

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – REMOVAL OF APPARATUS – whether neighbouring landowner has right to require removal of electronic communications apparatus from route of proposed new access – paras 38, 40, Sch.3A, Communications Act 2003 – reference dismissed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

**EVOLUTION (SHINFIELD) LLP AND
OTHERS**

Claimants

and

BRITISH TELECOMMUNICATIONS PLC

Respondent

**Re: Hollow Lane roundabout,
Shinfield,
Reading RG2 9EG**

Martin Rodger QC, Deputy President and Peter McCrea FRICS

Royal Courts of Justice

on

2-3 April 2019

*Brie Stevens-Hoare QC and Andy Creer, instructed by Freeths LLP for the claimant
Shaen Catherwood, instructed by BT Legal for the respondent*

No cases are referred to in this decision.

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Introduction

1. This reference is brought under paragraph 40(6) of the new Electronic Communications Code (“the Code”) by a consortium of developers who seek an order for the removal of a telecommunications cabinet from the publicly maintained footway at the Hollow Lane roundabout at Shinfield, a village on the southern fringe of Reading. The cabinet belongs to the respondent, BT, and houses fibre optic cables and other electronic communications apparatus which BT refers to as a “Digital Subscriber Line Access Multiplexer”. The cabinet is connected to ducts, cabling and joint boxes which run beneath the footway.

2. The claimants are the registered freehold owners of a large development site immediately to the west of the Hollow Lane roundabout. In November 2012, before the claimants acquired the site, planning consent was granted for a major new housing development on the site providing up to 1200 new homes, a community centre, a shop, additional primary school facilities and a new relief road.

3. Vehicular and pedestrian access to the eastern side of the development will be obtained from the Hollow Road roundabout. A new exit will be constructed over the current footway and over adjoining land which was formerly the site of two cottages but now forms part of the claimants’ development site. In about November 2011, pursuant to street works rights, the respondent installed the cabinet on the rear edge of the footway in front of the cottages (without impeding access). It is now on the route of the proposed new exit from the roundabout. Capacity and safety considerations prevent the redesign of the roundabout to avoid the cabinet, and both it and its associated ducting and joint boxes must therefore be moved to a different location to enable the development to proceed in accordance with the current planning permission.

4. At the request of the claimants the respondent produced a specification of works for the relocation of its apparatus. It estimated that they would take 32 weeks to complete and would cost almost £300,000. There may be a dispute about the cost of the necessary works, but that is not within the jurisdiction of the Tribunal and would have to be determined by arbitration; this reference is really about who will have to foot the bill, however much it is eventually found to be.

5. Before the introduction of the Code on 28 December 2017 the claimants would have had to meet the expense of relocation, either under regulations made pursuant to section 85 of the New Roads and Street Works Act 1991 or under paragraph 20 of the Code’s predecessor (“the old Code”). The claimants’ case is that under the new Code they have a right to require the removal of the respondent’s cabinet without charge to themselves.

6. The claimants rely on the right conferred by paragraph 38 of the Code by which the owner or occupier of neighbouring land may require the removal of apparatus which is kept on other land and which “interferes with or obstructs a means of access” to and from the neighbouring land. They say that it does not matter that the cabinet did not obstruct any access at the time it was installed. They say that by the time the Code was introduced they had already constructed the base course of a new road leading up to the boundary of their own site (though not over the footway) which in due course they will complete and connect to the new exit and that that is a sufficient “means of access” for paragraph 38 to be engaged.

Alternatively, the claimants say that the cottages which previously stood on the route of the new exit themselves had direct access onto the highway, and that that gives them, as owners of the same land, the right to require the removal of the cabinet.

7. For its part the respondent argues that paragraph 38 applies only to a means of access in existence when the relevant electronic communications apparatus was installed, rather than to any means of access which might be created in future. It also says that there was no previous access to the roundabout over the part of the footway on which their cabinet is situated.

8. At the hearing of the reference the claimants were represented by Ms Brie Stevens-Hoare QC and Ms Andy Creer, and the respondent by Mr Shaen Catherwood. Brief evidence was given by representatives of both parties but there was no dispute over the relevant facts which we have summarised above.

The Electronic Communications Code

9. The Code came into force on 28 December 2017 when, subject to transitional provisions, it replaced the old Code in Schedule 2 of the Telecommunications Act 1984 (“the 1984 Act”). The new Code is found in section 106 and Schedule 3A of the Communications Act 2003 (“the 2003 Act”), which were inserted by section 4 of the Digital Economy Act 2017 (“the 2017 Act”).

10. 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, under or over land. The respondent is an “operator” for the purpose of the Code.

11. “Electronic communications apparatus” is defined widely in paragraph 5 of the Code. It includes apparatus, lines, structures or things designed or adapted for use in connection with the provision of an electronic communications network. It is common ground that the cabinet and other infrastructure installed by the claimant at the Hollow Lane roundabout are within the definition.

The structure of the Code

12. The Code is divided into 17 Parts. Part 2 is concerned with conferral of Code rights and their exercise. Paragraph 9 provides that Code rights in respect of land may only be conferred on an operator by agreement between the operator and the occupier of the land.

13. Part 4 provides an alternative means of acquiring Code rights if they cannot be agreed, namely by the imposition of an agreement by an order of the Court under paragraph 20 (a jurisdiction exercisable in England and Wales by the Upper Tribunal). Under paragraph 21 an agreement may not be imposed unless certain conditions are met; broadly, prejudice to the landowner or occupier must be capable of being adequately compensated in money and must be outweighed by the public benefit likely to result from the making of the order. A defence to the making of an order under paragraph 20 is provided by paragraph 21(5) if 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.”

14. Part 5 of the Code contains provisions concerning the termination and modification of Code agreements. By paragraph 31 a site provider who is party to a Code agreement may bring the agreement to an end by notice if one of the grounds in sub-paragraph (4) can be demonstrated. One of those grounds is that the site provider intends to redevelop all or part of the land to which the Code agreement relates, or any neighbouring land, and could not reasonably do so unless the agreement comes to an end (paragraph 31(4)(c)).

15. It can therefore be seen that an intention to redevelop land is available both as a ground for refusing to confer Code rights and as a ground for their termination.

16. This reference is brought under Part 6 of the Code which, as paragraph 36 explains, makes provision about cases in which a person has the right to require the removal of electronic communications apparatus, and about how that right can be enforced. Part 6 also includes a procedure by which a person can discover whether apparatus is present on land pursuant to a Code right.

17. Code rights are to be distinguished from three separate categories of rights referred to as transport land rights, street work rights, and tidal water rights, which are provided for under Parts 7, 8 and 9 of the Code respectively. Street work rights are defined in paragraph 59 and include a right “to install and keep electronic communications apparatus in, on, under, over, along or across a street” (which means a street in England and Wales which is a maintainable highway). Under paragraph 58 an operator may exercise a street work right for the statutory purposes without the need for any separate agreement or order.

Obstruction of access

18. “Code rights” are defined in paragraph 3 of the Code under nine separate sub-paragraphs, each of which is described as a right “in relation to an operator and any land” and is exercisable “for the statutory purposes” (which include the provision of the operator’s network). Sub-paragraphs 3(a) and 3(b) are rights (a) “to install” and (b) “to keep installed electronic communications apparatus on, under or over the land”. In this reference it is necessary to refer to only one other right, namely, the right under sub-paragraph 3(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)”

19. The words in parentheses in sub-paragraph 3(h) make it clear that the land to or from which access may be obstructed pursuant to such a right need not be land on which any apparatus is installed. If the installation of apparatus by agreement between the landowner and the operator interferes with a means of access to or from neighbouring land, the operator could seek an agreement with the owner of the neighbouring land to confer the Code right in sub-paragraph 3(h) permitting that interference.

20. Paragraph 13, which is in Part 2 of the Code, also deals with access to land. So far as is material it provides as follows:

“13 Access to land

(1) This paragraph applies to an operator by whom any of the following rights is exercisable in relation to land—

- (a) a code right within paragraph (a) to (g) or (i) of paragraph 3;
- (b) a right under Part 8 (street works rights);
- (c)-(d) ...

(2) The operator may not exercise the right so as to interfere with or obstruct any means of access to or from any other land unless, in accordance with this code, the occupier of the other land has conferred or is otherwise bound by a code right within paragraph (h) of paragraph 3.”

21. The effect of paragraph 13 is that, unless a sub-paragraph 3(h) right has been obtained (i.e. a specific right to interfere with or obstruct a means of access) neither a Code right nor a street works right may be exercised so as to interfere with or obstruct any means of access to or from any other land. A similar limitation was contained in paragraph 3(1) of the old Code which prohibited exercising a right to keep apparatus installed “so as to interfere with or obstruct any means of entering or leaving any other land” without the agreement in writing of the occupier conferring the right to do so.

Removal of apparatus

22. The other provisions of the Code of most relevance to this reference are found in Part 6. Paragraph 37 identifies five circumstances in which a landowner may require the removal of apparatus from their own land. These include where the landowner has never been bound by a Code right allowing the operator to keep the apparatus on the land, where a right has come to an end, and where apparatus is no longer used.

23. In contrast, paragraph 38 is concerned with the rights of owners or occupiers of neighbouring land to require the removal of apparatus from land belonging to someone else. Omitting parts immaterial to this reference, it provides as follows:

“38 When does a landowner or occupier of neighbouring land have the right to require removal of electronic communications apparatus?”

(1) A landowner or occupier of any land (“neighbouring land”) has the right to require the removal of electronic communications apparatus kept on, under or over other land in exercise of a right mentioned in paragraph 13(1), if both of the following conditions are met.

(2) The first condition is that the apparatus interferes with or obstructs a means of access to or from the neighbouring land.

(3) The second condition is that the landowner or occupier of the neighbouring land is not bound by a code right within paragraph 3(h) entitling an operator to cause the interference or obstruction.”

24. There is a disagreement between the parties about the relationship between paragraph 13 and paragraph 38, to which we will return later. At this stage we simply point out that both paragraphs are concerned with circumstances in which apparatus is lawfully present on land.

Such apparatus may not be installed or kept on the land so as to interfere with or obstruct any means of access to or from any other land (paragraph 13), and if it does, the owner of neighbouring land may require its removal (paragraph 38) unless, in either case, the operator has the benefit of a right under paragraph 3(h) which allows such interference or obstruction.

25. In support of the rights to require removal paragraph 39 contains a procedure by which a landowner or occupier can find out whether apparatus is on land pursuant to a Code right. Sub-paragraph (1) concerns the owner's or occupier's own land. Sub-paragraph (2) enables information to be sought about neighbouring land, as follows:

“39(2) A landowner or occupier of neighbouring land may by notice require an operator to disclose whether—

(a) the operator owns electronic communications apparatus on, under or over land that forms (or, but for the apparatus, would form) a means of access to the neighbouring land, or uses such apparatus for the purposes of the operator's network, or

(b) the operator has the benefit of a code right entitling the operator to keep electronic communications apparatus on, under or over land that forms (or, but for the apparatus, would form) a means of access to the neighbouring land.”

26. Paragraphs 40 to 44 are concerned with the enforcement of rights of removal. The right to require the removal of apparatus under paragraph 37 or 38 is exercisable only in accordance with paragraph 40. If agreement cannot be reached, an application must be made to the Tribunal for an order under paragraph 44(1) requiring the operator to remove the apparatus, or under paragraph 44(3), permitting the applicant to remove and sell it and to recover the cost of doing so. The expense of removing apparatus pursuant to a right under Part 6 of the Code will therefore always fall on the operator and not on the landowner.

Alteration of apparatus under paragraph 20 of the old Code

27. It is relevant to mention at this point the position in relation to the removal of apparatus under the old Code, paragraph 20 of which dealt both with the rights of the owners or occupiers of land on which electronic communications apparatus had been installed, and with the rights of any person with an interest in adjacent land. Such a landowner or occupier could, by notice, request “the alteration of the apparatus on the ground that the alteration [was] necessary to enable that person to carry out a proposed improvement of the land.” If agreement could not be reached an application could be made to the court which was empowered to order the alteration only if it was satisfied that it was necessary and would not interfere with any service provided by the operator's network. Significantly, unless the court thought fit to make a different order it was obliged by paragraph 20(8) of the old Code to require the landowner to reimburse the costs incurred by the operator in carrying out the works necessary to comply with its order. Under the old Code alterations to apparatus to facilitate development were therefore at the expense of the developer and not the operator.

28. The old Code was repealed with effect from 28 December 2017. The transitional provisions in Schedule 2 of the Digital Economy Act 2017 provide at paragraph 16(1) that the

repeal does not affect paragraph 20 as it applies in relation to anything whose installation was completed before the repeal came into force.

Other relevant legislation

29. We were referred in some detail to the Highways Act 1980 and the New Roads and Street Works Act 1991. The only point of note under the 1980 Act is that works to create a new vehicle crossing over a footway under section 184, or other works of benefit to the public executed pursuant to an agreement with a highway authority under section 278 will, in accordance with a code of practice, be at the expense of the person requesting the works, and not at the expense of the highway authority.

30. Under Part III of the 1991 Act “street works” include works executed in a street involving placing or moving apparatus in pursuance of a statutory right. The cost of measures taken in relation to apparatus installed in a street which is affected by major highway works is to be allocated between the highway authority and the undertaker responsible for the apparatus in accordance with regulations made under section 85. It was common ground that if the procedures under Part III of the 1991 Act were to be followed at the Hollow Lane roundabout the whole of the cost of relocating the respondent’s apparatus would fall on the claimants.

31. The only other provision of the 1991 Act which it is necessary to mention is section 101(1) which provides that unless a contrary intention appears, no enactment passed after the commencement of Part III of the Act is to be construed as making or authorising any provision regulating the execution of street works in a manner inconsistent with that Part.

The claimants’ primary case

32. The essence of the claimants’ case was that, as a matter of statutory construction, the reference in paragraph 38 of the Code to “a means of access” included any “identified, implementable access or route” and was not confined only to an existing access which was in use when the apparatus was installed. On the facts of this case the access for which planning permission had been sought before the installation of the respondent’s cabinet at the edge of the footway was sufficiently identified to engage the right to require removal in paragraph 38, despite it not yet having been constructed. The Code did not refer to a “road” or even an “access” being obstructed, but instead to “any means of access”; this choice of words was inclusive (“any”) and not limited to something which was already complete; “means of” extended the concept to a route over which there was a right of access which might be used at some point, rather than requiring an existing access. Alternatively, if it was a requirement that there already be an existing access or means of access to and from the claimants’ land to the roundabout such an access had existed in fact, although it was only in the form of a domestic driveway with which the positioning of the cabinet did not interfere.

33. Ms Stevens-Hoare QC submitted that the intention of Parliament in enacting the Code had been to make the installation and retention of electronic communications apparatus more straightforward while at the same time achieving a balance between the rights of operators and the interests of private landowners. One important interest of any landowner was the ability to maintain and develop their own land. The significance of that ability is recognised in paragraph 21(5) which allows a person who intends to redevelop all or part of the land to which a Code

right sought by an operator would relate, or any neighbouring land, to resist the imposition of an agreement under Part 4 if they could not reasonably undertake their redevelopment if the order was made. The same interest was also recognised in paragraph 31(4)(c) which enables a site provider to terminate an agreement for Code rights if they intend to redevelop the land to which the agreement relates, or any neighbouring land, and could not reasonably do so unless the agreement comes to an end.

34. Under paragraph 20 of the old Code the opportunity for a neighbouring landowner to require the removal of apparatus to facilitate an improvement to the neighbour's own land had been restricted by the need to demonstrate that the service provided by the operator would not be interfered with as a result. Ms Stevens-Hoare pointed out that the circumstances in which a neighbouring landowner could now require the removal of apparatus were much more restricted, as they arose only where a means of access was obstructed. She suggested that Parliament's clear intention had been to facilitate the development of land in those limited circumstances as could be seen by the absence of any requirement to balance the interests of the neighbour and the operational needs of the network. This should not be regarded as an improbable outcome since the neighbour would not have been a party to the Code agreement under which the apparatus had originally been sited on the relevant land, would not have received either consideration or compensation and would be prejudiced if it had no right to require the removal of the apparatus.

35. Ms Stevens-Hoare contrasted paragraphs 13 and 38 of the Code. The former prevented an operator from installing apparatus or exercising rights which interfered with or obstruct any means of access to other land. For installation or the exercise of rights to interfere or obstruct in this sense it would be necessary for there to be an existing means of access either in use or sufficiently identified and established to enable the interference or obstruction to be apparent. Paragraph 38 was not so restricted and involved any interference or obstruction which may arise after the installation or other work has been undertaken and completed. It meant that an operator could install apparatus or exercise other Code rights in the absence of a means of access to or from neighbouring land, but subject always to the right of the neighbouring landowner to require its removal to facilitate the creation of a new access.

36. Noting that paragraph 13 refers to "any means of access" while paragraph 38 refers instead simply to "a means of access", Ms Stevens-Hoare suggested that the paragraph 38 right to require removal would logically be redundant if "means of access" referred only to an existing access in use since paragraph 13 already prohibited exercising the right to install apparatus on land where doing so would interfere with "any means of access".

37. The right to obtain information conferred by paragraph 39(2) was also said to lend weight to the claimants' analysis, as it enabled a landowner to obtain information about apparatus which was preventing the formation of a means of access to neighbouring land. This right would be otiose if there was then no ability for the landowner to remove such apparatus.

38. We do not accept Ms Stevens-Hoare's submissions on this aspect of the reference.

39. As a matter of language, the reference in paragraph 38(2) of the Code to apparatus which "interferes with or obstructs a means of access to or from neighbouring land" strikes us as referring to an existing means of access, rather than something potential. As Mr Catherwood

pointed out on behalf of the respondent, the expression is required to cover means of access of all types which might be obstructed in a variety of circumstances or locations. We take that to be a sufficient explanation of the avoidance of more specific terms such as “road” or “way”, and we see no need to read the choice of words as implying an extension of the right to cover an inchoate route which did not exist and was not obstructed when the apparatus was installed. The word “means” implies a current physical state of affairs rather than something more abstract. Mr Catherwood suggested that, on the claimants’ case, a continuous brick wall could nonetheless be a “means of access” if there were planning permission to pull down part of it and install the entrance to a driveway. We agree with him that that would not accord with the ordinary meaning of the words.

40. Language much more suggestive of a potential access is found in paragraph 39(2). This allows a landowner or the occupier of neighbouring land to require an operator to disclose whether the operator owns apparatus “that forms (or, but for the apparatus, would form) a means of access to the neighbouring land”. In the context of the current question the difference between paragraphs 38(2) and 39(2) is striking.

41. We prefer the respondent’s submissions that paragraphs 13 and 38 were intended to operate consistently with one another. They ensure (subject to agreement otherwise) that existing means of access to and from land take priority over operators’ street works rights under Part 8, and this priority is protected by a right to require removal. The statutory language does not suggest that the prohibition in paragraph 13 or the right of removal in paragraph 38 relates to prospective or future means of access.

42. Looking at the matter a little more widely we find it helpful to consider the problem by reference to two general and uncontroversial propositions of law. First, interference with a right of way is wrongful (provided the interference is appreciable, in the case of a public right, or substantial, in the case of a private right). In either case such interference constitutes the tort of nuisance and is unlawful. Secondly, a landowner is not liable to a neighbour for the consequences of the reasonable use of the landowner’s own property; landowner A cannot insist his neighbour N uses his neighbouring land in such a way as to facilitate the development of A’s land. If A wants N to cooperate with A’s plans they must first reach an agreement.

43. The first of these propositions is reflected in paragraph 13(2) of the Code which prohibits the exercise of a Code right over land so as to interfere with or obstruct any means of access to or from any other land. An exception is made in a case where the owner or occupier of the other land is themselves bound by a Code right within paragraph 3(h) which specifically authorises the obstruction of access, which reflects the second proposition.

44. If paragraph 38 of the Code is interpreted as suggested by the respondent, and limited to a right of removal of apparatus which interferes with or obstructs an existing access, it would also be consistent with the first proposition. On the respondent’s case paragraph 38 is simply the corollary of paragraph 13(2) and provides the route by which the prohibition on exercising rights in a way which interferes with an existing access may be enforced.

45. In contrast, if the claimants’ case on the effect of paragraph 38 of the Code is correct, the Code would operate in a way which was flatly contrary to the second proposition and would give

one landowner a significant degree of control over the use which could be made of the land of a neighbour. Paragraph 38(2) would enable the owner of land to insist that a change be made in the use of neighbouring land (by the removal of electronic communications apparatus lawfully present on that land), and that the change be made at the expense of the occupier of that land (the operator), simply in order to enable the owner to create a new access which allowed a different use to be made of his own land. That right would exist and be exercisable apparently without consideration of the scale of the expense, or the extent of the adverse consequences for the neighbour's lawful business, since the paragraph 38 right of removal is not controlled by any test of need or any balancing of the rights and interests of the neighbour, the operator and the general public.

46. On the claimants' interpretation of the Code an operator which did not wish to remove its apparatus to enable a new access to be created to its neighbour's land would be in a position to seek the imposition of a Code right, as against the neighbour, under paragraphs 3(b) and (h) of the Code. Those rights would enable the operator to keep the apparatus installed in its current position, thereby interfering as of right with the neighbour's proposed means of access. But such a Code right might not be readily available, since the neighbour would be entitled to resist its imposition under paragraph 21(5) if the neighbour's land could not reasonably be redeveloped were the order to be made. If the order was made and the neighbour was put to additional expense in developing his land, or its value was diminished, the neighbour would have an entitlement to apply for compensation under paragraphs 25(1) and 84(2). Thus, on the claimants' case a lawful occupier of land (including an operator) who might have been using that land for many years, could be required to compensate their neighbour for the neighbour's inability to make a more profitable use of their own land.

47. These substantial changes in the rights of neighbouring landowners appear all the more significant when the previous state of the law is recalled. Paragraph 20 of the old Code allowed a landowner to obtain changes in an operator's apparatus lawfully present on his own or neighbouring land, but only if a test of necessity was satisfied (the alteration had to be necessary to enable the proposed improvement to be carried out) and only if all other rights required to carry out the alteration had been obtained (such as planning permission). If the court was satisfied that the required pre-conditions were met it would order the alteration of the operator's apparatus at the expense of the person wishing to improve their own land.

48. Ms Stevens-Hoare emphasised that the neighbour's right to require removal of electronic communications apparatus was not only available to developers, but could equally be of benefit to private individuals who found a potential access to the highway from their land was obstructed by a cabinet, mast or other apparatus. She explained the absence of any balancing of rights and interests as between an operator and a neighbour by pointing to the fact that the neighbour was not party to a Code agreement and would therefore not have received consideration or been compensated for the depreciation in the value of their land. Neither of these submissions explains why a piece of legislation intended to improve electronic communications services for the benefit of the public by accelerating and simplifying procedures for installing and retaining infrastructure by operators should include such significant rights for owners of neighbouring land to require the removal of apparatus at the expense of the operator when such rights are contrary to the general law regulating relations between neighbours.

49. We have also had regard to work of the Law Commission which predated the Code (although not all its recommendations are reflected in the Code).

50. In paragraph 4.7 to 4.9 of its Consultation Paper No. 205 the Law Commission explained its understanding that although paragraph 9 of the old Code (which was concerned with street works) was subject to the paragraph 3 which prevented an operator from exercising rights in a way that obstructs access to neighbouring land, it did not take account of the potential for an operator “to restrict future access to land from the public highway, for example where a landowner has planning permission for development that will result in a new access to the property being constructed.” It acknowledged that a landowner who wished to carry out improvements to their land had rights to request the removal of apparatus at their own costs. It concluded that it did not think there was any need to include a prohibition on “the obstruction of access that is as yet undeveloped”, but sought the views of consultees.

51. The Law Commission’s final report (Law Com No.336) returned to the issue, first at paragraph 6.70, where they said this:

“Generally, landowners have no right to require removal of anything built or placed on a neighbour’s land provided that it does not contravene the planning legislation or the private law of nuisance. In most cases, we do not think that special provision should be made for electronic communications apparatus; accordingly we think that the position of neighbours must be left to the general law.”

In later passages the same point was repeated in different forms, but we need refer only to paragraph 9.138:

“We noted in the consultation paper the potential for problems to arise when apparatus interferes with the development plans of a neighbouring landowner, for example, where a roadside cabinet is situated where a landowner wishes to install, or change the position of, a driveway. We have no recommendation to include provision in the revised Code for these particular cases. In these circumstances we would expect the Code operator to act reasonably by agreeing, if technically possible and subject to the costs of doing so being met by the landowner, to move the infrastructure. We think that a code of practice could make clear that this is what is expected.”

52. It can therefore be seen that the Law Commission anticipated the circumstances illustrated by this reference and proposed a consensual solution, at the expense of the landowner. As Mr Catherwood emphasised, in contrast to other Law Commission recommendations, there is nothing to suggest that the Government intended not to implement this one. We agree that it is implausible that, without the Government giving any reason, Parliament decided not to implement this recommendation and moreover, decided to impose the cost of works on operators rather than the landowners for whose benefit they were undertaken.

53. A further difficulty in the claimants’ approach to paragraph 38 is that it would create a parallel regime inconsistent with the continuing application of paragraph 20 of the old Code to apparatus installed before its repeal. Ms Stevens-Hoare acknowledged that the respondent’s apparatus at the Hollow Lane roundabout is still covered by paragraph 20 and that the claimants could request its removal or alteration. There is no reason to think the parties would be unable to

agree, but any such agreement would inevitably be on no more favourable terms than would be ordered by the court in the event of disagreement. Paragraph 20(8) of the old Code provides that, unless the court otherwise thinks fit, the person seeking the order must reimburse the operator's costs of compliance. We think it unlikely that Parliament could have intended the right to require removal without charge under the new Code to exist in relation to apparatus which did not obstruct access when it was installed, when the continuing right to request removal under the old Code is ordinarily exercisable only at the expense of the landowner.

54. For these reasons we are satisfied that the condition in paragraph 38(2) of the Code is not satisfied and the claimants do not have the right to require the removal of the respondent's apparatus from the Hollow Lane roundabout. That apparatus does not interfere with or obstruct "a means of access" in the required sense.

The claimants' alternative case

55. The claimants advanced an alternative case on the assumption that the right to require removal under paragraph 38 was limited to cases where the apparatus interferes with an existing right of access. They relied on the original domestic drive serving the pair of cottages adjoining the roundabout which connected the highway to what is now the claimants' land. This access was in use when the respondent's apparatus was installed in September 2011.

56. The claimants' case was that the proposed development of their land to the west of the roundabout required the widening of the existing point of access to accommodate the new public highway. The respondent's cabinet on the footway would require to be moved to enable the access to be widened and the cabinet therefore interfered with or obstructed the existing means of access to the claimants' land.

57. In our judgment the claimants' alternative case fails on the facts. At the time the respondent's apparatus was installed it did not obstruct any means of access to what is now the claimants' land. The expected obstruction does not arise from any modification of an existing access, but from the creation of a wholly new access in a different location (although we acknowledge that a small part of the route of the new access will traverse the same ground as the former domestic drive). The plans we were shown had not been drawn with a view to identifying the relationship between the new route and the original drive but from the aerial photograph we were shown the original drive was perhaps 10 feet wide and 30 feet long; the new exit from the roundabout will be at least four times as wide, with a footway on each side and a pedestrian island in the middle. The two routes will overlap, but only to a limited extent. It is not necessary to decide whether apparatus which interference with a proposed modification of an existing means of access might be within the scope of paragraph 38(2), because this is clearly not such a case.

58. We therefore do not accept either of the bases on which the claimants presented their case and we dismiss the reference.

Martin Rodger QC
Deputy Chamber President
15 April 2019

P D McCrea FRICS