

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**



**Neutral Citation Number: [2018] UKUT 364 (LC)  
Case No: TCR/14/2018**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

*ELECTRONIC COMMUNICATIONS CODE – JURISDICTION – whether loss caused by failure to comply with old Code agreement may be subject of claim for compensation under new Code – paragraphs 84, 85 Electronic Communications Code – Schedule 3A, Communications Act 2003 – paragraph 14, Schedule 2, Digital Economy Act 2017 - notice of reference struck out*

**IN THE MATTER OF A NOTICE OF REFERENCE**

**BETWEEN:**

**ELITE EMBROIDERY LIMITED**

**and**

**Claimant**

**VIRGIN MEDIA LIMITED**

**Respondent**

**Re: Front Street,  
Bells Close,  
Leamington,  
Newcastle-Upon-Tyne  
NE25 6YF**

**Martin Rodger QC, Deputy Chamber President**

**Royal Courts of Justice, Strand, London WC2A 2LL**

**on**

**5 October 2018**

*John Campbell QC, instructed by Stokes Law and Mediation, for the claimant  
Christopher Rafferty instructed by Virgin Media Ltd for the respondent*

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1. The Tribunal has before it an application to strike out a notice of reference filed on 20 March 2018 by Elite Embroidery Limited, the proprietor of a factory and offices known as Elite House situated at Front Street in Newcastle-upon-Tyne. The respondent to the reference is Virgin Media Limited which has acquired the business of Telewest, another telecommunications company, which was principally concerned with the matters to which the reference relates.

2. The reference has been brought under the new Electronic Communications Code 2017 (“the Code”) and was the first such reference to be filed with the Tribunal. The Code is found in Schedule 3A to the Communications Act 2003 into which it was inserted by section 106 and Schedule 1 to the Digital Economy Act 2017. The Code sets out the basis on which electronic communication operators may exercise rights to deploy and maintain electronic communications apparatus on, over and under land. It replaces the previous electronic communications code (“the old Code”) which was found in Schedule 3 to the 2003 Act.

3. The Electronic Communications Code Jurisdiction Regulations 2017 provide for dispute resolution functions conferred by the Code on the court to be exercised in England and Wales by the Upper Tribunal and by the First-Tier Tribunal. The same regulations provide that certain proceedings under the Code may only be commenced in the Upper Tribunal, including proceedings for compensation under Part 14 of the Code.

4. In the language of the Code the respondent and Telewest are both “operators”.

5. The expression “code rights” used in the Code is defined in paragraph 3 in wide terms which include, so far as they are said to be relevant to this reference, the laying of apparatus below ground for the purpose of providing a communications network.

6. Code rights are conferred under Part 2 of the Code. By paragraph 9 it is provided that 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. The Tribunal has power under Part 2 to impose an agreement conferring Code rights on an operator which an occupier of land has refused to agree.

7. Provisions in relation to compensation under the Code are contained in Part 14. Paragraph 84 applies where the Tribunal has made an order imposing an agreement for Code rights on a person, or where compensation is payable in relation to the removal of apparatus from land. Paragraph 85 provides for compensation for injurious affection of neighbouring land and applies where a right conferred by or in accordance with any provision of Parts 2 to 9 of the Code are exercised by an operator.

8. I can now say a little more about the facts of the case.

9. In 2016 the claimant, which had acquired the land at Front Street for the purpose of erecting a new factory and offices, discovered a fibre optic cable buried below the surface of the land. It transpired on enquiry that the cable belonged to Telewest.

10. Further investigations revealed that the cable had probably been laid by Telewest sometime in the mid-1990s on land which at that time had belonged to Newcastle City Council. I understand it to be common ground that an agreement had been entered into between Newcastle City Council and Telewest for the installation of a cable under the City Council's land, although no copy of the agreement has so far come to light.

11. Unfortunately, Telewest did not install its cable in the location provided for by the agreement. It had been intended that the cable would be laid under the pavement adjoining the development site subsequently acquired by the claimant but, apparently in error, it was laid instead a little to the west, beyond the pavement and under what is now the claimant's land.

12. None of this is said to have been known by the claimant when it purchased the land from the City Council. I am told and accept that the claimant made all the usual inquiries about the presence of utilities and conducting media, but the presence of a telecommunications cable under the land was not revealed.

13. When the claimant discovered the cable it did not remove it, but instead redesigned the works which it was undertaking to enable the cable to remain in its original location. The modifications involved the diversion of some drainage runs which, as one would expect, resulted in additional expense to the claimant. It is said that the programme of works was delayed and that as a result the claimant was not able to claim certain Government grants. The claim itself is in six figures, with the cost of modifications to the works being in the order of £60,000 and the lost government grant an additional £186,000.

14. By this reference to the Tribunal under the Code the claimant now seeks to recover these losses from the respondent.

15. In his submissions on behalf of the claimant Mr John Campbell QC has made it clear that the claim is intended to be brought under the new Code and that no reliance is placed on any provision of the old Code. This Tribunal has no jurisdiction under the old Code.

16. Mr Campbell QC has also made it clear that he does not assert the existence of any agreement under the new Code. It is apparent that all of the events giving rise to the claim occurred before the new Code was enacted. When the cable was laid in the 1990s the old Code conferred the relevant rights. When the land was sold to the claimant and in 2016 when the claimant incurred the expense of modifying its works and sustained the loss of the government grant the old Code remained in existence. The agreement between Telewest and the City Council is therefore likely to have been an agreement to which the old Code applied and (in the absence of some relevant transitional provision) it cannot have been an agreement under the new Code. It

was for that reason that when the Tribunal received the notice of reference it invited the claimant to explain in greater detail how the provisions of the new Code were said to apply to the claim and on what basis it is said the Tribunal has jurisdiction to determine it.

17. An amended statement of case submitted by the claimant shed no further light on its case on jurisdiction and at a case management hearing conducted by telephone in June the Tribunal's concern was reiterated. I directed that a hearing be held today at which the Tribunal would consider whether it had jurisdiction and whether the reference ought to be struck out. The respondent has subsequently issued an application of its own requesting its summary dismissal.

18. By paragraph 8(2) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 the Tribunal is obliged to strike out the whole or a part of any proceedings if it does not have jurisdiction in relation to those proceedings.

19. The claimant's case, as explained by Mr Campbell QC, is that Telewest had no right under the old or new Codes to install the apparatus in its current location and the respondent has no right under the new Code to retain or make use of it. In those circumstances it is very difficult indeed to see how the Tribunal can have jurisdiction in this matter. It is not alleged that the respondent or Telewest have exercised any rights under the new Code. For that reason the operative provisions concerning compensation found in Part 14 of the Code have no application. Paragraph 84(1) applies only where the Tribunal is asked to make an order imposing an agreement, or an order requiring the removal of equipment. No such order is sought in this case, so it follows that no compensation can be payable under paragraph 84. Paragraph 85, to which Mr Campbell more specifically invited my attention, confers an entitlement to compensation for injurious affection only when a right is conferred by or in accordance with any of the provisions of Parts 2 to 9 of the Code. It is common ground in this case that no such rights have been conferred on anyone.

20. The old Code had provisions for compensation for injurious affection which were contained in paragraph 16. Mr Campbell's submission has been that the new Code simply supplants (as he put it) the provisions of the old Code in every respect and that any claim that could have been pursued under the old Code must be pursued instead under the new Code. Mr Campbell has not pointed to any provision of the new Code which has that effect. The transitional provisions having effect in relation to the cessation of the old Code and the introduction of the new Code are found in Schedule 2 to the Digital Economy Act 2017. These provide, by paragraph 14, that:

“The repeal of the existing code does not affect paragraph 16 of that code, or any other right to compensation, as it applies in relation to the exercise of a right before the new code comes into force.”

21. It follows that (so far as compensation is concerned) rather than rights under the old Code being replaced by rights under the new Code, the repeal of the old Code is without prejudice to any accrued right to compensation under it. This Tribunal has not been given jurisdiction to entertain such a claim.

22. In those circumstances I conclude that the Tribunal has no jurisdiction in this reference. The claim itself appears to be a viable claim for damages for trespass or nuisance or for compensation under the old Code, but if so, it must be pursued elsewhere. I therefore have no alternative but to strike out the reference under paragraph 8(2) of the Tribunal's Rules.

Martin Rodger QC,  
Deputy Chamber President  
31 October 2018