UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – access to buildings - whether Code rights include rights of access to assess the suitability of a building for the installation of electronic communications apparatus – whether interim rights to be granted – paragraphs 3, 20, 21 and 26, Electronic Communication Code – Schedule 3A, Communications Act 2003

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

THE UNIVERSITY OF LONDON

Respondent

Re: Lillian Penson Hall,
Talbot Square,
London
W2 1TT

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL
on
3, 9 October 2018

Oliver Radley-Gardner instructed by DAC Beachcroft LLP, for the claimant
Wayne Clark, instructed by Fladgate LLP, for the respondent

The following cases are referred to in this decision:

Attorney-General v Great Eastern Railway Co (1880) 5 App Cas 473

Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436

British Waterways Board v Severn Trent Water Ltd [2002] Ch 25

Canada Trust v Stolzenberg (No.2) [1998] 1 WLR 547

McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC [1992] 2 AC 48

R v Chief Constable of South Yorkshire Police ex.p. LS and Marper [2004] 1 WLR 2196

R v G [2004] 1 AC 1034

R (Sainsbury's Supermarkets Limited) v Wolverhampton CC [2011] 1 AC 437

R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd [2001] 2 AC 439

St Leger-Davey v First Secretary of State [2004] EWCA Civ 1612

Introduction

1. Dame Lillian Penson was a historian of late Victorian England and the biographer of Prime Minister, Lord Salisbury. In 1948 she was elected Vice-Chancellor of the University of London, the first woman chancellor of a University in Britain or the Commonwealth. After her death in 1963 the University named one of its Intercollegiate halls after her, the Lillian Penson Hall in Talbot Square, Paddington. It is situated opposite Paddington station and provides accommodation for 300 students.

2. The claimant, Cornerstone Telecommunications Infrastructure Ltd, believes that Lillian Penson Hall ("the Building") is likely to be the most suitable venue in the locality of Paddington station to provide a new site for electronic communications apparatus. A new site is required following the loss in May this year of a site on the roof of a building in Eastbourne Terrace which is to be demolished and redeveloped.

3. The claimant would like to have access to the roof of the Building to carry out a survey and other non-intrusive investigations to establish whether the site is as suitable as its desk top assessments suggest. The need for access is a relatively modest one, and it is likely to be required on three or four occasions in one twenty-eight day period for visits of about two hours by members of the claimant's staff.

4. The University of London is the owner of the Building and the respondent to this reference. It does not want electronic communications apparatus on its roof and it has refused the claimant's requests for access.

5. The Tribunal is now asked to impose an agreement for access on the parties under the new Electronic Communications Code ("the Code") which came into force on 28 December 2017. At this stage the claimant seeks no permanent rights to install apparatus, but in due course, if the Building is found to be suitable and the University refuses to enter into an appropriate agreement, the claimant is likely to make a further application in new proceedings for the imposition of an agreement.

6. This will be the first substantive decision given by the Tribunal in a reference under the Code. The reference was issued on 16 July 2018 and came before the Tribunal for hearing on 3 and 9 October.

7. The reference raises an important question of principle. Does the Tribunal have power under the Code to impose an agreement allowing access to a building for the purpose of determining whether it is a suitable site for the installation of electronic communications apparatus?

8. At the hearing of the reference the claimant was represented by Mr Oliver Radley-Gardner and the respondent by Mr Wayne Clark. Both are contributors to a recently published book, *The Electronic Communications Code and Property Law*, and I am

greatly indebted to them (and to their book) for their assistance in understanding the complex provisions of the Code.

The Electronic Communications Code

9. The Code came into force on 28 December 2017 and replaces the original telecommunications code (often now referred to as "the old Code") in section 10 and Schedule 2 of the Telecommunications Act 1984 ("the 1984 Act") as amended by section 106 and Schedule 3 of the Communications Act 2003 ("the 2003 Act"). The new Code is found in section 106 and Schedule 3A of the 2003 Act, which were inserted by section 4 and Schedule 1 of the Digital Economy Act 2017 ("the 2017 Act"). The Code sets out the basis on which electronic communications operators may exercise rights, known as "Code rights", to deploy and maintain electronic communications apparatus on, over and under land.

10. The Code itself is divided into 17 Parts and 108 paragraphs, with additional transitional provisions found in Schedule 2 of the 2017 Act. In what follows, references to Parts and paragraphs are to those of the new Code.

11. The Electronic Communications Code (Jurisdiction) Regulations 2017 confer jurisdiction on the Upper Tribunal in disputes in England and Wales concerning Code rights.

12. An overview of the relevant parts of the Code is necessary to put the issues in context.

13. In the language of the Code the claimant is an "operator", being a person to whom the Code applies by reason of a direction under section 106 of the 2003 Act (paragraph 2(a)).

14. The expression "Code rights" is defined in paragraph 3. The rights are expressed in wide terms to which I will return in greater detail shortly.

15. A Code right may only be exercised for one of the statutory purposes specified in paragraph 4, namely, for providing an operator's network, or for providing an infrastructure system (both "network" and "infrastructure system" are defined expressions, but it is not necessary to focus on them in this reference).

16. Code rights are conferred under Part 2. By paragraph 9:

> "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

17. Paragraph 9 might be thought to indicate that Code rights may only come into existence by agreement between willing parties, but that is not the case. Part 4 contains detailed provisions enabling the Tribunal to impose agreements by which the unwilling may be made subject to Code rights.

18. Paragraph 20 describes the circumstances in which the Tribunal may impose an agreement for Code rights. An operator which requires a person to agree to confer Code rights must first give that person a notice setting out the rights and the terms of the agreement the operator seeks and inviting the person's agreement (paragraph 20(2)). If within 28 days the recipient of such a notice (referred to as a "relevant person") does not agree to confer the rights, or if they give notice that they refuse to do so, the operator may apply to the Tribunal for an order under paragraph 20 imposing an agreement between the operator and the relevant person which confers the Code rights on the operator (paragraph 20(3)-(4)).

19. The test to be applied by the Tribunal in deciding whether to make an order imposing an agreement under paragraph 20 is contained in paragraph 21 which provides that two conditions must first be satisfied, as follows:

> "21. What is the test to be applied by the court?
>
> (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."

20. The first condition recognises that there may be certain circumstances in which it is not possible adequately to compensate by a payment of money for prejudice caused by interference with a person's land. In such a case no agreement conferring Code rights may be imposed.

21. The second condition, as amplified by sub-paragraph (4), requires that any prejudice caused to the relevant person must be outweighed by the public interest in the provision of access to "a choice of high quality electronic communications services". In formulating the second condition Parliament recognised the importance, in modern life, of what Mr Radley-Gardner whimsically referred to as "the human right of mobile telephony".

22. An agreement imposed by an order under paragraph 20 takes effect for all purposes of the Code as an agreement under Part 2 between the operator and the relevant person (paragraph 22).

23. The terms which may be imposed by the Tribunal are specified in paragraph 23(1) as being the Code rights sought by the operator "with such modifications as the Tribunal thinks appropriate".

24. Certain minimum provisions are mandatory: the terms must include terms for the payment of consideration by the operator to the relevant person (para. 23(3)), as well as such terms as the Tribunal thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the Code rights to those who occupy the land, own interests in it, or are from time to time on the land, whether or not they are party to the agreement (paragraph 23(5)-(6)). The terms must also specify for how long the Code rights are exercisable (paragraph 23(7)).

25. Other terms are discretionary. The Tribunal must determine whether the agreement should include a term permitting termination, and if so, in what circumstances, or a term enabling the occupier of the land to require the operator to reposition or temporarily to remove the equipment (paragraph 23(8)). Given the power of the Tribunal to require such modifications as it thinks appropriate, there is clearly potential for different terms and conditions to be introduced to meet particular circumstances.

26. Detailed provisions are contained in paragraph 24 for the determination of consideration for a Code agreement entered into or imposed by the Tribunal. In this reference the parties have agreed to postpone the issue of consideration until after a decision has been made about the scope of the Tribunal's powers. The quantum of the financial consideration which may be imposed does have a bearing on the interpretation of the Code, so it is relevant to mention the relevant provisions in outline.

27. In consideration for an agreement imposed by the Tribunal the operator is obliged to pay to the relevant person an amount representing the market value of their agreement to confer or be bound by the Code right (paragraph 24(1)). However, although that market value is to be assessed on a conventional willing buyer/ willing seller basis, the assessment is subject to certain assumptions. The detailed effect of those assumptions will have to be considered by the Tribunal in an appropriate case, but it is immediately apparent that they adopt principles similar to those which apply in other forms of compulsory acquisition of land or rights over land in the public interest. In a foreword to the Departmental paper publishing the government's proposals for the Code it was said by the Minister of State, Mr Ed Vaizey, that the new regime would provide for a "no scheme" basis of valuation". The valuation provisions therefore require that it be assumed that the rights to be granted do not relate to the provision or use of an electronic communications network, and that the site provider has no monopoly of suitable sites. Commentators have suggested that, because of these assumptions, the consideration payable under the Code may be quite modest. This would be a significant

change from the valuation criteria applied under the old Code in which the true market value of the rights conferred was payable.

28. In addition to consideration for the rights conferred, paragraph 25 allows the Tribunal to direct the payment of compensation by the operator to the relevant person for any loss or damage that has been or will be sustained by that person as a result of the exercise of the Code rights. Detailed compensation provisions are contained in Part 14, and particularly paragraphs 84 and 85, which it is not necessary to refer to at this stage.

29. The final provisions of Part 4 of the Code relate to "interim code rights" (paragraph 26) and "temporary code rights" (paragraph 27). As the meaning and effect of paragraph 26 is in issue in this reference, and as paragraph 27 is an aid to its construction, I have set them both out in full in an appendix to this decision.

30. Temporary rights and interim rights are available in quite different circumstances.

31. Temporary Code rights are available under paragraph 27 only in circumstances which do not apply in this case. The operator must have given a notice under paragraph 20 seeking new permanent Code rights over land of the recipient; the notice must also have required an agreement for Code rights on a temporary basis in relation to apparatus which is already installed on that land; finally, the recipient of the notice must have a right to require the removal of the apparatus under paragraphs 37 or 40. The objective of paragraph 27, as explained in sub-paragraph (3), is that the service provided by an operator's network should be maintained and the apparatus kept in repair until proceedings under paragraph 20, or any proceedings for removal under paragraph 40, have been determined. Where the conditions are met the operator may apply to the Tribunal under paragraph 27(2) for an agreement to be imposed conferring temporary Code rights which will be granted only if the Tribunal is satisfied that they are necessary for securing the objective in sub-paragraph (3).

32. The rights sought in this case are not temporary rights, but are said to be interim Code rights for which provision is made by paragraph 26. Code rights may be imposed by the Tribunal on an interim basis for a specified period or until the occurrence of a specified event (paragraph 26(2)).

33. At this stage it is necessary to draw attention to three features of paragraph 26. The first is that interim Code rights may only exist as the result of an agreement imposed by order of the Tribunal (although a true agreement by the parties is one of the grounds on which the Tribunal may make such an order: see paragraph 26(3)(a)). This is presumably because interim rights do not carry some of the benefits for operators which the Code is intended to confer in the public interest and the sanction of the Tribunal is considered a necessary safeguard to abuse.

34. Secondly, the paragraph 26 procedure enables interim rights to be obtained without the operator being required to prove that the conditions in paragraph 21 for the

imposition of a full Code agreement are met. That is because under paragraph 26(3)(b) the operator need only satisfy the Tribunal that it has "a good arguable case" that the paragraph 21 test is met.

35. Finally, paragraphs 30 and 31 are not amongst the provisions listed in paragraph 26(4) which apply to agreements conferring interim code rights. There is no statutory continuation of an agreement for interim rights, nor does the minimum period of notice of termination of 18 months apply. The latter point was not accepted by Mr Clark, but it appears to me to be the clear effect of an agreement of fixed duration which does not enjoy statutory continuation that it will terminate without notice in accordance with its terms.

36. Part 5 deals with the termination and modification of agreements, and by paragraph 30, gives effect to the principle that agreements conferring Code rights have the benefit of statutory continuation. Unless the operator agrees, Code rights may only be terminated by implementing the termination provisions in Part 5 and obtaining an order of the Tribunal under Part 6.

37. The process of terminating Code rights by notice is not speedy. In particular, paragraph 31(3)(a) requires that 18 months' notice of termination be given.

Code rights

38. Before turning to Code rights themselves, it is relevant first to refer to a power of entry conferred on certain persons by paragraph 6 of Schedule 4 to the 2003 Act. This power predates the new Code, having been included in section 37 of the 1984 Act from its inception. Like section 37, Schedule 4 contains provisions giving power to the Secretary of State to authorise the compulsory purchase of land by an operator for the purpose of its network. It is relied on by Mr Clark as an important part of the statutory context in which the Code itself must be construed. It provides:

> "6(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. …."

39. Sub-paragraphs 6(3)-(4) provide that certain supplementary provisions of the Town and Country Planning Act 1990 apply in modified form to the power of entry. These provisions relate to the giving of at least 28 days' notice of entry in the case of occupied land and other practical matters, as well as making it an offence to obstruct

entry. Sub-paragraphs 6(5)-(7) provide for compensation for damage or disturbance caused by entry under the power, but there is no provision for consideration to be payable for the entry itself.

40. It should be noted that, while the power of entry provided by paragraph 6 of Schedule 4 to the 2003 Act may only be exercised by someone who has been duly authorised by the Secretary of State, there is no requirement for an operator to obtain the agreement of the land owner, or of any court or tribunal, before exercising the power.

41. Code rights themselves are described in paragraph 3, as follows:

> "3. The code rights
>
> For the purposes of this code a "code right", in relation to an operator and any land, is 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."

42. The terms of paragraphs 3(d) and 3(e) replicate in more comprehensive language the effect of paragraph 2(1)(a) of the old Code in Schedule 2 of the 1984 Act, as amended by the 2003 Act. Paragraph 2(1)(a) of the old Code provided a Code right:

> "to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; …"

Paragraph 2(1)(b) of the old Code permitted apparatus to be kept installed on, under or over land, while paragraph 2(1)(c) provided a right of entry to inspect apparatus previously installed (now covered by paragraph 3(f) of the new Code where again it is expressed in more comprehensive terms than before). The new Code also provides an express right to "upgrade" which might, arguably, have been absent from the old Code.

43. The Law Commission in their Consultation Paper, having referred to para 2(1) of the old Code, said (para 3.10):

> "The focus of these rights is on physical works and the maintenance of electronic communications apparatus on land for the provision of the Code Operator's network."

Aids to the interpretation of the Code

44. Before considering the facts and rival arguments in this case I will first comment on some of the material to which I was referred and which is available to assist in the task of construing the Code. A helpful account of the European and domestic legislative background is provided in chapters 2 and 4 of Mr Clark and Mr Radley-Gardner's book.

45. It is not necessary to dwell on the detail of the relevant EU directives other than to note their objective, which forms part of the policy background to the Code. In general terms that objective is to harmonise the digital market across the EU, to encourage competition within that market, and to minimise obstacles to the creation of digital communications networks. The latter concern can be illustrated by reference to the following recitals:

> "Permits issued to undertakings providing electronic communications networks and services allowing them to gain access to public or private property are essential factors for the establishment of electronic communications networks or new network elements. Unnecessary complexity and delay in the procedures for granting rights of way may therefore represent important obstacles to the development of competition. Consequently the acquisition of rights of way by authorised undertakings should be simplified."
>
> (recital (42), Better Regulation Directive 2009/140/EC)

> "It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. …"
>
> (recital (22), Framework Directive 2002/21/EC)

46. A review of the operation of the old Code was commissioned by the Government in 2011 which led first to the publication of Law Commission Consultation Paper No.205 in June 2012 and then to Law Commission Report No.336 in February 2013. The Law Commission recommended the preparation of an entirely new code including a large number of reforms of the arrangements under the old Code. Significantly, however, these did not include a change to the principle under the old Code that the site provider should receive a true market value for the rights conferred on the operator.

47. The Law Commission did not prepare a draft Bill of its own but in January 2015 the Government announced its intention to legislate in line with its recommendations. This announcement attracted significant resistance from representatives of both operators and site providers and led to the withdrawal of the Government's proposals.

48. In 2015 the Government consulted extensively on new proposals. In May 2016 a Digital Economy Bill including a new code was included in the Queen's Speech. It was broadly in line with the Law Commission's original proposals but differed in at least one significant respect, in that for the first time the Government intended that the basis on which Code rights would be valued would change from the previous true market value approach to a new "no scheme" approach.

49. Law Commission papers and reports (with or without a draft bill) are a legitimate external aid to statutory interpretation if they form part of the relevant background and legislative history. Their utility, and the use of other external aids (i.e. material not contained within the statute itself) was discussed by Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC 439 at 397C to 398F. He described them as "a useful tool" in identifying the purpose of the legislation but warned that a balance must be struck and that courts should be "slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity".

50. There may be an additional reason for caution in the use of Law Commission material as an aid to the interpretation of the Code. The Law Commission anticipated that the owners of suitable sites would willingly confer Code rights on operators (and would compete for opportunities to host apparatus) in return for consideration measured by the true market value of the rights. As enacted however the Code does not provide for the economic value of Code rights to be shared in the way originally intended; site owners are to be compensated only for the value of the rooftop or field margin in a "no scheme" or "no network" world, a value which is expected to be nominal. It may therefore be unsafe to place weight on statements made by the Law Commission about the thinking underlying its proposals, because those proposals differed in at least this fundamental respect from the principles on which the Code as enacted is based.

51. As Mr Clark submitted (citing in support *R v G* [2004] 1 AC 1034 at [46] *per* Lord Steyn, and *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 *per* Viscount Simmonds) in enacting the Code Parliament must be presumed to have been aware of the relevant pre-existing law. The provisions of the old Code and those of the 2003 Act in its original form therefore provide part of the context in which paragraph 3 of the Code ought to be construed.

The relevant facts

52. The claimant is a joint venture company formed by Telefonica UK Ltd and Vodafone Ltd. It does not itself provide an electronic communications network, but installs and maintains apparatus which it makes available to its two shareholders. This is a permitted statutory purpose under the Code.

53. The claimant's first approach to the University expressing interest in the Building was by an agent who wrote on 9 January 2017. That letter was not addressed to any individual or department and may never have come to the attention of any member of the University's staff with relevant responsibilities. In any event, it received no reply.

54. There may have been a second request in March 2018 but, if so, it too went astray; a further approach was made on 10 April 2018 by newly instructed agents, Dalby Sinclair. Their letter was in some respects contradictory and confused, but indicated that agreement was sought for three visits to inspect and survey the roof of the Building in an unspecified four-week period. It was immediately passed by the University to its agent, Mr Goodacre of Hub Telecoms Consultancy Ltd. In subsequent exchanges Mr Goodacre made clear his own view that the Code did not provide a right for an operator to have access to buildings against the wishes of the building owner.

55. The agents having reached an impasse, the claimant turned to its solicitors. On 17 May 2018 DAC Beachcroft gave notice to the respondent under paragraph 26 of the Code seeking interim Code rights. As an invitation to the University to enter into an agreement the letter of 17 May was rather a rough wooing. Its tone was imperative and threatening and it described the proposed terms of the agreement as "non-negotiable". It was a poor move in what should be a consensual process. It also left unclear exactly what rights were being sought: both the covering letter and the notice itself requested that the University enter into an agreement conferring all Code rights on the claimant for a period of 18 months, but elsewhere the letter stated that the rights were required to provide access for survey purposes only, while reserving the right to seek additional rights should the Building prove suitable. A detailed draft agreement was also provided.

56. The lack of clarity in the notice of 17 May gave rise to much unproductive correspondence and unnecessary debate in witness statements, before eventually a second notice was served on 23 August restricting the period for which rights were

sought to four weeks. Fortunately, no point is now taken about the sufficiency of the original notice.

57. No agreement having been reached, on 16 July the claimant issued its notice of reference inviting the Tribunal to impose an agreement for interim code rights exercisable for 28 days from the date of the agreement, but otherwise in the form requested on 17 May. Amongst other provisions the draft agreement required the University to keep the Building in a sufficient state of repair and condition to enable the rights to be exercised safely. The claimant proposed that the consideration for this agreement should be a single payment of £50.

The issues

58. The parties agreed that the issues of consideration, compensation and the detailed terms of any agreement should be left over to be considered after the issue of principle had been determined. That consensus enables me to pass over the evidence of Mr Ian Thornton-Kemsley, a Chartered Surveyor called on behalf of the University, which went mainly to the issue of terms.

59. The issues to be determined at this stage are therefore:

1. Whether the Tribunal has jurisdiction to impose an agreement under paragraph 26 providing only for a right of access to undertake a survey of the roof of the Building. This requires consideration of whether a right of access to undertake a survey is a Code right at all.

2. Whether the claimant is entitled to seek an interim Code right under paragraph 26 without at the same time seeking the same or any permanent Code right under paragraph 20.

3. If the Tribunal has jurisdiction to impose an agreement as requested, whether the claimant has shown a good arguable case that the conditions in paragraph 21 are satisfied.

Issue 1: Is the right sought by the claimant a Code right?

60. On behalf of the claimant Mr Radley-Gardner the answer to the first issue was clearly "yes". He put his case in two ways.

61. First, he submitted that a right to undertake a site "MSV" (a multi-skilled visit – the industry jargon for the visits by different professionals to establish the suitability of a site for the installation of equipment) was included in the menu of rights comprised in paragraph 3. In particular, paragraph 3(d) confers a Code right in broad terms to carry out any works on the land for or in connection with the installation of electronic communications apparatus. If an agreement was entered into conferring on an operator the right to install equipment on a long term basis it could hardly be suggested that the operator would be unable to undertake the surveys required as a

prelude to the installation itself. That was because the necessary preparatory work was part and parcel of the installation of the equipment and fell either within paragraph 3(a) or 3(d).

62. Mr Radley-Gardner submitted that there was no need for the claimant to seek all of the Code rights it might eventually require by a single request. It was a matter of common sense that it could properly ask only for the limited rights it required at the outset, before it was clear that the site was suitable. The Tribunal would have power to impose an agreement for permanent Code rights, contingent on the site being shown to be suitable by a proper survey. If it could impose an agreement for comprehensive rights which included the right to an MSV, it would be absurd if it had no power to impose an agreement providing for a preparatory MSV alone.

63. Alternatively, Mr Radley-Gardner argued that if the right to conduct an MSV was not included as part of the Code rights listed in paragraph 3, it was nonetheless implicit. A proper survey was essential before it could be confirmed that a site was suitable. The fact that a site survey may be required in any case was recognized by OFCOM in its Code of Practice (at paragraphs 1.17 to 1.19) and the necessity for such a survey in this case was acknowledged by Mr Goodacre, the University's telecoms agent. It was a well-established canon of statutory interpretation that an express statutory power carries with it all of the implied ancillary powers that are needed: see *Attorney General v Great Eastern Rwy Co* (1880) 5 App Cas 473.

64. On behalf of the University Mr Clark submitted that issue 1 should be answered in the negative and that the Tribunal had no power to impose the agreement sought in this reference.

65. Mr Clark began by submitting that a strict construction of statutes expropriating private property was recognised by the Supreme Court in *R (Sainsbury's Supermarkets Limited) v Wolverhampton CC* [2011] 1 AC 437, 38]. The sole right provided by the 2003 Act to inspect and undertake exploratory investigation for the purposes of determining the suitability of a site for network purposes is that contained in paragraph 6 of Schedule 4 to the 2003 Act (see paragraph 38 above). That power was expressly not available in the case of land covered by buildings. An additional right of inspection extending to buildings could not be shoehorned into paragraph 3(d), which was concerned only with physical works. The use of the term "works" connoted an operation involving some form of intrusive physical work to the land to facilitate the installation of electronic communications apparatus. The Claimant has made it clear that no intrusive work was proposed at this stage and all that is claimed is a right of access to inspect and record what is seen. As a matter of ordinary English, that does not amount to "works". The right sought was not a Code right at all.

An express right?

66. Mr Radley-Gardner is clearly correct that the list of Code rights in paragraph 3 is a menu rather than a description of a single right which must either be acquired in its entirety or not at all. The paragraph is headed "The code rights" and provides that

"for the purposes of this code a "code right", in relation to an operator and any land, is a right for the statutory purposes" to do the things then described. Each of sub-paragraphs (a) to (i) describes a particular Code right or sometimes a variety of related Code rights. There is no reason in principle or in the statutory language why an agreement for Code rights must confer them all. Mr Clark did not argue to the contrary.

67. It is also true that paragraph 3(d), on which Mr Radley-Gardner principally relies, is expressed in broad terms referring to carrying out "any works" on the land "for or in connection with" the installation of electronic communications apparatus. In other places a more exhaustive torrential style of drafting has been employed to convey the intended meaning. Thus, the right to install is distinguished from the right to keep installed in sub-paragraphs (a) and (b) while in (d) it is considered appropriate to list maintenance and repair, and adjustment and alteration each as separate activities.

68. A desire in places to describe Code rights in comprehensive terms might be said to militate against filling suggested gaps by giving a generous interpretation to more general words. But the inclusion of general words, particularly in paragraph (d), was clearly intended to cover a range of activities which have not been individually itemised. If Parliament believed that it had foreseen and described every activity which might be required on the land of another in order to provide an electronic communications network there would have been no need for it to employ the wide language found in paragraph (d). It would not be legitimate to cut down the apparent breadth of that language or to restrict its natural and contextual meaning simply because elsewhere the drafting is more precisely focussed.

69. Mr Clark's strongest argument against construing paragraphs 3(a) and 3(d) as sufficient to confer a right of access to undertake surveys is the existence of express rights of access for similar purposes. Paragraph 6 of Schedule 4 to the 1984 Act is the most proximate to the Code rights themselves, as it is to be found in the same statute, but he referred also to the Communications (Access to Infrastructure) Regulations 2016, paragraph 5 of which provides for requests by a network provider to undertake on-site surveys of elements of an infrastructure operator's physical infrastructure. This provided a further example in the field of telecommunications legislation of rights of access being conferred in explicit terms, rather than being left to be inferred from less precise language.

70. As Mr Clark demonstrated, it cannot be suggested that the Code was drafted in ignorance of the normal requirement for preliminary surveys or of the potential for them to cause delays under the old Code. He referred me to the consultation on the Law Commission's proposals in which one consultee, Cable & Wireless, had drawn attention to the need for site surveys and to the difficulty of obtaining prompt access for them without operators being held to ransom. The consultee suggested that the right to survey was implicit in the old Code rights, but requested that a "standalone right" be provided for. Another consultee, the Mobile Operators Association also suggested that the old Code was deficient in failing to provide such a right.

71. Of course, the availability of other rights of access exercisable in different circumstances does not exclude the possibility that Code rights were intended to permit access for preliminary surveys. Neither paragraph 6 of Schedule 4, which concerns compulsory purchase and is confined to land without buildings, nor the 2016 Regulations, which deal with land on which another operator has apparatus, would cover the ordinary case in which an operator wishes to undertake a survey of a new rooftop site. Nor is it significant that the detailed regimes of notice and compensation found in other provisions is not replicated in the Code rights; the Tribunal has power to impose equivalent conditions if it is appropriate to do so. I therefore do not consider that the existence of alternative rights applicable in different circumstances is a bar to the interpretation of Code rights for which the claimant contends, but it is a relevant factor which must be taken into account when considering the meaning of paragraph 3.

72. Focussing then on language, it seems to me that the right conferred by paragraph 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 paragraph (a). The inclusion of a specific right, at paragraph (f), to enter land to inspect, maintain etc, apparatus already on that land does not make it any less clear that paragraph (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 paragraph 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.

74. No electronic communications apparatus could be installed without some preparatory work, including a "multi skilled visit", being undertaken. Mr Clark suggested that the evidence did not support the conclusion that a preliminary survey was a necessary prelude to installation of equipment in every case, but that seems to be to me to be the effect of Mr Goodacre's evidence on behalf of the University. It stands to reason that an appreciation of what else might occupy a space and some understanding of the construction of a building would both be required before a means of fixing antennae or other equipment to it could be designed. In reality, the cost of commissioning an installation would not be incurred without first determining whether the required coverage could be achieved. It follows in my judgment 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 paragraph 3(a).

75. As for the right to carry out "any works in connection with the installation" under paragraph 3(d), I agree with Mr Clark that the word "works" is not one which would readily be understood to include carrying out a non-intrusive survey. It more naturally suggests the provision of infrastructure by physical operations, rather than measuring and recording the characteristics of a site, and it was said by Mr Clark to be used in that sense elsewhere in the Code (see, for example, the provisions concerning street work rights in paragraph 59). Mr Clark also pointed to the Law Commission's observation at paragraph 3.10 of the Consultation Paper that the right "to execute any works … for or in connection with" the installation or maintenance of apparatus under the old Code focused "on physical works". I agree that is how one would usually understand "works".

76. On the other hand, the undertaking of "works" in that sense necessarily requires preparatory site investigations and surveys, and I see no reasons why a right to undertake the investigations required to design works should not be included in the right to undertake works. "Works" is a word of imprecise or general meaning, as is recognized by paragraph 59(2) which identifies particular types of works as being included in the ancillary right to undertake street works. I can see no reason to confine the meaning of so general a word in such a way as to exclude the undertaking of surveys as steps preparatory to installation. Nor do I think it is necessary to define a precise boundary between the right to install under paragraph 3(a) and the right to undertake works in connection with installation under paragraph 3(d). "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.

77. An important consideration in support of giving paragraphs 3(a) and 3(d) a wide ambit is the need to avoid a situation in which the whole edifice of Code rights is liable to be undermined. 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.

78. Mr Clark acknowledged the force of this argument and sought to meet it. As part of his submission that the disputed right was not conferred by paragraphs 3(a) or 3(d) Mr Clark argued that there were two routes by which an operator could secure access for preliminary surveys.

79. The first was said to be under paragraph 23(1), which permits an order under paragraph 20 to "impose an agreement which gives effect to the Code rights sought by the operator with such modifications as the court thinks appropriate." The power to "give effect to" Code rights enabled the Tribunal to confer additional rights which were not themselves Code rights, where it was appropriate to do so. I do not accept that is the effect of paragraph 23(1), which seems to me to be concerned with modifying the rights sought by the operator rather than augmenting the list of Code rights by a power to impose non-Code rights. If Mr Clark's construction were correct it would apply equally to an order under paragraph 26 (for interim rights) since paragraph 23 applies in full to such an order (see paragraph 26(4)(c)). It would only avail him if the power to confer an interim right of survey under paragraphs 23(1) and 26(4) could not exist independently of a decision to grant another Code right. I can see no reason to interpret the Code in general and paragraph 23(1) in particular in such an inflexible way.

80. I prefer instead Mr Radley-Gardner's submission that, if an operator to whom comprehensive Code rights had been granted could undertake preliminary surveys there is no reason to prevent the operator from limiting the right it seeks to no more than a right of entry to undertake such surveys.

81. The second route by which Mr Clark suggested a right to undertake preliminary survey could be obtained by an operator was under the Tribunal's own rules or under CPR 25 of the Civil Procedure Rules if an application was proceeding before a court. In either case the court or Tribunal could direct that an operator seeking full Code rights should be allowed access to inspect and survey to the extent required for the purpose of the proceedings. I do not accept that that is a coherent approach to the interpretation of the Code. It assumes that the Code is defective, and that the defect can be rectified by a procedural work round. That assumption is not one which should lightly be made, and the much stronger inference is that the Code itself contains sufficient powers to render it effective.

82. I would add finally on this aspect of the matter that I accept that the legitimate exercise of a Code right to undertake preliminary surveys does not depend on the outcome of the survey. An operator granted comprehensive rights over a site who concluded, after preliminary surveys, that the site was not suitable for the installation of apparatus would still have been exercising Code rights when carrying out the investigations which led to the rejection of the site. I do not accept that Code rights may only be exercised over a site which is known to be suitable, and there seems to me to be no reason why they may not be conferred and exercised contingently on the outcome of a preliminary survey. No purpose would be served by construing the Code in a more restrictive way.

83. My conclusion is, therefore, that the right to undertake preliminary surveys or "MSVs" is a Code right within paragraph 3(a) or, failing that, paragraph 3(d).

An implied right?

84. There is a considerable overlap between Mr Radley-Gardner's primary submission, which I have accepted, and his fallback position that the right to enter to undertake a survey must be implied into the Code in order to make it effective if it is not already present as a Code right.

85. Mr Clark countered this submission in a number of different ways.

86. He first said that a right to inspect in order to determine whether a site was suitable for the installation of apparatus could not be regarded as ancillary to a right to install apparatus; it was too remote and was not conducive or incidental to the right of installation itself. Mr Clark referred to *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC* [1992] 2 AC 48, but as I have already explained why I consider that all steps preparatory to installation are encompassed in the right to install it is not necessary to consider that decision.

87. Mr Clark next suggested that a right of entry for the purpose of preliminary survey was difficult to define and of uncertain ambit. That was said to be a factor pointing against the implication of the right (a proposition for which Mr Clark relied on *British Waterways Board v Severn Trent Water Ltd* [2002] Ch 25, [39] which concerned powers to lay and maintain pipes which was found not to imply a power to discharge into a watercourse). I do not accept that there is a difficulty in defining the required right of entry, the limits of which are controlled by what is reasonably required for the statutory purpose. It also seems to me that there is a difference between the implication of an additional power into a scheme of detailed powers which is not subject to further definition by a court or tribunal, and the implication into the Code of a right which will be exercisable on terms determined by the Tribunal.

88. Nor do I accept Mr Clark's submission that the implication of a right to undertake a preliminary survey is not essential to the effective operation of the Code. I have explained in paragraph 77 above why I consider that the absence of such a right would subvert the operation of the Code and defeat the intention of Parliament. I have also explained why I reject the other routes by which Mr Clark submitted that access might be obtained. The only alternative, if it is assumed that the right is not conferred by the express provisions of paragraphs 3(a) and 3(d), is that the right must be implied to render the Code effective.

Issue 2: Is the claimant entitled to ask for an interim right without also seeking a permanent right?

89. Mr Clark's second line of defence raises another important issue of principle. It arises from the fact that the only relief which the claimant seeks in this reference is the imposition of an agreement providing for interim Code rights under paragraph 26. Those rights, if granted, will enable it to determine whether the Building is one over which it would like to acquire permanent rights, but it does not seek to establish an entitlement to permanent rights in these proceedings. Moreover, if it decides that the

Building is suitable the claimant will not need to repeat the investigations which it will have undertaken at the preliminary stage. These features give rise to two arguments on behalf of the University.

90. Mr Clark submitted that an application for an order imposing interim rights under paragraph 26 must be parasitic on an application for an order providing for permanent rights under paragraph 20; interim rights could only be imposed by the Tribunal as an interim measure pending determination of a full paragraph 20 claim. That, Mr Clark submitted, was apparent from paragraph 26 itself, from Explanatory Notes published with the 2017 Act, and from Law Commission Report No.336. No paragraph 20 notice had been served in this case and the reference was therefore premature.

91. Alternatively, even if it was the case that a paragraph 26 claim could be made albeit a paragraph 20 notice seeking full code rights was not pending, Mr Clark submitted that the right claimed must be in anticipation of the Code right subsequently being imposed under paragraph 20. The only rights sought in this case would necessarily have become spent (i.e. the site surveys would have been completed and would not have to be carried out again) before any paragraph 20 claim for rights to install apparatus if the Building proves to be suitable. That, Mr Clark suggested, was impermissible, either as a matter of jurisdiction because it is not what the Code provides for, or to the exercise of its discretion under paragraph 26(3) because it is not within the spirit or intent of the Code.

92. Mr Radley-Gardner submitted that the availability of interim rights reflected the policy of the Code that electronic communications networks should be capable of being created cheaply and quickly. An over-technical approach to the interpretation of the Code which placed obstacles in the way of the deployment of new apparatus would be contrary to its evident purpose. The Code did not provide in express terms for it to be a condition of an order imposing interim rights that permanent rights should be sought at the same time. Rights were interim in the sense that, as paragraph 26(2) made explicit, they were available for a specified period or until the occurrence of a specified event. There were many occasions when all that an operator needed was Code rights for a short period to satisfy a temporary requirement (such as during the redevelopment of another permanent site, or to meet an increased demand from an event such as a music festival). The Code would be seriously defective if it did not provide for rights to be obtained in such situations.

93. I begin consideration of this issue with paragraph 26 itself. Paragraph 26(1) allows an operator to apply to the Tribunal for an order conferring Code rights "on an interim basis". The meaning of "interim" is explained in paragraph 26(2): an order imposes an agreement "on an interim basis" if it provides for the agreement to bind the parties "(a) for the period specified in the order, or (b) until the occurrence of an event specified in the order". The Tribunal may make such an order "if (and only if) … a notice which complies with paragraph 20(2)" has been given by the operator stating that an agreement is sought on an interim basis. Two further conditions are specified, namely, either (a) that the operator and site owner have agreed to the

making of such an order or (b) that the Tribunal is satisfied that the operator has a "good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met". The Tribunal is not obliged to make the order sought, but it must exercise its discretion judicially and on a proper consideration of the relevant facts.

94. Mr Clark relied on the description of the rights provided for by paragraph 26 as "interim", on the requirement for service of a notice complying with paragraph 20(2), and on the application of the paragraph 21 qualifying test as justifying the implication of a requirement that an application under paragraph 20 must already be on foot or must be commenced at the same time as an application for interim rights under paragraph 26. He also referred to paragraph 26(5) and to paragraph 26(7)(b) as further indications to the same effect.

95. I do not accept Mr Clark's submissions on the circumstances in which an application for interim rights may be made.

96. The sense in which the word "interim" is used is explained in paragraph 26(2); the circumstances which will end the interim rights are not limited by reference to a determination or agreement under paragraph 20, they are expressed much more generally as the expiry of a specified period or the occurrence of a specified event.

97. The fact that a notice complying with paragraph 20(2) must be served does not import a requirement that permanent rights must be sought in that notice, or in another served simultaneously. On my reading of the Code it is not right to regard the giving of a notice under paragraph 20 as a step which implies an intention to seek permanent rights. A notice under paragraph 20(2) is a precondition of any application for Code rights, whether permanent, temporary or interim; it is the mechanism for initiating the statutory procedure whatever rights are sought. The terms of the notice are not limited by paragraph 20(2) and need not seek permanent rights; they may include a proposal that the rights are to be on a temporary or interim basis and, in the latter case, will no doubt specify the event or period for which they are sought. For the same reason nothing of relevance to this question can be read into paragraph 26(5), which allows the Tribunal to make an order in a case of urgency even though the period specified in the paragraph 20 notice has not elapsed.

98. Nor does the adoption of the test for permanent rights in paragraph 26(3)(b), to be satisfied on a "good arguable case" basis, suggest that the same qualifying test must necessarily be intended to be satisfied to the full standard of proof on some subsequent occasion.

99. Paragraphs 26(7) and (8) give a site owner the right to require the removal of apparatus if the period specified in an interim rights order has expired or the specified event has occurred "without (in either case) an agreement relating to the code right having been imposed on the person by order under paragraph 20." Mr Clark relied on these provisions as demonstrating that an application under paragraph 26 was

intended to be conducted in tandem with an application under paragraph 20, but that is to read too much in to them. The only purpose served by sub-paragraphs (7) and (8) is to confirm that the right of removal is exercisable in accordance with Part 6 of the Code on the expiry of interim rights. If an order imposing permanent Code rights has been made under paragraph 20 the operator will be in a position to rely on those rights for the retention of its apparatus, as paragraph 26(7)(b) implicitly recognizes. These provisions do not introduce a condition, absent elsewhere, for the making of an application or the imposition of an agreement.

100. Mr Clark supported his submissions by referring to the Explanatory Notes to the 2017 Act which described paragraph 26 as enabling "code rights to be granted on an interim basis pending agreement or the court determining a final agreement". It paraphrased the test in paragraph 26(3)(b) as allowing interim rights to be imposed "when the court considers that there is a good arguable case that the interim code right will be made permanent at a final hearing."

101. The Explanatory Notes are an aid to construction, as Lord Steyn explained in *R v Chief Constable of South Yorkshire Police ex.p. LS and Marper* [2004] 1 WLR 2196 at [6]:

> "Explanatory Notes are not endorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material than other aids regularly used by the courts, such as Law Commission Reports, Government Committee reports, Green Papers, and so forth."

102. In this case, however, I do not find the Explanatory Notes helpful for the purpose for which Mr Clark seeks to employ them which is, in effect, to supplement the statute in a way which is not justified by its express terms or required by necessary implication. They provide a description of circumstances in which paragraph 26 is likely often be employed, but they do not purport to be a comprehensive account of the limit of the Tribunal's power.

103. The absence of qualifying conditions for the making of an application under paragraph 26 is in contrast to the requirements of paragraph 27(1) which must be satisfied before the opportunity to seek temporary rights will be available at all. The conditions in paragraph 27(1) require that a paragraph 20(2) notice be served which not only seeks rights under that paragraph but "*also* requires … agreement on a temporary basis", thereby making it clear that, using Mr Clark's expression, temporary rights are "parasitic" on a request for permanent rights. Paragraph 27(3) identifies the objective of temporary rights as being the maintenance of the operator's network "until the proceedings under paragraph 20" are determined and clearly contemplates that such proceedings will be pursued. Nothing remotely comparable is to be found in paragraph 26.

104. I should add that Mr Clark also referred to the discussion by the Law Commission in its February 2013 Report No. 336 of its proposal for the introduction of provisions allowing for early access which subsequently given effect by paragraph 26. It is clear enough from paragraphs 9.48 to 9.67 of the report that the Law Commission had in mind that, usually at least, an application for early access was likely to be required where parties were in dispute over the price to be paid for installation rights, though not the principle. The intention was that operators would be able to apply for "an interim order for access pending the resolution of disputes over payment" (paragraph 9.61). The Commission stressed that there should be an immediate right of removal of apparatus "if the test for imposition of Code rights is not satisfied at a final hearing (or the Code Operator discontinues the proceedings)" (paragraph 9.67).

105. I do not read the Law Commission's Report as recommending the sort of condition which Mr Clark invites me to find in paragraph 26. The Commission did not provide a draft bill so it is not possible to know how it would have expressed its intentions in detail, but while the existence of proceedings for permanent rights was clearly in contemplation it was nowhere identified as a condition of interim rights being available. Paragraph 9.48 records that the circumstances in which Code rights may be required ranges from the need to satisfy a long-term requirement justifying permanent rights, "to a temporary right to obstruct a landowner's access" where all that is required is "a simple temporary licence". It is not clear how the Law Commissions proposals for interim rights were intended to apply in the simplest of situations. It would not be legitimate to use the Report to give the Code itself a different meaning from that which seems to me to emerge most clearly from the language in which Parliament chose to give effect to the Law Commission's proposals.

106. Mr Clark's alternative way of putting his case on this issue was that, in the absence of an intention to apply for permanent rights, an application for interim rights should be regarded by the Tribunal as an abuse of process or otherwise should be refused in the exercise of its discretion under paragraph 26(3). The bedrock of this submission was the suggested unfairness to a site owner of a procedure which allowed an operator to obtain rights to enter the site owner's private land, to undertake potentially invasive works, to install and maintain apparatus, and to interfere with access, all without ever having to satisfy the Tribunal that the qualifying test in paragraph 21 was actually met. Interim rights were available if it could be shown that there was a "good arguable case" that the paragraph 21 test was satisfied, which was a lesser requirement than where the test must be shown to be satisfied to the usual civil standard of proof (as it would have to be before an order could be made under paragraph 20). It was, Mr Clark submitted, an abuse of process for an operator to utilise paragraph 26 as means of circumventing the Tribunal's consideration at trial of paragraph 20 and seeking to rely solely on the "good arguable case" standard. It was an attempt to exert commercial pressure and prejudice on the respondent, and was utilising paragraph 26 for an improper collateral purpose.

107. I do not accept these submissions.

108. The opportunity for an operator to seek interim rights is conferred by the Code in terms which I am satisfied do not require a request for the same (or any) permanent rights to be made concurrently. It cannot therefore be an abuse of process simply for an operator to make use of that opportunity, nor is there anything specific to the current application which would justify treating it as an abuse.

109. As to the standard of proof, the fact that interim rights may be available without the need for an operator to satisfy the normal civil standard of proof is the result of a policy decision by Parliament to give greater weight to the public interest in the provision of electronic communication networks than to the public interest in the preservation of private property rights. Parliament must be taken to have appreciated that at an early stage of proceedings and before the opportunity properly to test an operator's case is available to a site owner, substantive rights might be conferred on that operator on an interim basis applying the "good arguable case" standard, which fuller scrutiny subsequently demonstrates could not have been obtained if a higher standard of proof was insisted on.

110. Parliament has, of course, provided in paragraph 26(4) that consideration is payable on the statutory basis under an agreement for interim rights, together with compensation in the event that loss or damage is suffered by the site owner. The site owner also has the protection of paragraph 23 which allows the Tribunal to control the terms on which interim rights are exercised. As previously explained, interim rights do not carry any right of statutory continuation. I can therefore see no abuse in an operator seeking to acquire interim rights in those circumstances.

111. I have much greater sympathy with Mr Clark's submission that the lower standard of proof attending the imposition of an agreement for interim rights goes to the exercise of the Tribunal's discretion. Even where circumstances are made out which would permit the Tribunal to make an order under paragraph 26, it is not bound to do so if relevant factors weigh sufficiently against it. One such factor may in some cases be that only limited scrutiny of the paragraph 21 conditions has been possible at the stage an application is made; another may be that the burden of proof is relatively low. Those factors, which are part of the design of the Code, will not always be relevant. If the site owner does not object in principle to the acquisition of rights, but disputes the terms proposed by the operator, there may be no reason for the Tribunal not to impose rights on an interim basis. Whether it is appropriate to exercise the Tribunal's discretion in this case is a matter to which I will return shortly.

112. For these reasons I resolve the second issue in the claimant's favour and find that the absence of an application for the same, or any, permanent Code rights at this stage does not deprive the Tribunal of jurisdiction to impose an agreement for interim rights.

Issue 3: Has the claim for interim rights been made out in this case?

113. The final issue is specific to this reference, although it raises a point of general importance on which, fortunately, Mr Clark and Mr Radley-Gardner were in agreement.

The standard to be applied

114. The point of general significance concerns the standard which the Tribunal should apply when considering whether the claimant had made out the "good arguable case" required by paragraph 26(3)(b). This does not require that the operator be able to show on a balance of probability that the paragraph 21 conditions are satisfied. In *Canada Trust v Stolzenberg (No.2)* [1998] 1 WLR 547 at 555 the "good arguable case" standard was considered by the Court of Appeal in the context of the test under RSC Order 11 for obtaining permission to serve proceedings out of the jurisdiction. Waller LJ described the requirement as "a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction". He went on to explain that it meant that "one side has a much better argument on the material available."

115. At paragraph 9.63 of the Law Commission's Report No. 336, it recommended that the "good arguable case" standard should be applied on contested applications for the imposition of agreements for interim rights and in a footnote it referred to the *Canada Trust* decision and described the standard as "well-established in cases where the applicant is seeking an order that will have significant consequences for the respondent."

116. The adoption of the "good arguable case" test, and the Law Commission's reference to *Canada Trust*, are consistent with the expectation that applications for interim rights will be dealt with by the Tribunal on a summary basis, without oral evidence or cross examination, and without full disclosure of documents. In this reference the parties agreed that there should be cross examination, and the Tribunal acceded to their request to permit it, but that was an exceptional course reflecting the infancy of this jurisdiction. In future applications for interim rights will be dealt with, in the absence of agreement, at a hearing at which evidence will be received in writing. It will be for an operator seeking such rights to provide sufficient information, supported where appropriate by the disclosure of sufficient documents, to demonstrate to the Tribunal that it has a good arguable case that the test in paragraph 21 is made out.

The conditions to be satisfied

117. Paragraph 20 provides for the satisfaction of two conditions for the imposition of a code agreement by the Tribunal), namely: that the prejudice caused to the site provider by the order is "capable of being adequately compensated by money" (paragraph 21(2)); and that "the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person" (paragraph 21(3). In deciding whether the second condition is met the Tribunal is directed by paragraph 21(4) to

have regard to "the public interest in access to a choice of high quality electronic communications services."

The evidence

118. Evidence in support of the reference was provided on behalf of the claimant in two virtually identical witness statements by Mr James Moirano, a Networks Manager with Vodafone, and by Mr Catalin Diaconu, London Radio and Performance Manager for Telefonica. They each explained that a new site was required to replace a rooftop site at Eastbourne Terrace immediately to the west of Paddington station (referred to as "the remove site"). The loss of the remove site was the result of a consent order made on 8 December 2017 in county court proceedings brought by the owner of the building for the removal of the apparatus to enable its redevelopment. Under the terms of that order the Claimant had been required to vacate the remove site by 31 May 2018, and it had done so. Rights had been obtained, eventually by agreement, to install apparatus temporarily on another building adjoining the station but it is due to be redeveloped and would not provide a permanent solution. It was said by Mr Moirano and Mr Diaconou that there has been a significant deterioration in coverage in the Paddington area for their networks as a result of the loss of the remove site. I will come to that evidence in greater detail when I consider whether the conditions for the making of an order imposing an agreement for interim rights have been satisfied.

119. A witness statement was also provided by Mr Maidens, the claimant's solicitor, who took issue with certain procedural matters and doubted facts deposed to by the University's witnesses, including its own plans to refurbish the Building. Mr Maidens is not in a position to know what the University intends and his observations on the credibility of its evidence are not themselves an appropriate subject for a witness statement and simply add to the costs of the reference.

120. In response to the reference evidence was given by Mr Goodacre, the University's telecoms agent, who identified alternative sites which might be suitable for the claimant's purposes, and by Ms Caroline Bidder, the University's Head of Asset Management and Compliance.

121. Ms Bidder explained that the University had had a bad experience when it had allowed access to one of its buildings by telecommunications operators including Vodafone. International Hall in Bloomsbury is the only University building currently providing a site for apparatus under an agreement allowing Vodafone to install a mast in the 1990s. A series of breaches of that agreement were alleged to have occurred, including that Vodafone had shared the use of the mast with Telefonica without consent, had installed or adjusted handrails on the roof without consent, had left debris and rubbish on the roof, and had damaged some ducting by standing on it. It was also said that contractors attending the site to service or adjust the apparatus on the roof failed to follow the University's access procedures, which was a cause of concern given the number of students in residence in the building.

122. Ms Bidder's evidence establishes the sort of problems which can arise between operators and site providers, and for which provision ought to be made in a Code agreement. Where the site provider obtains a significant financial return from hosting an operator's apparatus no doubt problems of this sort are easier to shrug off; where there is no meaningful return to the site provider they may become more difficult to endure. In any event they are of little significance in this reference which is not concerned with the grant of long term Code rights, but only with a small number of short visits to the Building. It was not possible to ascertain how serious or trivial the matters complained of were, nor whether they amounted to a breach of the agreement under which Vodafone exercises its rights at International House (no copy of which was produced). To the extent that the evidence was relied on in support of the University's case that the Tribunal should refuse to exercise a discretion in favour of the claimant it was wide of the mark. The roof of International House is used by more than one operator, including Vodafone but not including the claimant.

123. Concern was also expressed by Ms Bidder concerning excessive radiation from installations on the roof of International House, but it was not suggested that this would be experienced if apparatus was correctly positioned and adjusted, and in any event such limited evidence as there was suggested that the source of the problem was not equipment belonging to Vodafone.

The first condition

124. The first condition is not concerned with the quantum of the compensation and consideration provided for by the Code, or with the evidence relied on by either party to establish that sum, but rather it is concerned with the nature of the prejudice which will be experienced by a particular site owner. If that prejudice is found to be of a nature which is incapable of being adequately compensated by a payment of money then the first condition will not be satisfied. This is not an appropriate case in which to consider what sort of prejudice will be incapable of adequate compensation in money, as I am satisfied that this is clearly not such a case.

125. Mr Clark submitted that it was for the operator to satisfy the Tribunal in relation to the first condition, and he pointed out that the claimant had adduced no evidence of the compensation it proposed, without which it was impossible to determine whether it would be adequate to compensate the University for prejudice it would experience. I do not accept that approach. I agree that it is for the claimant to make out its case, and that it carries the burden of satisfying the Tribunal that money will be adequate compensation, but it is not required to speculate about any particular difficulty or inconvenience which will be caused to the University which the University itself has not chosen to identify. Nor is it required to adduce evidence at this stage concerning the quantum of compensation or consideration.

126. The evidence of Ms Bidder was that the University was put to expense, and the time and attention of its staff were diverted from tasks more useful to it, by the need to monitor and supervise visits to its International Hall building. She expected similar inconvenience to be caused at the Building and invited the Tribunal to impose

a regime of charges for access visits which would compensate for it. She put the required payment at £400 per person per visit, which would cover the work of its staff checking the safety qualifications of intending visitors, briefing them on safety matters when they arrived, and accompanying them during their visit. The University was not content to allow contractors unsupervised access to a building which housed several hundred students for whose welfare it was responsible.

127. I agree that the inconvenience caused to the University by the provision of access ought to be properly compensated. I do not accept that such inconvenience is incapable of being compensated in money, and the contrary was not seriously suggested by Mr Clark. It should be remembered that the number of visits which the claimant says it will require is very limited. The fact that Ms Bidder was able to identify the functions involved and the amount of time University staff would be required to devote to them shows that it is possible to make an informed estimate of how much would be required to compensate the University for the diversion of their services. The fact that the claimant did not make a positive case about the quantum of the payment was irrelevant; the parties have agreed (and the Tribunal would have directed in any event) that compensation and consideration should be dealt with separately after a decision has been given on the issues of principle; if they cannot be agreed the Tribunal will make a determination on evidence provided at a later date.

128. I am therefore persuaded that the claimant has a good arguable case that the first condition is satisfied.

The second condition

129. Mr Clark submitted that there was simply no satisfactory evidence from the Claimant with respect to this condition. No information had been provided about the nature and extent of the equipment at the remove site or about the network supported by it. The claimant had given no disclosure of documents concerning the county court proceedings and had not explained why it had agreed to give up the remove site if, as a result, its networks were so seriously prejudiced. It was not known whether there are any other sites capable of supporting the network in the vicinity, or how the service provided by the claimant's shareholders had fared in the five months since the decommissioning of the remove site. No detail had been provided and only the broadest and most general of statements had been included in the witness statements provided in support of the claim.

130. The evidence provided by the claimant's two technical witnesses, Mr Diaconu and Mr Moirano, was indeed rather limited on the issue of public benefit (which in this case revolves around the consequences for the quality of electronic communications in the Paddington area of the loss of the remove site without a permanent replacement being available). The relevant part of their witness statements amounted to little more than the assertion that "as a consequence of the loss of the Remove Site capacity and coverage in the Paddington area has been significantly affected." Whether such abbreviated evidence would be sufficient to discharge the good arguable case requirement on its own might be questionable, although Mr

Radley-Gardner was able to point out that the evidence about a temporary replacement site having been secured was some demonstration of a genuine need for an additional ste in the area. In this case, however, Mr Clark had the opportunity to cross examine both witnesses and elicited a significant amount of additional information.

131. There was a certain amount of cross examination and submission about the availability of alternative sites which might be used by the claimant instead of the University's Building. I do not regard that evidence as directly relevant to the paragraph 21 test to be applied by the Tribunal. The focus of paragraph 21(3) (the second condition) is the public benefit likely to result from the making of the order sought by the operator. No comparison is required (or permitted at this stage) between that public benefit and the public benefit which might result from the making of a different order conferring rights over different land. Mr Radley-Gardner referred to a decision of the Court of Appeal under the old Code, *St Leger-Davey v First Secretary of State* [2004] EWCA Civ 1612 at [22] to [24] in support of his submission that a comparison between sites was not relevant to the second condition. I agree with his submission, but I do think the Court of Appeal's decision supports it, as the test under the old Code was materially different.

132. If any further underpinning is required of what seems to me to be the clear effect of paragraph 21(3) it can be found in paragraphs 4.32 and 4.33 of the Law Commission's Report, to which Mr Radley-Gardner also referred. The Commission rejected the suggestion made by one consultee that an operator should be required to show that there was no reasonable alternative to the land over which rights were sought; it considered that approach would be "impractical and too stringent" and would be likely to produce stalemate where two or three sites were possible.

133. The choice of sites is left by the Code to the judgment of operators. It might possibly be argued that the availability of an alternative site was relevant to the exercise of the Tribunal's discretion (as to which I express no concluded view) but, generally, a comparison between sites is not required to demonstrate satisfaction of the second paragraph 21 condition.

134. The evidence of Mr Moirano and Mr Diaconu established to my satisfaction that the claimant has a good arguable case that the second paragraph 21 condition is satisfied.

135. Mr Moirano explained that the anticipated loss of the remove site was the driver of a search for a replacement which led to the Building being identified. He was able to describe the claimant's usual procedures from his own experience, and I have no reason to doubt his account. He was familiar with the remove site and had read an internal report recommending the Building as an apparently suitable replacement, but he did not produce it and had not been involved in the relevant decision making. He was able to explain in more detail the nature of the difficulty caused by the loss of the remove site. Pending the commissioning of the temporary

alternative site the nearest active Vodafone mast to the remove site was on St Mary's Hospital, northeast of Paddington Station. In his capacity as networks manager Mr Moirano received a daily email reporting service quality in London which he said showed a significant degradation of service from the St Mary's site following the loss of the remove site, which was to the west of the station. Greater demand was being placed on the St Mary's site than it had the capacity to cope with, and the result was a poor service in front of the station and on its western side. Those were residential areas with a lot of hotels where demand was high. The Building was close to those areas and because of its height it was expected that it would provide a good alternative site. Other sites had been considered but the options were limited.

136. Mr Diaconu's evidence was to the same effect. He was responsible for performance and "optimisation" on behalf of Telefonica in London. It was not his responsibility to select alternative sites but he had looked at the options in the Paddington area before making his witness statement and he agreed with the assessment made by his colleagues that the Building was likely to be the best solution. He explained that the loss of the remove site had created problems of capacity and of coverage, particularly what he called "deep indoor coverage" on the lower floors of buildings and in Paddington Underground station (the main line station has its own internal antennae). Since the loss of the remove site in May the weekly reports which he received showed that signal strength at street level had decreased, and that the St Mary's site was unable to satisfy the demand. Mr Diaconu also provided anecdotal evidence of his own experience in trying to make use of the Google Maps app on his phone in front of Paddington Station: he had been unable to make use of it because of the limited capacity of the service in that location.

137. The evidence suggests that there is a good arguable case that the communication services currently available to the public through the Vodafone and Telefonica networks in this busy part of London are not of the high quality the Code is intended to facilitate. Paragraph 21(4) requires the Tribunal to have regard to that state of affairs when assessing whether the public benefit likely to result from the making of the order outweighs the prejudice to the University.

138. Mr Clark submitted that the claimant's evidence on public benefit missed the point, because it focused only on their own experience and, inferentially, that of their customers rather than on the public as a whole. I do not agree. The claimant's shareholders are substantial operators whose networks contribute to the choice available to the public; if those networks are not of a high quality in a particular location the public interest is disadvantaged in the sense contemplated by paragraph 21(4). They also have a large number of customers (although there was no evidence of precisely how many) who represent a segment of the public the quality of whose experience is directly relevant to the second condition.

139. The second paragraph 21 condition requires a comparison between the benefit to the public and the prejudice to the site provider of the imposition of the agreement sought. Where, as in this case, the agreement sought is limited to a right of access on a few occasions during a limited period, the prejudice caused to the University is

likely to be small and the public benefit required to overtop it need itself only be relatively modest.

140. The evidence currently before the Tribunal is to the effect that that the provision of access to the Building for site surveys will be an important first step in replacing lost capacity and improving the quality of the service available to the public. That evidence establishes the good arguable case required by paragraph 26(3)(b) in relation to the second paragraph 21 condition.

141. I should add that although there was evidence that the University is considering the redevelopment of the Building to meet its requirement for additional student accommodation, Mr Clark did not rely on paragraph 21(5). The claimant's requirement for access is an immediate one which will be exercised within a few months at most and will not interfere in any way with the University's redevelopment plans.

Discretion

142. Paragraph 26(3) confers a discretion on the Tribunal ("the court may make an order …"). Having been persuaded to the standard of a good arguable case that the test for the making of an order is satisfied in this case, the factors which might weight against the exercise of that discretion would have to be significant in their own right to justify a refusal. Mr Clark nevertheless identified a number of factors which he submitted should result in the application for interim rights being dismissed.

143. Mr Clark relied first on what he said was the weakness of the claimant's evidence. Secondly he referred to the claimant's "bad attitude" by which he meant the generally aggressive and uncompromising tone of its and its solicitors' correspondence (which included reference to letters which the University had never received). Thirdly, while he acknowledged that the availability of alternative sites could not provide a knock-out blow (for the reasons given in paragraph 131 above) it was a factor to be taken into account. Fourthly, the claimant had failed to adhere to the OFCOM Protocol in a number of respects identified by Mr Goodacre; Mr Clark submitted that the Tribunal should make it clear that operators would not get away with ignoring the good practice recommended by the Protocol. Finally Mr Clark relied on the claimant's failure to provide disclosure of documents requested by his instructing solicitors.

144. Individually and cumulatively these factors are insufficient to persuade me to refuse to make an order in this case. The deficiencies of the claimant's evidence on points of substance was cured by cross examination and this has not been a case in which the "good arguable case" standard has only narrowly been satisfied. As I made clear during the hearing, aspects of the claimant's solicitors correspondence have been unattractive (in particular the description of the proposed terms of agreement as "non-negotiable"), but this is not a beauty contest and I give that conduct little weight; in any event Ms Bidder's evidence was that the University was disinclined to have

operators on any of its buildings, so a more tactful or diplomatic style is unlikely to have made any difference to the outcome. Nothing in the evidence suggested that there was a better site than the Building. The OFCOM Protocol is important in all cases, and especially so where a site owner is not professionally represented; but by April this year the parties' professional agents were in contact and failed to make progress in large part because of the University's policy and Mr Goodacre's view that there was no Code right of access to undertake preliminary surveys. As for disclosure, this is intended to be a summary procedure and extensive disclosure is not required at an early stage; many of the documents referred to by Mr Clark were peripheral.

Disposal

145. For these reasons the Tribunal will make an order imposing an agreement for interim Code rights sufficient to enable the claimant to undertake the surveys and investigations required to establish whether the Building is an appropriate site for its apparatus. If the parties are unable to agree the terms of that agreement they may submit their differences to the Tribunal in writing and a further determination will be made.

Martin Rodger QC,

Deputy Chamber President

30 October 2018

APPENDIX

Paragraphs 26 and 27, Electronic Communication Code

Interim code rights

26(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.

Temporary code rights

27(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.

(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 where, in the course of the proceedings under paragraph 20, it is shown that a person with an interest in the land was entitled to require the removal of the apparatus immediately after it was installed.

(8) The court must, in determining for the purposes of paragraph 20 whether the apparatus should continue to be kept on, under or over the land, disregard the fact that the apparatus has already been installed there.