A growing body of telecoms case law

Ed Cracknell looks at a recent case that offers guidance on how to correctly remove a mobile phone mast from your land

The relationship between landlords and digital/telecoms infrastructure operators had, until recently, been governed by a set of rules written in 1984. That all changed in 2017 when the new Electronic Communications Code was introduced, at which point responsibility for resolving disputes was moved from the courts to the Upper Tribunal (Lands Chamber) (UT).

The ease and speed of using the UT has been a factor in there being nine reported decisions in as many months under the new Code (compared to only a handful in 30 years under the old Code), as has the fact that all UT decisions are reported on its website. Consequently, the new legal landscape for the digital communications age is gradually being formed and greater clarity provided, just as increasing attention is being paid to digital infrastructure with the roll out of 5G and the all-pervasiveness of mobile communication.

Redevelopment

In its latest decision in *EE Ltd and Hutchison 3G UK* v *Trustees of the Meyrick 1968 Combined Trust of Meyrick Estate Management* [2019] UKUT 164 (LC), the UT focused on the process by which a landowner can regain possession of land from a telecoms operator when it wants to carry out a redevelopment.

Paragraph 21(5) of the Code provides that the UT is precluded from ordering a landowner to be bound by Code rights "if it thinks that the relevant person [in most cases the landowner] 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."

This raises a number of questions. How, for example, might a landowner demonstrate his intention and when does he need to hold this intention? Is his ability to carry out a redevelopment relevant to whether he has the requisite intention? What type of scheme might constitute redevelopment for these purposes and in what circumstances might the operator's Code rights reasonably prevent such a development taking place?

DIMITRIS LEGAKIS/SHUTTERSTOCK

Similarities with the 1954 Act

Lawyers have naturally drawn parallels with ground 30(1) (f) of the Landlord and Tenant Act 1954 (the 1954 Act) which allows a landlord to resist the grant of a new business tenancy on redevelopment grounds and there is a large body of case law on ground (f) which means that we largely understand how it works in practice. The UT in *EE* found that while the 1954 Act ground (f) cases are not binding authorities when it comes to Code cases, the principles in those cases should be adopted where relevant.

So we now have guidance on the following in relation to a landowner's application to resist the imposition of Code rights on redevelopment grounds:

1. The date for assessing the landowner's intention is the date of the hearing;
2. The landowner must have a firm and settled intention to redevelop; and
3. The landowner must be practically able to redevelop (for example, may need to show that he has the necessary finance and any relevant permissions including planning permission).

Genuineness of the intention

In the landmark 1954 Act case *S Franses Ltd* v *Cavendish Hotel (London) Ltd* [2018] UKSC 64; [2019] EGLR 4 the Supreme Court found that a landlord's intention to redevelop must be a genuine one; not merely contrived as a means of removing the tenant. The acid test is whether the landlord would intend to do the same works even if the tenant had left voluntarily.

The defendant in *EE* was the owner of the Hinton Admiral Estate in Hampshire, a 5,600-acre site comprising farmland, forest, some houses, two hotels, other commercial premises and solar panels. The claimant operated four mast sites on the land and claimed Code rights to continue to operate them after the leases had ended.

The landowner opposed the claim under paragraph 21(5), arguing that he intended to redevelop the land by removing the masts and building his own, larger, masts to which the operator's apparatus could be added along with other equipment to create a broadband network.

Since the Code does not allow Code rights to be acquired over apparatus, in this way the landowner could completely circumvent the Code, charging whatever he liked and removing the equipment when he liked.

KEY POINTS

- In July 2019, the UT handed down a decision that will have a profound effect on how landowners and telecoms operators work together to deliver new digital services
- Decision centres on when a landowner can reclaim land from a telecoms operator for redevelopment
- Lessons for landowners who will need to prove valid motive for and practical ability to undertake redevelopment

The UT found the *Franses* test applied to Code cases, and a landowner could not get possession if his sole intention was to prevent the acquisition of Code rights. As with *Franses*, the existence or otherwise of a solid commercial basis for the redevelopment proposal is strong evidence as to the landowner's true motive. In *EE*, the proposal did not stack up financially and the UT decided the landowner's real motive was to frustrate the Code and accordingly it was not entitled to rely on paragraph 21(5).

Final word

As a society we are now completely dependent on mobile communications. It has become nearly as important as any other utility to our everyday lives, and the new Code reflects that.

If a landowner wishes to resist the acquisition of Code rights by a telecoms operator it will need good reasons. *EE* will not be welcomed by landowners; but at least there is clarity that, as most practitioners had assumed, the fundamental principles of ground (f) apply also to paragraph 21(5) cases under the Code: at the date of the hearing, landowners will need to demonstrate a firm, settled and unconditional intention and ability to redevelop.

Ed Cracknell is a senior associate in the property disputes team at Russell-Cooke