

30th June 2011

Rt. Hon. Jeremy Hunt MP
Secretary of State for Culture, Media & Sport
2 – 4 Cockspur Street
London
SW1Y 5DH.

Dear Sir,

Communication Review

I welcome the opportunity afforded by your open letter dated 16th May 2011 to respond to the need to reform the regulation and legislation relating to telecommunications in the UK. I believe this is long overdue.

I act for a small rural firm of Chartered Surveyors based in Lancashire who specialise in telecommunications work on behalf of landowners and occupiers affected by operators' telecommunications networks. I continue to act on behalf of The Bridgewater Canal Company Limited (a company within the Peel Holdings Limited group of companies), who were involved in the recent *Geo Networks v. Bridgewater Canal Company* [2010] EWHL 548 (Ch) and *Geo Networks v. Bridgewater Canal Company* [2010] EWCA civ 1348 cases. These are the two main cases that have considered the Electronic Communications Code ("the Code").

The Code is badly drafted. In the first case *Lewis v. Harris* J said about the Code:

"The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says that the code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as "the electronic communications code" in "this Chapter", the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called "The Telecommunications Code". I have simply called it the Code."

To make matters worse, there are no cases which deal with the Code and there is little of any use in *Hansard* as to Parliament's intentions at the time of its drafting.

The *Bridgewater Canal* case set out the overall structure of the Code but gave precious few answers that practitioners need. In short, the Code provides for a general regime for regulating rights of operators against ordinary landowners as well as special regimes for particular kinds of landowners, such as the owners of 'Linear Obstacles' such as canals, which were considered under the *Bridgewater Canal* case.

The major difficulty with the general regime, apart from its poor drafting, is the security of tenure afforded to operators and its ill-considered interaction with the security of tenure provisions under Part II of the *Landlord and Tenant Act 1954*. There is a problem with landowners getting possession of their land back when required for development purposes. Paragraph 20 allows a person with an interest in land to require the alteration of an operator's equipment, which includes seeking its removal. If the operator serves a counter-notice then the alteration can only be made if a Court Order is made. The Court will only do so if they believe the alteration is necessary and it will not substantially interfere with the operator's service provision. This can really screw up a development, particularly as lawyers and barristers are undecided whether a notice under paragraph 20 will or will not override the requirements of a contractual redevelopment break clause.



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Paragraph 21 of the Code allows an operator to serve a counter-notice that will then make the equipment's removal impermissible without a Court Order. The mere fact that a notice can be served under paragraph 20 does not mean that there is an entitlement to serve under paragraph 21.

The real problem comes with the interface between the Code and the 1954 Act – the two simply do not fit together – and it is evident that Parliament failed to consider this issue when initially drafting the Code. When parties have entered into a written agreement whereby the operator is granted a lease, the operator can argue that it is a business tenant occupying, via its apparatus, for the purposes of a business. Although landowners could 'contract out' of the 1954 Act security provisions, they often are unable to, having previously permitted operators access to their land under a "site access agreement", which effectively grants operators a lease – despite its wording – and security of tenure as well.

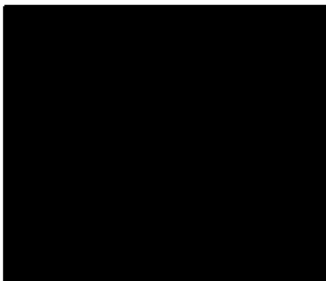
When tenancies continue beyond their contracted term a valid landowner's notice seeking possession usually under Section 30 (f) or (g) of the 1954 Act, can be frustrated as he cannot demonstrate he can take occupation of the land because of the existence of the Code protected telecoms lease. Conversely until such time as he can dispose of his Court application for possession under the 1954 Act, he is prevented from serving a notice under paragraph 21 of the Code. He is snookered in a perfect legislative circle! Procedural amendment is needed to the statute to allow the Code and the 1954 Act to be dealt with together.

Returning to the special regimes, and following the Court of Appeal decision in the Bridgewater Canal case, we have the apparent nonsense that a general landowner is entitled to proper wayleave-type consideration under the general regime whereas the owner of a Linear Obstacle is not. Indeed even the Court of Appeal in this recent case failed to determine what could otherwise have been in Parliament's mind when it stated that 'consideration' and 'compensation' should be payable to owners of Linear Obstacles under paragraph 13 (2) (e) of the Code. This anomaly caused by poor draftsmanship of the Code, is at variance to the very considerable number of commercial arrangements that involve all the major telecoms operators under which the likes of Network Rail and British Waterways (two essentially state owned bodies) generate significant premiums and/or annual payments.

Following the reversal of Lewison J's decision, the Court of Appeal has conferred on operators the right to cross obstacles without payment for the underlying right to install and maintain apparatus. I would strongly suggest that the Code needs to be reviewed to correct this apparent irregularity that owners of 'Linear Obstacles' can no longer benefit financially from having telecoms apparatus crossing them in the same way as owners of general land benefit. Both groups of owners should receive a fair and reasonable consideration for the rights granted to telecoms operators, as hitherto has been the case as evidenced by the large number of existing agreements that have been freely entered by those parties since the Code came into existence.

I trust that these comments are received in the same constructive manner in which they have been suggested and the opportunity is taken to carry out a full review and overhaul of the regulatory and legislative framework to the telecommunications industry, particularly to the Code/Telecoms Code/Electronic Communications Code or whatever Parliament ended up calling in under statute!

Please do not hesitate to contact me if you feel I can be of further assistance in the process of your ongoing Review.



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