IN THE COUNTY COURT AT CAMBRIDGE

Case No: B00CB071

Hearing Room No. 5

197 East Road

Cambridge

Cambridgeshire

CB1 1BA

Tuesday, 28th April 2015

Before:

DEPUTY DISTRICT JUDGE DACK

B E T W E E N:

CREST NICHOLSON (OPERATIONS) LIMITED

and

ARQIVA SERVICES LIMITED & ORS.

Transcript from a recording by Ubiqus

61 Southwark Street, London SE1 0HL

Tel: 020 7269 0370

MR W CLARK appeared on behalf of the Claimant

MS TOZER appeared on behalf of Arqiva Services Limited, Arqiva Communications Limited, and Arqiva Limited

MR N TAGGART appeared on behalf of EE Limited and Hutchinson 3G Limited

NO APPEARANCE by or on behalf of Vodafone Limited

JUDGMENT

(Approved)

DDJ DACK:

1. This is regarding an application by the Defendant to strike out from the particulars of claim references to notices served pursuant to paragraph 21 of the Electronic Communications code on the ground that such notices have been served at a time when service is not permitted. The Claimant has indicated that on proper construction of paragraph 21 it should be construed to the effect that the notices served were valid because at the time of service a notice under section 25 Landlord and Tenant Act 1954 had been served and that is an enactment that allows a paragraph 21 notice to be validly served. He says that paragraph two of the schedule indicates that alteration includes removal, which is correct. It is correct, therefore, and everybody accepts, that a paragraph 20 notice can be served at any time.
2. I have to construe the wording of 21(1) which says:

‘Where any person is for the time being entitled to require the removal of any of the operator’s electronic communications apparatus from any land (whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub‑paragraph (12) below, in accordance with the following provisions’.

I construe that first of all it is necessary for the entitlement to require removal of the communication apparatus to be current, and it has been argued on behalf of the claimant that this is the case. It is supported largely by the text in the book of which learned counsel for the claimant is an author, and that is not the be all and end all, but I have to say that I can use it in support of any findings, that it has to be a current entitlement: ‘For the time being entitled to require the removal of any equipment’.

1. In this case there is not a present right to remove that apparatus because it is there under the terms of a lease. The lease will not determine at least until a date in October, 11 October I believe, but a date in October this year by effluxion of time, subject of course to any application that is dealt with by the court for renewal of the lease, or the determination of the landlord’s notice under Section 25 to determine the lease, where that can be extended by another three months plus 21 days. I would say that generally where there is a lease one cannot serve the Section 21 notice until after the lease expires for whatever reason. That could be in October; it could be three months and 21 days after that.
2. As far as being “under any enactment”, I do not accept that the mere issue of a notice under Section 25 of the 1954 Act is something that of necessity gives a right to serve this notice, and I think that is accepted in the textbook of which Mr Clark is one of the authors.
3. “Any other reason”. Well, it cannot just be something plucked out of the air. It has to be something that is relevant, it has to be something connected with this and, frankly, no other reason really has been put forward, that I can see, that alters that general rule that the person has to be, ‘For the time being entitled to require the removal’, and it is not the case. Therefore, I cannot accept that that Section 21 notice is valid.
4. Therefore, in those circumstances, I must strike out the Section 21 notice provision. It has been stated that I should not do so because well, this is “developing litigation”, etc., etc. I do not accept that. This is a factual issue on very simple, straightforward matters as to where we are at the moment. There is nothing magic about it. There is nothing particularly complicated apart from the wording of the statutory provisions. When one looks at those words and breaks them down in the proper context using the ordinary, everyday language that is used there, and as a proper construction there is no need to do anything else, and looking at the words particularly of Section 21(1), and looking at sub‑paragraph (12), which I do not think helps us particularly at all here, the fact is that these are not notices that should or could at the moment be properly served.
5. In those circumstances, I am going to strike that provision out of the particulars of claim.

MR CLARK: Thank you for that, sir. May I ask in relation to that may I have leave to appeal in relation to that issue?

JUDGE DACK: No, I am not going to grant that because I believe that I have properly construed the wording of Section 21(1) in accordance with the rules of construction. There is, therefore, very little chance of any appeal succeeding for that reason. I cannot think of any other reason why I should grant leave to appeal today. I will complete the form necessary for that.

MR CLARK: Thank you, sir.

JUDGE DACK: And I will let you have that before I go home tonight. Let us just have a look and see what we are going to write in the order.

MR CLARK: Yes. Well, then I think‑

MR TAGGART: In my skeleton I think I have noted the paragraphs that need‑

MS TOZER: Paragraphs, they are in my draft of the directions order as well.

MR CLARK: Well, I think it would just follow, sir, from your... I think it is 31(2), is it, 31(3)?

JUDGE DACK: Right.

MR TAGGART: And paragraph 1(3) of the prayer.

MS TOZER: 28 and 29.

MR CLARK: 31(2), 31(3).

JUDGE DACK: This is, sorry, the...?

MR CLARK: Of the particulars.

MS TOZER: The particulars of claim.

JUDGE DACK: Ah, right. Yes, indeed.

MR CLARK: There’s probably part of the prayer. I mean, I’m sure there is no difficulty in sorting out what the paragraphs are.

JUDGE DACK: Right. ‘There shall be struck out from the claimant’s particulars of claim...’

MR CLARK: I think as Ms Tozer says, it’s 28 to 29, 31.2.

JUDGE DACK: Let us just have a look. Yes, indeed. ‘All references to paragraph’‑

MR CLARK: To paragraph 21.

JUDGE DACK: ‑‘21 notices and counter‑notices contained in paragraphs 28 and 29 thereof’ and‑

MS TOZER: And 31.2.

JUDGE DACK: ‘And 31.2’.

MR CLARK: And 31.3.

JUDGE DACK: Right. Oh, well, let us take that ‘and’ out. ‘28, 29, 31.2, 31.3’.

MS TOZER: And paragraph 1(3) of the prayer.

JUDGE DACK: Paragraph 1(3) of the prayer. Right. ‘There shall be struck out from the claimant’s particulars of claim all references to paragraph 21 notices and counter‑notices contained in paragraphs 28, 29, 31.2, 31.3 and paragraph 1(3) of the prayer’. Right.

MR CLARK: Thank you, sir.

JUDGE DACK: Thank you.

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