation of legislation.

68. The following features of paragraph 26 as enacted deserve comment. First, although paragraph 23 (7) (which requires an agreement to specify how long a code right is exercisable) is applied to paragraph 26, paragraph 26 also includes paragraph 26 (2). Paragraph 26 (2) must therefore have been intended to perform an additional function. Although not expressed in terms of a definition, paragraph 26 (2) in effect defines what it means by "interim". It states that:

> "An order under this paragraph imposes an agreement on the operator and a person on an interim basis if it provides for them to be bound by the agreement—
>
> (a) for the period specified in the order, or
>
> (b) until the occurrence of an event specified in the order."

69. There is no reference here to the gap between the application under paragraph 20 and its final determination. Second, the Law Commission's reference to discontinuance of the application also finds no place in paragraph 26 as enacted.

70. It is a pre-condition of an application under paragraph 26 that the operator has given:

> "... a notice *which complies with paragraph 20(2)* stating that an agreement is sought on an interim basis..."

71. Paragraph 20 (2) requires the notice to be in writing:

> "(a) setting out the code right, and all of the other terms of the agreement that the operator seeks, and
>
> (b) stating that the operator seeks the person's agreement to those terms."

72. Paragraph 27, by contrast, which deals with temporary (rather than interim) rights, requires a notice to be given "*under* paragraph 20 (2)". This distinction in language between the two paragraphs was not referred to in *Cornerstone v Compton Beauchamp Estates*. In the case of paragraph 27 we consider that a notice "under" paragraph 20 (2) is one which seeks the imposition of an agreement under that paragraph: i.e. an application for full code rights. That is reinforced by paragraph 27 (1) (b) which provides that the notice "under" paragraph 20 must "also" require agreement on a temporary basis. Accordingly, the application under paragraph 20 and the application under paragraph 27 are inextricably linked.

73. We do not consider that the wording of paragraph 26 (3) compels the same conclusion. Rather, in our judgment a notice which "complies with" paragraph 20 (2) is simply one that contains the information and makes the statement required by paragraphs (a) and (b). Second, the objective of an order under paragraph 27 is the provision of the operator's service "until the proceedings under paragraph 20 ... are determined." The language refers to "the" proceedings under paragraph 20; not "any" such proceedings. Necessarily, the use of the definite article entails that there are proceedings under that paragraph to be determined. There is no equivalent wording in paragraph 26.

74. There are further significant differences between paragraph 26 and paragraph 27. First, paragraph 27 applies where there is already electronic communications apparatus on the land; whereas paragraph 26 applies whether or not there is apparatus on the land. Indeed, in most cases to which the latter paragraph applies there will be no apparatus on the land. Second, the test applied by the UT in deciding whether to impose interim rights under paragraph 26 differs from the test required under paragraph 27. Third, the conferring of interim rights under paragraph 26 confers no security of tenure on the operator. This is clear both from paragraph 30 (3), which disapplies paragraph 30(2) of Part 5, and also from paragraph 26 (8) which enables the landowner to proceed straight to Part 6 of the Code once the interim right ceases to be enforceable. Paragraph 27, by contrast, operates in the context of an application for an agreement conferring code rights under paragraph 20. The operator's security will continue until the determination of that application and, if the application succeeds, the new agreement will also attract security of tenure.

75. Mr Clark stressed the fact that the *duty* contained in paragraph 23 (3) to include terms about payment in an agreement had been downgraded by paragraph 26 (6) (b) to a *power* to include such terms. That, he said, was consistent with his argument that the

purpose of paragraph 26 was to fill the gap between an application under paragraph 20 and its eventual final determination where what is in dispute is the consideration for the code right. We do not doubt that that will be the purpose of an application under paragraph 26 in many (perhaps most) cases. But paragraph 26 is, in our judgment, not so confined. The very fact that the UT has the power to impose terms about consideration (and all the other powers contained in paragraph 23) is equally consistent with an application under paragraph 26 alone when the consideration is either not in dispute or can be readily resolved by the UT.

76. There are two features of paragraph 26 which, at first sight, might be puzzling. The first is that an order of the UT is required under paragraph 26 even if the parties agree on the terms of interim code rights. We consider that the probable explanation is that the policy underlying the Code is that agreements to confer code rights cannot exclude the security of tenure for which paragraph 30 (2) provides: see paragraph 100. Paragraph 30 (3) disapplies paragraph 30 (2); but only where the interim or temporary code right is conferred by order of the UT. We consider that the probable explanation is that the legislative intention was that, since interim code rights should not attract security of tenure, the oversight of the UT was required for their conferral.

77. Second, the test to be applied is that of a "good arguable case" which is a lower test than that laid down by paragraph 21 itself. We do not accept Mr Clark's submission that the adoption of that test *necessarily* entails the consequence that at some later date the test will be revisited on a "balance of probabilities" basis. It appears from the Law Commission Report that the test derives from cases about service of proceedings outside the jurisdiction, where the putative claimant has to establish a "good arguable case" that one (or more) of the gateways in PD 6B applies. That question is decided summarily and on the basis of the "good arguable case" test, even though the issue will not necessarily be revisited at trial.

78. Mr Clark accepted that, if an operator made an application for full code rights under paragraph 20, it could apply for an interim right (such as a right to carry out an MSV) under paragraph 26. He relied, however, on paragraph 26 (7), which provides for application of Part 6 of the Code if the termination of the interim code right has occurred without an agreement relating to the code right having been imposed by the UT under paragraph 20, as showing that there is a clear linkage between the application under paragraph 26 and an application under paragraph 20. We do not accept this argument. In the first place, it distorts the words of paragraph 26 (7). It treats the words of the paragraph as requiring the existence of an application under paragraph 20 rather than, in accordance with its actual wording, the absence of an order under paragraph 20. Secondly, there are a number of circumstances which might lead to no imposition of an agreement under paragraph 20, of which only one, an unsuccessful paragraph 20 application, turns on there necessarily having been a paragraph 20 application. For example, the parties may reach agreement on the terms of an agreement conferring code rights. Such an agreement would attract security of tenure and would not require the intervention of the UT. Another example is if the interim right granted to the operator is time limited (e.g. the right to carry out an MSV) and the operator does not need any further right and, therefore, does not have a practical need to make an application for full code rights under paragraph 20. There may also be a one-off event (such as a music festival) for which electronic communications apparatus may be needed, and for which an interim right is granted;

but once it is over the need disappears. Once again, the operator would have no practical need for any further code right. This scenario was not considered by the Law Commission.

79. Mr Clark made the point that if, as Mr Seitler submits, the operator has an unfettered choice whether to proceed under paragraph 20 or 26, it would surely always choose the route with the lower threshold test. That would allow the operator to sidestep the full test in paragraph 21; and deprive the landowner of the right to argue that the interim code right should never have been granted. He emphasised that, if Mr Seitler were right, then the UT could grant *any* code right on an interim basis; not just those which were "one-off" such as the right to carry out an MSV or the right to lop a tree. Mr Clark also emphasised the fact that the Code applies to land of all kinds. There may be sensitive government buildings, for example, where it would be inappropriate to allow access for an MSV (let alone the actual installation of electronic communications apparatus) simply on the basis of a "good arguable case" without requiring the operator ultimately to satisfy the full test under paragraph 21. Equally, there may be cases in which the landowner has development proposals which are not yet crystallised; and the conferring of interim rights under paragraph 26 might defeat the landowner's ability to resist the imposition of code rights in reliance on paragraph 21 (5).

80. We consider that most (if not all) of the potential problems can be dealt with by the terms of the agreement that the UT imposes. It could, for example, provide for limited hours of access; restrict access to sensitive parts of a building; provide for supervised access and so on. So far as prospective development is concerned, that could be dealt with by providing for the interim code right to terminate on the occurrence of a specified event (e.g. the grant of planning permission for development). In an extreme case the UT might exercise the discretion which it has under paragraph 26 to refuse to impose the agreement at all.

81. Mr Clark also pointed out that there is no statutory temporal limitation on the period during which an interim right may be exercised. Nor is there any restriction on the making of successive applications for the same interim right. An operator could, therefore, prolong the period during which code rights could be exercisable without ever having to satisfy the full test in paragraph 21. As far as the first of these points is concerned, the UT will no doubt balance the interests of the operator and those of the landowner in specifying the period or event as required by paragraph 26 (2). As far as the second is concerned, the UT may well take the view that the making of successive applications for the same interim right amounts to an abuse of its process. In that event it has the power to strike out the application: *Shiner v HMRC* [2018] EWCA Civ 31, [2018] 1 WLR 2812.

82. We consider it improbable that Parliament would have legislated in such a way as to require an application to be made under paragraph 20 when there was no practical reason to do so. It would both cause the parties to incur unnecessary costs and also divert the resources of the UT. Mr Clark suggested that landowners ought not to be deprived of their right to argue that the interim code right should never have been granted. In the case of an ongoing code right, the likelihood is that the operator will make an application under paragraph 20 for the permanent conferral of that right; so the landowner's right is safeguarded. If, on the other hand, "interim" simply means what paragraph 26 (2) says it means, there does not seem to us to be any need for the

landowner to have that right. In addition, where the right in question is only required for a temporary period, we consider that the landowner's position is safeguarded by the open-ended ability to apply for compensation for loss and damage under paragraph 25 (applied to paragraph 26 by paragraph 26 (4)(e)). It is clear from the fact that paragraph 25 is imported into paragraph 26 itself that no separate application for compensation needs to be made under paragraph 20.

83. We consider that one explanation for the lower test of "good arguable case" under paragraph 26 is the fact that a code right exercisable on an interim basis by virtue of an order under that paragraph does not attract security of tenure. Where a less valuable right is in issue it is appropriate for a lower threshold test to be applied.

84. In addition to all those points, it is appropriate to note in conclusion that there is nothing in paragraph 26, including in particular paragraph 26(2), which expressly requires there to be a "final" hearing of any kind, let alone a final hearing of a paragraph 20 application. Nor is there any plain and obvious inference of such a requirement in the wording of paragraph 26. Cornerstone's stand-alone application is within the literal wording of paragraph 26 and, for all the reasons we have given, there is no purposive reason to give it any other meaning than its literal meaning. For these reasons, we do not consider that it is a necessary part of an application under paragraph 26 that it be accompanied by an application under paragraph 20. In short, we consider that a free-standing application under paragraph 26 is permitted by the Code.

Result

85. We dismiss the appeal.