Daniel Margolin was called to the Bar in 1995 and practises at Maitland Chambers in Lincoln's Inn. His practice encompasses property litigation, commercial chancery work, company and insolvency litigation, professional negligence and disciplinary proceedings, and trusts, charities and succession disputes. In the property sphere his experience includes such diverse cases as Munro v Premier Associates Ltd (2000) 80 P&CR 439 (notice to complete; waiver and estoppel), Ipswich Borough Council v Moore The Times, 25 October 2001 (CA) (public right of navigation; mooring rights), Republic of Iraq v Al-Kobayci [2006] All ER (D) 55 (Apr) ( forgery of lease and deed of rectification; summary judgment) and Republic of Croatia v Republic of Serbia [2010] Ch 200 (entry of restriction against registered title to property in London following dismemberment of former Yugoslavia; Land Registration Act 2002 sections 42 and 43). He has had a particular interest in litigation concerning the Electronic Communications Code for a number of years and has been instructed in numerous cases in this field. He is recommended in The Legal 500 for property litigation and appears in the real estate litigation, commercial chancery and chancery (treasury counsel) rankings in Chambers UK. He is a member of the Attorney-General’s “A” Panel of counsel and in that capacity is sometimes called upon to advise on the more obscure areas of property law such as the law of escheat and to advise HMRC in relation to the tax implications of property transactions.
Introduction

1 The Electronic Communications Code (the “Code”) – formerly known as the Telecommunications Code – is to be found in Schedule 2 to the Telecommunications Act 1984 as amended by Schedule 3 to the Communications Act 2003. It was intended to replace the provisions of the Telegraph Acts 1863 to 1916 with a new statutory regime which was better suited to “modern” conditions. It remains relatively obscure, having generated little in the way of litigation and very few cases which have been reported or whose outcomes have otherwise found their way into the public domain. Those involved in property litigation might feel, therefore, that they can be forgiven for being unfamiliar with the provisions of the Code. The difficulty with that approach is that the largely self-contained provisions of the Code confer on “operators” – that is to say, licensed providers of electronic communications services – quite extensive property rights including a distinctive form of security of tenure.

2 The Office for Communications (“OFCOM”), the “independent regulator and competition authority for the UK communications industries”, has this to say on its website regarding the ambit of the Code:

“The Electronic Communications Code ("the Code") enables electronic communications network providers to construct electronic communications networks. The Code enables these providers to construct infrastructure on public land (streets), to take rights over private land, either with the agreement with the landowner or applying to the County Court or the Sheriff in Scotland. It also conveys certain immunities from the Town and Country Planning legislation in the form of Permitted Development.

In addition to providers of electronic communications networks the Code is also available to those who wish to construct conduits to be made available to network providers.

The Code is granted to network providers by the Office of Communications ("OFCOM") by a direction made following a public consultation and consideration of the responses to that consultation.


3 The Code applies in the case of a particular operator if a direction to that effect has been made under section 106 of the Communications Act 2003. A list of those operators to which the Code applies can be found on OFCOM's website.

1 http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/
2 http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/register-persons-power
In the recent case of Geo Networks Ltd v The Bridgewater Canal Company Ltd [2010] EWHC 548 (Ch) Lewison J, at first instance, described his impression of the Code, at [7], [56], in terms which were distinctly unflattering.³

“The Code is not one of Parliament’s better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says that the code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as “the electronic communications code” in “this Chapter”, the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called “The Telecommunications Code”. … It will be apparent that, in my view, the Code is extremely difficult to understand; and that the overall scheme of the Code is difficult to fit into a coherent framework.”

As regards “the overall scheme of the Code”, the Code contains a number of references to “the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services” (see paragraphs 5(3), 13(5), 14(4), 17(8) and 20(4)), which on the claimant’s appeal to the Court of Appeal in Geo Networks Ltd v The Bridgewater Canal Company Ltd [2010] EWCA Civ 1348 Sir Andrew Morritt C described at [25] as “the overriding principle”. That said, “access to an electronic communications network or to electronic communications services” is a qualified rather than an absolute requirement, the notion that “no person should unreasonably be denied access” requiring a kind of balancing exercise to be undertaken. As Lewison J put it in Geo Networks Ltd v The Bridgewater Canal Company Ltd at first instance, at [28]:

“The formulation of the principle … is not that no person shall be denied access to a network. It is that no person shall unreasonably be denied access. Necessarily, as it seems to me, formulating the principle in this way entails the conclusion that there may be circumstances in which it is reasonable to deny such access.”

Unhelpfully, however, the Code provides no real guidance as to the circumstances in which it will be reasonable to deny a person access to an electronic communications network.

The “right” with which the Code is primarily concerned is that referred to in paragraph 2(1), being:

“… a right for the statutory purposes—

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

(b) to keep electronic communications apparatus installed on, under or over that land; or

c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator’s network.”

7 The exercise of that right is subject to paragraph 2(5), which provides that:

“(5) A right falling within sub-paragraph (1) above shall not be exercisable except in accordance with the terms (whether as to payment or otherwise) subject to which it is conferred; and, accordingly, every person for the time being bound by such a right shall have the benefit of those terms.”

8 The exercise of the right referred to in paragraph 2(1) is also subject to the conditions laid down by the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2553/2003) as amended by the Electronic Communications Code (Conditions and Restrictions) Amendment Regulations 2009 (SI 548/2009) (the “Regulations”). In particular:

1) Regulation 3 of the Regulations (General conditions) provides that:

“(1) A code operator shall consult—

(a) highway authorities … to ensure that any works involving the breaking up of maintainable highways or public roads do not undermine or unduly disturb the highway authorities’ or roads authorities’ work;

(b) planning authorities in relation to the installation of electronic communications apparatus, including installation in a local nature reserve; and

(c) relevant undertakers with a view to avoiding the disruption of the services provided by those undertakers.

(2) A code operator shall ensure that any electronic communications apparatus installed underground is installed at such a depth that it will not interfere with the use of the land (as at the date of the installation), unless the occupier and any other person having a legal interest in that land have consented.

(3) A code operator, when installing any electronic communications apparatus, shall, so far as reasonably practicable, minimise—

(a) the impact on the visual amenity of properties, in particular buildings on the statutory list of buildings;

(b) any potential hazards posed by work carried out in installing the apparatus or by apparatus once installed; and
(c) interference with traffic.

(4) A code operator, where practicable, shall share the use of electronic communications apparatus.

(5) A code operator shall install the minimum practicable number of items of electronic communications apparatus consistent with the intended provision of electronic communications services and allowing for an estimate of growth in demand for such services.”

(2) Regulation 4 of the Regulations (Lines) provides:

“(1) A code operator shall install all lines underground unless—

(a) the line is flown from a pole in an area where service lines are already flown from poles;

(b) the line is—

(i) affixed to and lying on the exterior surface of a building or other permanent structure and is either used as a service line or terminates at a service line distribution point;

(ii) a service line flown from the eaves of one building or other permanent structure to those of another where the distance between them is less than 8 metres; or

(iii) a feeder cable connecting equipment for the provision of services by wireless telegraphy;

and is neither affixed to a building shown as grade 1 … in the statutory list of buildings nor located in a conservation area;

(c) the line is attached to or supported by poles or pylons which are used in connection with the transport of electricity at a nominal voltage of at least 6000 volts;

(d) the line is installed for the purpose of providing a temporary electronic communications network under regulation 15; or

(e) it is not in all the circumstances reasonably practicable to do so.

(2) A code operator shall ensure that any lines installed over the carriageway of—

(a) a maintainable highway … are placed at least 5.5 metres above the surface of the highway or road; and
(b) a maintainable highway ... which is a high load grid route are placed at least 6.5 metres above the surface of the highway or road.

(3) If requested by any person to relocate a line which is already installed above the ground, a code operator must relocate that line unless—

(a) he determines either that the request is unreasonable or that the person making the request will not pay the costs of the relocation; and

(b) he notifies that person of that determination within 56 days of the receipt of the request."

(3) Regulation 5 of the Regulations (Installation of electronic communications apparatus) provides:

“(1) A code operator must give one month’s notice, in writing, to the planning authority for the area in question where—

(a) he has not previously installed electronic communications apparatus in the area and is intending to install electronic communications apparatus, other than lines, in that area; or

(b) he intends to install a cabinet, box, pillar, pedestal or similar apparatus for the installation of which he is not required to obtain planning permission under the Town and Country Planning Act 1990.

(2) The notice to be given under paragraph (1) must state the code operator’s intention to install electronic communications apparatus and must describe that apparatus and identify the location where it is proposed to install it.

(3) Where a code operator has given notice under paragraph (1), the planning authority may, within one month of the receipt of that notice, give the code operator written notice of conditions with which the planning authority wishes him to comply in respect of the installation of the apparatus, but he is not obliged to comply with those conditions to the extent that they are unreasonable in all the circumstances.

(4) A code operator is exempt from paragraph (1) if—

(a) the electronic communications apparatus he intends to install is to be installed inside a building or other permanent structure;

(b) the apparatus is to be installed for the purpose of providing a temporary electronic communications network under regulation 15; or
(c) the apparatus he intends to install is to be attached to or supported by poles or pylons which are used for the transport of electricity at a nominal voltage of at least 6000 volts.

(5) Where a code operator installs electronic communications apparatus underground in a maintainable highway or a street … he shall place that apparatus in the verge or footway rather than the carriageway unless it is not reasonably practicable to do so.”

(4) Regulation 9 of the Regulations (Use of conduits) provides:

“Where electronic communications apparatus is to be installed underground in—

(a) a part of a maintainable highway …, or

(b) a street … which the code operator has been notified by the street authority or the road works authority is to be paved, or

(c) the verge of any street …,

it shall be installed in conduits unless it is not reasonably practicable to do so.”

(5) Regulation 10 of the Regulations (Maintenance and the safety of apparatus) provides:

“(1) A code operator shall inspect and maintain his electronic communications apparatus, other than apparatus installed underground or inside a building or other permanent structure, so as to ensure that it will not cause injury to any person or damage to property.

(2) A code operator who receives a report that any electronic communications apparatus of his, wherever installed, is in a dangerous state shall investigate that report and, if necessary, make the apparatus safe.

(3) A code operator shall inform the highway authority … of the arrangements he has made to comply with paragraph (1).”

8. The Regulations also contain specific provisions with regard to conservation areas, listed buildings and ancient monuments and protected areas, and in relation to such matters as arrangements with electricity suppliers, record keeping and the making available by the operator of “trained staff … to indicate, on site, the location and nature of electronic communications apparatus of his installed in or under a maintainable highway or street” when asked to do so by a relevant undertaker or highway authority.

9 In Geo Networks Ltd v The Bridgewater Canal Company Ltd at first instance Lewison J drew a distinction between the “general regime” of the Code (as to which see [8]-[12]) and the “special regimes” for which specific provision is made
in paragraphs 9 to 12 (as to which see [14]-[18]). On appeal, Sir Andrew Morritt C (with whom Leveson and Patten LJJ agreed) described the special regimes as being “quite different” from the general regime (see [27]).

10 It should be noted that as appears from paragraph 2(7) of the Code, “a right falling within sub-paragraph (1) above is not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land.” The existence of rights under the Code is not, therefore, something which would be apparent from an inspection of the Register of Title, the Land Charges Register or the Local Land Charges Register.

11 Paragraph 27(2) of the Code provides that:

“The provisions of this code, except paragraphs 8(5) and 21 and sub-paragraph (1) above, shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.”

In other words, save to that limited extent contracting-out of the Code is permissible.

12 It would appear that the Code (as supplemented by the Regulations) is intended to provide a comprehensive scheme governing the activities of network operators. This is apparent from paragraph 27(3) which provides that:

“Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with this code.”

13 As appears from paragraph 26(1), the Code applies “in relation to land in which there subsists, or at any material time subsisted, a Crown interest as it applies in relation to land in which no such interest subsists.”

The general regime

14 On appeal to the Court of Appeal in Geo Networks Ltd v The Bridgewater Canal Company Ltd Sir Andrew Morritt C gave the following summary of the general regime (at [5]):

“The basic structure of the general regime is to require the operator … to acquire the rights it needs to install and keep electronic communications apparatus on land in the occupation and/or ownership of another by agreement. If agreement cannot be reached then paragraph 5 provides a mechanism by which the necessary rights are obtained through the giving of a notice specifying the rights required and an order of the County Court if it is satisfied as to the matters set out in paragraph 5(3). The order of the County Court is required by paragraph 7(1) to make provision for the payment of consideration and compensation. The provisions which are particularly relevant are those contained in paragraphs 2(1), 5(2), (3) and (4) and 7(1). The
overall effect of the general regime is that all those who have an interest in the relevant land, if bound by the order, are to be entitled to be paid for the right to install and keep the electronic apparatus on their land and to be compensated for any loss or damage sustained in consequence of its installation and maintenance thereon."

15 Thus in order to exercise rights under the Code, an operator requires either the “agreement in writing of the occupier for the time being” of the relevant land under paragraph 2 (Agreement required to confer right to execute works etc.) or a court order under paragraph 5 (Power to dispense with the need for required agreement).

16 So far as the need for the occupier’s agreement “in writing” is concerned, Schedule 1 to the Interpretation Act 1978 provides that:

“"Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.”

There is, therefore, no requirement for agreement to be given by deed; indeed, no particular formality is required. There are understood to have been instances when an occupier’s written agreement has been unwittingly given simply by filling in an operator’s application form. (To ensure that agreement is not given before appropriate terms have been agreed as to payment and otherwise, it might be wise to ensure that all communications relation to the proposed installation of electronic communications apparatus are expressed to be “subject to contract”.) Specific provision is made by section 395 of the Communications Act 2003 in relation to electronic communications, as discussed below.

17 Paragraph 2(1) refers to the agreement in writing of “the occupier for the time being” of the land. The distinction between “occupation” and “possession” (as to which see, for example, Lam Kee Ying Sdn Bhd v Lam Shes Tong [1975] AC 247 (PC); Akici v LR Butlin Ltd [2005] EWCA Civ 1296, [2006] 1 WLR 201 (CA); Clarence House Ltd v National Westminster Bank plc [2009] EWCA Civ 1311, [2010] 1 WLR 1216 (CA)) will be a familiar one to property litigators. An “occupier” may be a licensee who has no interest in the land in question and is not in “possession” of it. It would seem to follow, on the face of it, that the agreement of a licensee without any interest in the land in question will be sufficient for the Code to apply. However, paragraph 2(8)(a) of the Code (as amended by paragraph 114 of Schedule 8 to the New Roads and Streets Works Act 1991) provides, so far material, that:

“references to the occupier of any land shall have effect—

(iii) in relation to any land, not being a street ..., as references to the person, if any, who for the time being exercises powers of management or control over the land or, if there is no such person, to every person whose interest in the land would be prejudicially affected by the exercise of the right in question”.

There may, therefore, be scope for argument as to whether, in any particular case, it is the licensee or the licensor who “exercises powers of management or
control over the land" (which may ultimately depend on the precise terms of the licence itself) and hence as to whether the written agreement of the licensee is sufficient to confer Code rights on the operator.

At all events, paragraph 2(1) is subject to the specific provisions of paragraphs 2(2) and 2(3) and paragraph 4. Paragraph 2(2) provides:

“A person who is the owner of the freehold estate in any land or is a lessee of any land shall not be bound by a right conferred in accordance with sub-paragraph (1) above by the occupier of that land unless—

(a) he conferred the right himself as occupier of the land; or
(b) he has agreed in writing to be bound by the right; or
(c) he is for the time being treated by virtue of sub-paragraph (3) below as having so agreed; or
(d) he is bound by the right by virtue of sub-paragraph (4) below.

Paragraph 2(3) is concerned with the situation where the occupier of the land has granted a right “for purposes connected with the provision, to the occupier from time to time of that land, of any electronic communications services” and where the person conferring the right is also the freeholder or a lessee under a lease for a term of a year or more, or where the freeholder or lessee under a lease for a term of a year or more has agreed in writing that his interest in the land should be bound by the right. And, so far as relevant for present purposes, paragraph 4 contains the following provisions:

“(1) Anything done by the operator in exercise of a right conferred in relation to any land in accordance with paragraph 2 or 3 above shall be deemed to be done in exercise of a statutory power except as against—

(a) a person who, being the owner of the freehold estate in that land or a lessee of the land, is not for the time being bound by the right; or
(b) a person having the benefit of any covenant or agreement which has been entered into as respects the land under any enactment and which, by virtue of that enactment, binds or will bind persons deriving title or otherwise claiming under the covenanor or, as the case may be, a person who was a party to the agreement.

(2) Where a right has been conferred in relation to any land in accordance with paragraph 2 or 3 above and anything has been done in exercise of that right, any person who, being the occupier of the land, the owner of the freehold estate in the land or a lessee of the land, is not for the time being bound by the right shall have the right to require the operator to restore the land to its condition before that thing was done.
(3) Any duty imposed by virtue of sub-paragraph (2) above shall, to the extent that its performance involves the removal of any electronic communications apparatus from any land, be enforceable only in accordance with paragraph 21 below.

19 Thus the agreement in writing of the occupier, as defined in paragraph 2(8), is sufficient to confer rights under the Code on the operator, but the owner of the freehold estate in the land or the lessee of the land is not bound by those rights unless it was he who conferred them on the operator; or he has given his agreement in writing to be bound by them; or he is treated as having given his agreement in writing to be bound by the rights by virtue of paragraph 2(3); or his interest is a derivative interest deriving from that of a person who has agreed that his own interest should be bound (see paragraph 2(4)). Furthermore, a freeholder or lessee who is not bound by the operator's rights is entitled “to require the operator to restore the land to its condition before that thing [i.e. something done in exercise of the operator's right] was done” (see paragraph 4(2)); however, as provided in paragraph 4(3), if that involves the removal of any electronic communications apparatus this can only be enforced in accordance with the procedure laid down in paragraph 21, as to which see further below.

20 Paragraph 4 goes on to provide for compensation to be payable by the operator in certain circumstances. More particularly, paragraph 4(4) provides:

“Where—

(a) on a right in relation to any land being conferred or varied in accordance with paragraph 2 above, there is a depreciation in the value of any relevant interest in the land, and

(b) that depreciation is attributable to the fact that paragraph 21 below will apply to the removal from the land, when the owner for the time being of that interest becomes the occupier of the land, of any electronic communications apparatus installed in pursuance of that right,

the operator shall pay compensation to the person who, at the time the right is conferred or, as the case may be, varied, is the owner of that relevant interest; and the amount of that compensation shall be equal (subject to sub-paragraph (9) below) to the amount of the depreciation.”

Paragraph 4(6) provides for any question as to a person's entitlement to compensation under paragraph 4(4) to be determined by the appropriate tribunal (in England and Wales this is now the Upper Tribunal: see paragraph 4(10A)(a)) and for section 4 of the Land Compensation Act 1961 (relating to costs) to apply; paragraph 4(7) lays down a procedure for notifying such a claim; paragraph 4(8) provides that “rules (2) to (4) set out in section 5 of the Land Compensation Act 1961 shall, subject to any necessary modifications, have effect as they have effect for the purposes of assessing compensation for the compulsory acquisition of any interest in land”; and paragraph 4(10) provides that “Subsections (1) to (3) of section 10 of the Land Compensation Act 1973 (compensation in respect of mortgages, trusts of land and settled land) shall apply in relation to
compensation under sub-paragraph (4) above as they apply in relation to compensation under Part I of that Act.” Compensation under paragraph 4 thus falls to be quantified in accordance with compulsory purchase principles.

21 As mentioned above, paragraph 5 enables the court (defined in paragraph 1(1)(a) as meaning the county court) to dispense with the need for agreement under paragraph 2. So far as material for present purposes it provides as follows:

“(1) Where the operator requires any person to agree for the purposes of paragraph 2 or 3 above that any right should be conferred on the operator, or that any right should bind that person or any interest in land, the operator may give a notice to that person of the right and of the agreement that he requires.

(2) Where the period of 28 days beginning with the giving of a notice under sub-paragraph (1) above has expired without the giving of the required agreement, the operator may apply to the court for an order conferring the proposed right, or providing for it to bind any person or any interest in land, and (in either case) dispensing with the need for the agreement of the person to whom the notice was given.

(3) The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order—

(a) is capable of being adequately compensated for by money; or

(b) is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order;

and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

(4) An order under this paragraph made in respect of a proposed right may, in conferring that right or providing for it to bind any person or any interest in land and in dispensing with the need for any person’s agreement, direct that the right shall have effect with such modifications, be exercisable on such terms and be subject to such conditions as may be specified in the order.

(5) The terms and conditions specified by virtue of sub-paragraph (4) above in an order under this paragraph, shall include such terms and conditions as appear to the court appropriate for ensuring that the least possible loss and damage is caused by the exercise of the right in respect of which the order is made to persons who occupy, own interests in or are from time to time on the land in question.”
Thus the Code requires the court to make an order under this paragraph if it is satisfied that any prejudice caused by the order is either “capable of being adequately compensated for by money” or “outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order”, having regard to all the circumstances and to the rather nebulous principle referred to above that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

If the court is persuaded to make an order under paragraph 5, it may (and in certain circumstances apparently must) do so subject to conditions. As to this, paragraph 7 of the Code (Court to fix financial terms where agreement dispensed with) provides, so far as material, as follows:

“(1) The terms and conditions specified by virtue of sub-paragraph (4) of paragraph 5 above in an order under that paragraph dispensing with the need for a person’s agreement, shall include—

(a) such terms with respect to the payment of consideration in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order; and

(b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are adequately compensated (whether by the payment of such consideration or otherwise) for any loss or damage sustained by them in consequence of the exercise of those rights.

(2) In determining what terms should be specified in an order under paragraph 5 above for requiring an amount to be paid to any person in respect of—

(a) the provisions of that order conferring any right or providing for any right to bind any person or any interest in land, or

(b) the exercise of any right to which the order relates,

the court shall take into account the prejudicial effect (if any) of the order or, as the case may be, of the exercise of the right on that person’s enjoyment of, or on any interest of his in, land other than the land in relation to which the right is conferred.

(4) The terms specified by virtue of sub-paragraph (1) above in an order under paragraph 5 above may provide—

(a) for the making of payments from time to time to such persons as may be determined under those terms; and
(b) for questions arising in consequence of those terms (whether as to the amount of any loss or damage caused by the exercise of a right or otherwise) to be referred to arbitration or to be determined in such other manner as may be specified in the order.”

24 These provisions were considered in Mercury Communications Ltd v London and India Dock Investments Ltd [1994] 1 EGLR 229, (1993) 69 P&CR 135 and in Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd [2002] EWCA Civ 720.

25 In Mercury Communications Ltd v London and India Dock Investments Ltd the applicant, Mercury, wished to lay and use telecommunications ducts under a private roadway in the Isle of Dogs which was owned by the respondent, LIDI. The ducts were intended to link Mercury’s “Earth Station” in East London with Canary Wharf. There were already some ducts between Canary Wharf and the Earth Station but it was common ground that these were inadequate and that further ducts would have to be laid. LIDI did not provide its written agreement under paragraph 2 and Mercury therefore sought an order under paragraph 5 of the Code. Both parties agreed that the conditions for the making of an order under paragraph 5 of the Code were satisfied, that there was no “loss or damage” for which LIDI was entitled to be “compensated” under paragraph 7(1)(b) and that LIDI would not suffer any loss or damage as a result of severance or injurious affection so that no compensation was payable under paragraph 7(2) either. The sole issue to be determined, therefore, was what “consideration” Mercury should be required to pay under paragraph 7(1)(a). Mercury’s argument was that compulsory purchase principles were applicable, that under those principles only the value to LIDI could be considered, that any increase in value to LIDI due to the scheme under Mercury’s acquisition had to be ignored and that the consideration payable was therefore nil or nominal. LIDI argued that compulsory purchase principles did not apply, that the rights to be conferred were equivalent to a “ransom strip” of the kind identified in Stokes v Cambridge Corporation (1952) 13 P&CR 77 and that LIDI could thus negotiate for, and was entitled to a percentage share of, Mercury’s anticipated profits from its Canary Wharf operation.

26 HH Judge Hague QC looked carefully at the wording of paragraph 7(1)(a) and came to the view that:

(1) The words “willingly given” referred to the grantor, who must therefore be a “willing” grantor, but a “willing” grantee—that is to say, one who was willing to take on “fair and reasonable” terms—also had to be assumed.

(2) It was necessary to consider what would be “fair and reasonable” terms as between the applicant and the respondent, rather than as between a hypothetical grantor and a hypothetical grantee.

(3) Deciding what would have been “fair and reasonable” if agreement had been willingly given necessarily involved “an element of subjective judicial opinion, for there can be no proof or objective determination of what is fair and reasonable. To a certain extent, the answer must depend on the judge’s own perception of what is "fair and reasonable"."
There was, therefore, a distinction between this case and the more usual case where what was required was a determination of “market value”, which would involve “an objective assessment of a factual matter not involving any discretion or subjective opinion.” What the court had to determine was not, therefore, “the same as what the result in the market would have been if the grant had been given willingly.”

However, that was “far from saying that the market result is irrelevant or can afford no guidance”. Indeed, “the market result is the obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable", because prima facie it would be neither fair nor reasonable for the grantor to receive less than he would in the market or for the grantee to have to pay more than he would in the market.” There might, however, be circumstances, “of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable".”

The word “willingly” in paragraph 7(1)(a) (“such terms … as it appears to the court would have been fair and reasonable if the agreement had been given willingly …”) could not be taken in isolation, since it was “a meaningless concept if considered apart from the financial terms of the grant. Whether or not a vendor or grantor is "willing" must necessarily depend on the price or consideration he is to receive.”

27 The learned Judge went on to hold that compulsory purchase principles did not apply, not least because unlike previous legislation the Code did not expressly incorporate the compulsory legislation (save in certain specific cases), and that the applicable principles were instead those derived from the words “willingly” and “fair and reasonable”. But he also rejected LIDI’s submission that the occupier was entitled to claim a percentage share in the Mercury’s profits on a “ransom strip” basis. Nor did he consider that LIDI was entitled to a share of the increased value of the development site, indicating that this was “not an appropriate method to use for any situation except where (1) there is a single capital payment to be made and (2) the benefit to the developer/payer can be relatively easily quantified, as in the typical Stokes v Cambridge situation”, and saying that he had “heard no evidence of this kind of "profit" calculation being employed in practice in any other situation, and in particular in any situation involving an annual payment … I cannot think that, except in very special and unusual instances, it would be so used where its basis is an estimated future profit on an annual basis.” The “nearest analogous situation”, in his judgment, was that of a wayleave:

“In principle, it seems to me that the equivalent of a wayleave rent would be the most "fair and reasonable" method of determining the consideration. However, that is plainly not practical in the present case, just as it is not practical in the majority of right of way cases. There must necessarily be instead a capital payment or annual rent,

\[4\] The learned Judge’s reasoning in relation to this issue was approved by Lord Clarke JSC in Star Energy Weald Basin Ltd v Bocardo SA [2010] UKSC 35, [2010] 3 WLR 654 (SC), [2010] 3 All ER 975 (SC) at [138].
but that should in my view reflect the anticipated use of the right and thus its importance and the value to the grantee.”

28 The only material available to the Judge on which such an evaluation could be based was the evidence of comparable transactions. Having considered this evidence in detail he arrived at a figure which he then cross-checked “objectively and ignoring the method of arriving at it” in order to ascertain whether it was “the right sort of figure given the importance of the ducts to Mercury and the bargaining strengths of both sides”.

29 In Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd both parties adopted HH Judge Hague QC’s statements of principle in Mercury Communications Ltd v London and India Dock Investments Ltd and so the Court of Appeal did not hear argument in relation to these matters. Even so they did “highlight certain aspects which emerge from the judgment” in Mercury Communications Ltd v London and India Dock Investments Ltd, with Mance LJ (with whom Longmore and Aldous LJJ agreed) saying in particular that:

“[7] … the exercise required by paragraph 7 is not one of ascertaining market terms or value, although any market terms or value are a relevant consideration to take into account. The test, when fixing terms with respect to either the payment of consideration or the exercise of the rights to which the order relates, is what "it appears to the court would have been fair and reasonable if the agreement had been given willingly". This formulation was no doubt chosen because of the public interest in enabling ordinary members of the public to be offered and to obtain new telecommunications services without individual landowners being able to insist on perhaps excessive sums, for example because of the need to use what might in some cases amount to no more than ransom strips.

[8] However, as His Honour Judge Hague remarked at page 144G, this formulation does introduce an element of subjective judgment into the process of fixing of terms. His Honour Judge Hague found that assistance was to be obtained when making such a judgment from examining comparables, and so did the experts called in the present case. When considering comparables allowance should, however, be made if it could be shown that the paying party had, for whatever reason, been ready to concede a high value for pragmatic reasons: for example time constraints, the expense or uncertainty of litigation, or (I might add) the small size of the works and of any payment: see page 168.”

30 Reference should also be made to [43]-[44] where Mance LJ dealt with the complaint (not in fact pursued at the hearing of the appeal) that the Judge should have insisted upon an annualised payment rather than a once and for all payment, saying:

“The appellants certainly had no right to dictate terms under the statute. What the terms were was for the judge to determine. Mr Sadler’s evidence was emphatically that a once and for all payment was nowadays the common way of paying for such a wayleave. The
arguments of a practical nature, which could be advanced by the respondents, against any continuing relationship involving a lease or annual wayleave with calculations and variations from time to time were, it seems to me, overwhelming. It would, as was said at one point, have been taking a sledgehammer to crack a nut. The judge was right to order a once and for all payment.”

31 The Code lays down two procedures whereby “possession” and/or the removal of the apparatus may be secured. Both involve the giving of notice followed, if necessary, by an application to the court.

32 Paragraph 20 (Power to require alteration of apparatus) provides as follows:

“(1) Where any electronic communications apparatus is kept installed on, under or over any land for the purposes of the operator’s network, any person with an interest in that land or adjacent land may (notwithstanding the terms of any agreement binding that person) by notice given to the operator require the alteration of the apparatus on the ground that the alteration is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest.

(2) Where a notice is given under sub-paragraph (1) above by any person to the operator, the operator shall comply with it unless he gives a counter-notice under this sub-paragraph within the period of 28 days beginning with the giving of the notice.

(3) Where a counter-notice is given under sub-paragraph (2) above to any person, the operator shall make the required alteration only if the court on an application by that person makes an order requiring the alteration to be made.

(4) The court shall make an order under this paragraph for an alteration to be made only if, having regard to all the circumstances and the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services, it is satisfied—

(a) that the alteration is necessary as mentioned in sub-paragraph (1) above; and

(b) that the alteration will not substantially interfere with any service which is or is likely to be provided using the operator’s network.

(5) The court shall not make an order under this paragraph for the alteration of any apparatus unless it is satisfied either—

(a) that the operator has all such rights as it appears to the court appropriate that he should have for the purpose of making the alteration, or

(b) that—
(i) he would have all those rights if the court, on an application under paragraph 5 above, dispensed with the need for the agreement of any person, and

(ii) it would be appropriate for the court, on such an application, to dispense with the need for that agreement;

and, accordingly, for the purposes of dispensing with the need for the agreement of any person to the alteration of any apparatus, the court shall have the same powers as it would have if an application had been duly made under paragraph 5 above for an order dispensing with the need for that person's agreement.

(6) For the purposes of sub-paragraph (5) above, the court shall have power on an application under this paragraph to give the applicant directions for bringing the application to the notice of such other interested persons as it thinks fit.

(7) An order under this paragraph may provide for the alteration to be carried out with such modifications, on such terms and subject to such conditions as the court thinks fit, but the court shall not include any such modifications, terms or conditions in its order without the consent of the applicant, and if such consent is not given may refuse to make an order under this paragraph.

(8) An order made under this paragraph on the application of any person shall, unless the court otherwise thinks fit, require that person to reimburse the operator in respect of any expenses which the operator incurs in or in connection with the execution of any works in compliance with the order.

(9) In sub-paragraph (1) above "improvement" includes development and change of use."

33 Crucially, "alteration" is defined in paragraph 1(2) of the Code so as to include "removal", so that the paragraph 20 procedure may be invoked—either by the owner of the land on which the apparatus is situated or by an owner of adjacent land—provided that the removal of the apparatus is "necessary" in order to enable that person to carry out a proposed "improvement" (including "development" and "change of use") of the land in which he has an interest.

34 There are, however, a number of difficulties with the paragraph 20 procedure, particularly from the perspective of the person seeking the removal of the apparatus.

(1) For one thing, for the procedure to be successfully invoked the removal of the apparatus must be "necessary" rather than merely desirable: see paragraph 20(1) and paragraphs 20(4)(a).

(2) In addition, it must be shown that the removal of the apparatus "will not substantially interfere with any service which is or is likely to be provided
using the operator’s network”: see paragraph 20(4)(b). It may not be easy for the applicant to obtain evidence to demonstrate this.

(3) Any order made under paragraph 20 “shall, unless the court otherwise thinks fit, require that person to reimburse the operator in respect of any expenses which the operator incurs in or in connection with the execution of any works in compliance with the order”. Such expenses may not be easy to predict, and could be substantial.

(4) There may be scope for argument as to the correct legal analysis if a person invokes the paragraph 20 procedure at some point during the currency of a fixed-term agreement relating to the installation of the apparatus. Arguably this would amount to a repudiation or frustration of the agreement. But it is not inconceivable that the network operator might claim to be entitled to return to the site following the completion of the development, an analysis which could well be undesirable from the landowner’s point of view.

Paragraph 21 (Restriction on right to require the removal of apparatus) is the main source of the unusual security of tenure conferred on operators by the Code. Paragraph 21(1) provides that:

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

Paragraph 21(2) then provides that:

“The person entitled to require the removal of any of the operator’s electronic communications apparatus shall give a notice to the operator requiring the removal of the apparatus.”

The operator then has 28 days in which to serve a counter-notice, failing which the giver of the notice “shall be entitled to enforce the removal of the apparatus”: see paragraph 21(3). A counter-notice given by the network operator must, as appears from paragraph 21(4), “(a) state that that person is not entitled to require the removal of the apparatus” and/or “(b) specify the steps which the operator proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land.” Paragraph 21(5) then provides that:

---

5 Oliver Radley-Gardner of Falcon Chambers has pointed out in a recent paper (available at http://www.falcon-chambers.com/uploads/docs/section9/Some_Things_You_Might_Not_Know_About_the_Electronic_Communications_Code.pdf) that this is how the operation of the RTM under Part II of the Commonhold and Leasehold Reform Act 2002 is sometimes explained insofar as regards contracts entered into before the RTM was exercised, but he also argues that a contract cannot be frustrated where the alleged frustrating event was reasonably foreseeable and that repudiation and frustration will be more difficult to make out where the underlying agreement is a lease.
“Those steps may include any steps which the operator could take for the purpose of enabling him, if the apparatus is removed, to re-install the apparatus; and the fact that by reason of the following provisions of this paragraph any proposed re-installation is only hypothetical shall not prevent the operator from taking those steps or any court or person from exercising any function in consequence of those steps having been taken.”

Where the operator does serve a counter-notice, the landowner may only enforce the removal of the apparatus pursuant to an order of the court, and where the operator's counter-notice specifies steps which it is proposing to take to secure a right to keep the apparatus on the land, the court can only order the apparatus to be removed if it is satisfied “(a) that the operator is not intending to take those steps or is being unreasonably dilatory in the taking of those steps” or “(b) that the taking of those steps has not secured, or will not secure, for the operator as against that person any right to keep the apparatus installed on, under or over the land or, as the case may be, to re-install it if it is removed.”

Where a person is “is entitled to enforce the removal of any apparatus” under paragraph 21—either because of the operator’s failure to serve a counter-notice or because he has obtained a court order under paragraph 21(6)—he may apply to the court “for authority to remove it himself”, and the court may “if it thinks fit” give that authority: see paragraph 21(7). In such a case, he may then recover from the operator “in any court of competent jurisdiction” any expenses which he has incurred in or in connection with the removal of the apparatus: see paragraph 21(8). In addition, when the court gives the landowner authority under paragraph 21(7) to remove the apparatus, it may also authorise him to sell the apparatus and to retain the proceeds of sale, in whole or in part, on account of his expenses.

As regards the inter-relationship between paragraphs 20 and 21, paragraph 21(12) makes it clear that a person shall not be entitled to enforce the removal of the apparatus merely on the ground that he is entitled to give notice under paragraph 20 and that the paragraph 21 procedure is “without prejudice” to the power to enforce an order of the court under paragraph 20. There would appear to be nothing to prevent a landowner from invoking the two procedures in parallel, although the paragraph 21 procedure is probably the more advantageous from his perspective, both because he will not be liable to reimburse the operator in respect of the expense incurred in removing the apparatus and because, subject to obtaining authority from the court, he may be able to remove the apparatus himself and then recover the costs of so doing from the operator: paragraph 20 does not contain an equivalent provision.

It is not unheard of, in the writer’s experience, in circumstances where the landowner has given notice under paragraph 21(2) requiring the removal of the operator's apparatus, for the operator to serve a counter-notice under paragraph 21(3) of the Code stating that it intends to give notice under paragraph 5(1) requiring the landowner to agree that the requisite right should be conferred on the operator, but without actually serving such a notice. Indeed, on occasions the operator may at the same time as giving the counter-notice under paragraph 21(3) write a conciliatory letter to the landowner stating that the counter-notice has only been given as a precautionary measure while the operator looks for an
alternative site for its apparatus, and that it remains committed to reaching an amicable solution. It may be argued that such a letter shows that the operator is not in reality intending to take the steps specified in the notice (i.e. to give notice under paragraph 5(1)), and if written on an “open” basis the letter can be referred to by the landowner in subsequent proceedings. That apart, the landowner may wish to argue that the operator’s failure actually to serve a notice under paragraph 5(1) shows that the operator is “being unreasonably dilatory” in taking the steps specified in its counter-notice (see paragraph 21(6)(a)).

Special regimes

42 In Geo Networks Ltd v The Bridgewater Canal Company Ltd Sir Andrew Morritt C described the principal features of the special regimes as follows:

“[6] Paragraphs 9 to 13 provide for what the judge called special regimes in respect of street works, a power to fly lines, tidal waters and linear obstacles. Each of the special regimes differs from the general regime in a number of different, but important, respects. In the case of street works paragraph 9 confers on the operator … the right to install, keep, inspect and maintain electronic apparatus under, in, across and along a street maintainable by the public and any incidental works. In the case of street works no provision is made for notices, court orders or payment of consideration or compensation.

[7] Paragraph 10 applies in a case where some electronic communications apparatus has been installed and the operator wishes to attach a line to it, overfly neighbouring land and attach the other end to similar apparatus there. In such a case the paragraph itself confers the requisite power on the operator. No provision is made for notices, court orders or the payment of consideration or compensation.

[8] Paragraph 11 deals with tidal waters. It confers on the operator the right to install and keep electronic apparatus on or over tidal waters and land. But where the tidal waters or land are part of the Crown Estate such right is only exercisable with the agreement of the particular emanation of the Crown concerned. Further, in all cases, the operator is required, prior to seeking to exercise the right, to submit plans of the proposed works to the Secretary of State for his approval. No provision is made for any court order in default of agreement. Nor is consideration or compensation payable to any one.

[9] Paragraphs 12, 13 and 14 deal with what are called "linear obstacles". Not only is that term not defined but it only appears in the headings to these three paragraphs. This omission may be important in other cases because it may provide a limit to the application of the general regime the terms of which are materially different to those of this special regime in a number of important respects. Paragraph 12 confers the relevant right but subjects its exercise to certain conditions. They include the giving of notice by the operator not to the owner of any interest in the land but to the person with control of it. That person may object to the proposed works and/or require compensation. In
those events an arbitrator is appointed in accordance with the provisions of paragraph 13(1) with the powers specified in paragraph 13(2). The compensation and consideration referred to in paragraph 13(2)(e) is assessed in accordance with paragraph 13(6) and paid, not to the owner of any interest in the land but to the person in control of it."

43 In addition to these special regimes, paragraph 17 of the Code contains provisions relating to objections to overhead apparatus. In addition to the case of Lloyd Jones v T Mobile (UK) Ltd [2003] EWCA Civ 1162 which relates to the notice requirements of paragraphs 17 and 18 and which is discussed below, paragraph 17 has given rise to another, rather singular, case whose outcome is in the public domain, Petursson v Hutchison 3G UK Ltd [2005] EWHC 920 (TCC).

44 The facts of that case are, in outline, as follows. In August 2003 the defendant, Hutchison 3G, installed a mast and three antennae within a flagpole mounted on a pub called “The Little Sauce Factory” at 55 London Road, Worcester, together with a base station at ground level. The claimants lived at 57 London Road (the base station was situated roughly 28 metres from their house) and ran their business from home. However, they moved their business to another location in September 2003, moved house in February 2004 and sold the property in August 2004. The claimants gave notice of objection under the Code in September 2003 seeking the removal of the apparatus. It was accepted that this was within the three-month time limit from the completion of the installation of the apparatus laid down by paragraph 17(2). They commenced proceedings in December 2003 seeking an order for the removal of the apparatus together with damages for personal injury and for diminution in the value of their property.

45 After an unsuccessful attempt to obtain a pre-emptive costs capping order (see [2004] EWHC 2609 (TCC)), the matter came on for trial in February 2005. By that stage the claimants had abandoned their claims for damages and sought only an order for the removal of the apparatus. By then they had also, as previously mentioned, moved out and sold the property. The defendant argued that the claimants therefore had no interest in continuing to seek an order for the removal of the apparatus. The claimants, by contrast, argued that they did have standing under paragraph 17(5) to apply to make an application to the court as it was they who had given notice of objection under paragraph 17(2) and there was no requirement in the Code that they should still be the owners and/or occupiers of the property when the application came to be determined.

46 That argument was rejected. The Judge (HH Judge Frances Kirkham) held that the claimants no longer had standing to seek an order for the removal of the apparatus, saying:

“[49] … Paragraph 17(6) permits the court to uphold an objection if the apparatus “appears materially to prejudice the applicant’s enjoyment of an interest in the land …”. That is expressed in the present tense. Now that the land has been sold the claimants cannot demonstrate that it appears materially to prejudice their enjoyment of the land. Further, having disposed of their interest in the land and no longer
potentially being affected by it, the claimants can have no interest in continuing to seek an order that the apparatus be moved or removed. No such interest has been demonstrated here.

[50] As Mr Humphreys for the defendant points out, paragraph 16 of the Code enables an objector, in the circumstances set out in that paragraph, to claim compensation in the Lands Tribunal for “injurious affection”. Accordingly, an objector who moves from premises before his objection comes before the court nevertheless has the right to claim compensation. I accept Mr Humphreys’ submission that the provisions of paragraph 16 are consistent with the defendant’s case that, when occupation and ownership cease, a claim may be brought only, if at all, in respect of the diminution in value to the interest in land.”

47 Although the learned Judge dismissed the claim on the ground that the claimants no longer had standing to seek an order for the removal of the apparatus, she nonetheless went on to consider at some length whether the claimants had established that the apparatus had materially prejudiced their enjoyment of 57 London Road. Although the Judgment is, to say the least, rich in human interest—the claimants claimed that they, their visitors and their cocker spaniel, the appropriately named “Floppy”, had suffered many and varied health problems, and they and their adult son took to wearing foil hats when in the property, although it transpired that the date from which they claimed to have been suffering symptoms was before the apparatus had actually been switched on—perhaps the most significant aspects relate to the learned Judge’s detailed treatment of the expert evidence and her approach to the test in paragraph 17(6). Paragraph 17(6) provides that:

“Subject to sub-paragraph (7) below, the court shall uphold the objection if the apparatus appears materially to prejudice the applicant’s enjoyment of, or interest in, the land in right of which the objection is made and the court is not satisfied that the only possible alterations of the apparatus will—

(a) substantially increase the cost or diminish the quality of the service provided by the operator’s network to persons who have, or may in future have, access to it, or

(b) involve the operator in substantial additional expenditure (disregarding any expenditure occasioned solely by the fact that any proposed alteration was not adopted originally or, as the case may be, that the apparatus has been unnecessarily installed), or

(c) give to any person a case at least as good as the applicant has to have an objection under this paragraph upheld.”

48 In the light of her findings the learned Judge did not need to consider the matters specified in paragraph 17(6)(a)-(c) and did not do so: see [98]. However, in relation to the issue of whether the apparatus appeared materially to prejudice the claimants’ enjoyment of 57 London Road she said:
“The claimants believed that the emissions affected their health. I accept that, in that sense, the claimants’ perception of the effects of the apparatus constituted material prejudice to their enjoyment of their property. They have a perception of material prejudice caused by the operation of the defendant’s apparatus. That however in my judgment is not sufficient. The test set out in paragraph 17(6) of the Code is, in my judgment, objective not subjective. The claimants’ subjective perception is insufficient. In my judgment, the claimants must demonstrate, on balance of probabilities, that the apparatus caused the ill effects of which they complain in order to prove the matters set out in paragraph 17(6) of the Code.”

This they failed to do:

“[97] … It is clear that there is continuing scientific debate and continuing research work and there is widespread recognition that such on-going debate and research is desirable. Mr Eyre [counsel for the claimants] submits that, in that context, it is understandable that the test imposed in the Code was the appearance of material prejudice and not solely proof of its existence. The legislature was accepting that determinative proof of material prejudice might be difficult to obtain but was indicating that in a developing field of knowledge the appearance of material prejudice would suffice to bring the court’s power into play. I accept that it is right to consider the test set out in the Code in the light of the current evidence and scientific uncertainty of the sort to which I have alluded. However, even in that context, in my judgment it cannot be said that in this case the claimants have demonstrated the appearance of material prejudice. There is no evidence to support the claimants’ case except their own perception of harm, and that perception is in my judgment based on no objective evidence of harm but only on their subjective perception that they were harmed by emissions. I have no hesitation in concluding that the claimants have not proved on balance that there is any appearance of material prejudice to their enjoyment of 57 London Road.”

49 Geo Networks Ltd v The Bridgewater Canal Company Ltd, a case less right in human interest though no more straightforward in terms of statutory interpretation, was concerned with the laying of an additional fibre optic cable through an existing telecommunications duct under the Bridgewater Canal—a “linear obstacle” for the purposes of paragraphs 12 and 13 of the Code—and, more particularly, with what the operator had to pay under paragraph 13(2)(e). As Sir Andrew Morritt C observed at [9]:

“…the linear obstacle regime differs from the general regime in at least the following respects:

(1) In the former the notice under paragraph 12(4) is given to the person in control of the land, in the latter paragraph 5(1) requires the notice to be given to the person whose agreement is required to bind his or any relevant interest in the land.”
(2) The linear obstacle regime provides for the person to whom the notice was given to serve a counter-notice of objection and requirement for payment of compensation under paragraphs 12(6) and (8) but the general regime does not.

(3) In the case of the linear obstacle regime differences as to what may be done and what should be paid are referred to arbitration but in the case of the general regime they are determined by the County Court.”

Paragraph 12(1) confers on operators the right for the statutory purposes, and subject as provided in the Code:

“to cross any relevant land with a line, to install and keep the line and other electronic communications apparatus on, under or over that land and—

(a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of that line or the other electronic communications apparatus; and

(b) to enter on that land to inspect the line or the other apparatus.”

By paragraph 12(4), the operator is required to give 28 days' notice to the person with control of the land (except in case of emergency); paragraph 12(6) provides for the giving of notice of objection by the person with control of the land within that period of 28 days; paragraph 13(1) provides that any such objection shall be referred to arbitration, as mentioned above, such arbitration to be by a single arbitrator appointed by agreement between the parties concerned or, in default of agreement, to be appointed by the President of the Institution of Civil Engineers; and paragraph 13(2), so far as relevant, provides that:

“Where an objection under paragraph 12 above is referred to arbitration under this paragraph the arbitrator shall have the power—

…

(e) to award such sum as the arbitrator may determine in respect of one or both of the following matters, that is to say—

(i) compensation to the person who objects to the works in respect of loss or damage sustained by that person in consequence of the carrying out of the works, and

(ii) consideration payable to that person for the right to carry out the works.”

At first instance, Lewison J held (at [51]) that “what the operator must pay for is the right to carry out the works; which right carries with it the right to keep the works on (or under or over) the relevant land in accordance with whatever terms and conditions the arbitrator awards. The price payable must be fair and reasonable but will take into account everything that the operator acquires by
carrying out the works. Because the price is one that a fair and reasonable it will not include a ransom value.” The Court of Appeal came to a different conclusion. At [27] Sir Andrew Morritt C (with whom Leveson and Patten LJJ agreed) observed that the special regimes were "quite different" from the general regime in a number of respects, so that it was to be expected that the special "linear obstacles" regime would differ from the general regime. It also differed from the other special regimes, in that some consideration or compensation was payable. He then referred, at [28], to a number of pointers in relation to the question what such consideration or compensation was payable for:

“The first is that paragraph 12 is concerned to enable the operator to cross a railway, canal or tramway. Although the crossing does not have to be by the most direct or shortest route the excess must not exceed 400 metres. Thus the interference or intrusion on the land of others is minimal. Second, the land in question must be used by or incidental to a railway, canal or tramway. Land used for any other purpose does not fall within the linear obstacle regime. An undertaker of those activities is not necessarily a public body, but is likely to be providing a public facility. There is no principle of which I am aware which requires the provider of one public facility, a railway, to be paid by another, a provider of electronic communications networks or services for such a minimal intrusion as crossing the railway with a line and, if necessary, a pylon. Third, it is noteworthy that under paragraph 13(2)(e) the compensation or consideration is payable to the person in control of the land, that is the person carrying on the railway, canal or tramway undertaking. It is payable to him either in respect of loss sustained by him or as consideration "for" the right. There are no provisions applicable to this special regime comparable to those of the general regime for binding persons with an interest in the land in question or assessing compensation in respect of those interests. Indeed the payments under paragraph 13 are made to the person in control of the land, namely the person carrying on the railway, canal or tramway as the case may be, not, as in the general regime, to the occupier.”

In the light of those matters he concluded, at [29], that it was not necessary to interpret the Code in such a way as not to burden a person's property without his being entitled to some compensatory payment; that, more particularly, paragraphs 12 and 13 did not require the Code to be interpreted in that way; and that:

“It is clear from the opening words of paragraph 12 that subparagraphs (a) and (b) are included for implementing the grant of the right to install and keep the apparatus crossing the railway not for conferring it. The compensation and consideration payable under paragraph 13(2)(e) is in respect of the right to carry out of those works and the loss sustained by reason of doing so in implementation of the right to install and keep. Given the structure of paragraphs 12(1) and 13(2)(e) I see no reason to interpolate into the words "the right to carry out the works" in paragraph 13(2)(e) the additional words "and to keep the same..."."
**Interaction with Part II of the Landlord and Tenant Act 1954**

54 As explained above, the provisions of the Code confer a kind of security of tenure on operators. However, it will often be necessary to consider not only the security of tenure to which the Code gives rise but also the operation of Part II of the Landlord and Tenant Act 1954 (the “1954 Act”).

55 In this regard it will be necessary, as is so often the case, to consider first of all whether the relevant agreement in writing creates a lease or a licence. Certain network operators use a standard form of agreement which describes itself as a lease and is, in general terms, couched in language appropriate to a lease rather than a licence (“rent” rather than “licence fee”, etc.) but which on closer scrutiny may, perhaps, create a licence rather than a lease. As to this, it is obviously important to keep in mind not only Lord Templeman’s familiar observation in *Street v Mountford* [1985] AC 809 (HL) at 819 concerning garden tools but also Jonathan Parker LJ’s remarks in *Clear Channel UK Ltd v Manchester CC* [2005] EWCA Civ 1304, [2006] ECLR 27 (CA) at [28]-[29]. At all events, leaving aside any issue regarding the “label” attached by the parties to their agreement or their use of language, certain agreements, although expressed to be leases (and sometimes even contracted out of Part II of the 1954 Act), do not expressly demise or grant exclusive possession over a defined area but instead confer narrower rights such as the right to install and operate the relevant apparatus on the land in question, possibly coupled with certain rights of access to the apparatus. It is certainly arguable that such agreements do not involve the grant of exclusive possession. If an occupier wishes to ensure that his agreement with an operator does not create a tenancy, he may be well advised to ensure that it contains a provision allowing him to require the apparatus to be moved to an alternative location: cf *Dresden Estates Ltd v Collinson* [1987] 1 EGLR 45, 1987) 55 P&CR 47 (CA).

56 It is generally assumed that a communications network operator can “occupy” land for the purposes of its business through its apparatus. This is a sensible assumption to make, bearing in mind that as Lord Nicholls of Birkenhead explained in *Graysim Holdings Ltd v P&O Property Holdings Ltd* [1996] AC 329 (HL) at 334:

> “... the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words "occupied", and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used.”

Cases such as *Bracey v Read* [1963] Ch 88 (land used as gallops for racehorses) and *Pointon York Group plc v Poulton* [2006] EWCA Civ 1001, [2007] 3 EGLR 37 (CA), [2007] 1 P&CR 115 (CA) (parking spaces) illustrate the wide range of factual circumstances which may amount to occupation by the tenant for the purposes of a business for the purposes of section 23(1) of the 1954 Act, and, perhaps more relevantly, in *Northern Electric Plc v Addison* [1997] 2 EGLR 111 (CA), where the parties proceeded on the footing that a lease of an electricity substation was within Part II of the 1954 Act, neither the Judge at first instance nor the Court of Appeal appears to have queried this.
Even so, the proposition that a network operator’s installation and use of electronic communications apparatus falls within the scope of section 23(1) of the 1954 Act has never, to the best of the writer’s knowledge, been tested in court.

As regards the interaction of the Code and Part II of the 1954 Act, a particular problem may arise in relation to the recovery of possession for the purposes of development or owner occupation. If the tenant seeks the grant of a new tenancy which is opposed by the landlord, for example on the grounds specified in section 30(1)(f) (development) or 30(1)(g) (own occupation), the effect of section 64 of the 1954 Act (Interim continuation of tenancies pending determination by court) is that the tenancy continues until the expiration of the period of three months beginning with the date on which the application is finally disposed of. Only then, it would seem, would the landlord be entitled to serve a notice under paragraph 21 of the Code. At the date of the trial of the tenant’s application for a new tenancy, the landlord would be unable to demonstrate an ability to develop or go into occupation himself because of the tenant’s security of tenure under the Code. In the case of intended redevelopment the landlord may be able to fall back on the paragraph 20 procedure, but as previously mentioned this has certain unattractive features from a landlord’s perspective not least in terms of his potential liability for the operator’s costs of complying with the court order.

**Notices**

Paragraph 24 (Notices under code) lays down various requirements regarding the content and service of notices given under the Code. (Reference has already been made, in particular, to the procedures for the giving of notice by the operator under paragraph 5(1) and for the giving of notices and counter-notices under paragraphs 20 and 21 of the Code.)

Paragraph 24(1) provides that:

“(1) Any notice required to be given by the operator to any person for the purposes of any provision of this code must be in a form approved by OFCOM as adequate for indicating to that person the effect of the notice and of so much of this code as is relevant to the notice and to the steps that may be taken by that person under this code in respect of that notice.”

Paragraph 24(6) makes it clear that a certificate issued by OFCOM and stating that a particular form of notice has been approved by them as mentioned in paragraph 24(1) “shall be conclusive evidence of the matter certified”.

There is no equivalent requirement as regards notices given by occupiers. Thus it is not, perhaps, inconceivable that a notice under section 25 of the 1954 Act might contain the information required by paragraph 20(1) and/or paragraph 21(2) of the Code: whether it should be treated as a notice given under the relevant provision of the Code even though it does not on its face state that it is given, or intended to take effect, under the Code is, possibly, open to argument.
As regards the service of notices, paragraph 24(2) provides:

“A notice required to be given to any person for the purposes of any provision of this code is not to be sent to him by post unless it is sent by a registered post service or by recorded delivery.”

Paragraph 24(2A) then goes on to provide that:

“For the purposes, in the case of such a notice, of section 394 of the Communications Act 2003 and the application of section 7 of the Interpretation Act 1978 in relation to that section, the proper address of a person is—

(a) if the person to whom the notice is to be given has furnished the person giving the notice with an address for service under this code, that address; and

(b) only if he has not, the address given by that section of the Act of 2003.”

Whilst paragraph 24(5) provides as follows:

“If it is not practicable, for the purposes of giving any notice under this code, after reasonable inquiries to ascertain the name and address—

(a) of the person who is for the purposes of any provision of this code the occupier of any land, or

(b) of the owner of any interest in any land,

a notice may be given under this code by addressing it to a person by the description of “occupier” of the land (describing it) or, as the case may be, “owner” of the interest (describing both the interest and the land) and by delivering it to some person on the land or, if there is no person on the land to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous object on the land.”

Section 394 of the Communications Act 2003 (Service of notifications and other documents) applies, inter alia, where provision made by or under the Code:

“authorises or requires—

(a) a notification to be given to any person; or

(b) a document of any other description (including a copy of a document) to be sent to any person.”

Section 394(3) provides that the notification or document may be given or sent to the person in question by delivering it to him, by leaving it at his proper address or by sending it by post to him at that address. Section 394(7) states that for the purposes of section 394 and of section of the Interpretation Act 1978, a person’s “proper address” is in the case of body corporate, the address of the registered
or principal office of the body; in the case of a firm, unincorporated body or association, the address of the principal office of the partnership, body or association; in the case of a person to whom the notification or other document is given or sent in reliance on any of subsections 394(4)-(6) (service on the secretary or clerk of a body corporate, on a partner in a firm or a person having control and management of the partnership business, or on a member of the governing body of an unincorporated association or body), the proper address of the body corporate, firm or other body or association in question (as the case may be); and in any other case, the last known address of the person in question. In the writer’s experience, it is not unheard of for an operator to send a notice or counter-notice under the Code to an address other than that specified in section 394, enabling the recipient to argue that the notice is invalid.

Section 395 of the Communications Act 2003 (Notifications and documents in electronic form) applies where section 394 authorises the giving or sending of a notification or other document to a particular person, and the notification or document is transmitted to the recipient by means of an electronic communications network or by other means but in a form which nevertheless requires the use of apparatus by the recipient to render it intelligible. Such communication will only be effective where the recipient (being a person other than OFCOM), or the person on whose behalf the recipient receives the notification or other document, has indicated to the person making the transmission the recipient’s willingness to receive notifications or documents transmitted in the form and manner used: see section 395(5). Section 395(6) governs “indications” for the purposes of section 395(5).

It is important to note that the provisions of paragraph 24(1) and 24(2) apply to “Any notice required to be given by the operator to any person” and to “A notice required to be given to any person for the purposes of any provision of this code” (emphasis added) respectively, and paragraph 24(2A) (“... in the case of such a notice ...”) refers to a notice as specified in paragraph 24(2). It is at the very least arguable that these provisions are not, therefore, applicable to notices which are not “required” to be given, but merely “authorised” to be given, under the Code: see (in relation to section 196(5) of the Law of Property Act 1925) Wandsworth London Borough Council v Attwell [1996] 1 EGLR 57 (CA) at 58-59 where it was held that, in the absence of a contractual provision to the contrary, section 196 did not apply to service of a notice to quit, being entirely voluntary. So far as material, paragraph 5(1) provides that “... the operator may give a notice ...” and paragraph 20(1) provides that “... any person with an interest in that land or adjacent land may ... by notice given to the operator require the alteration of the apparatus ...”, whereas paragraph 21(2) provides that “The person entitled to require the removal of any of the operator’s electronic communications apparatus shall give a notice to the operator requiring the removal of the apparatus.” (By contrast, it will be seen that paragraph 24(5) refers to “giving any notice under this code” (emphasis added).) Whilst it is, perhaps, unlikely that it was intended that the provisions of paragraph 24 should apply to a notice under paragraph 21(2) but not to notices under paragraphs 5(1)

6 In many statutes and statutory instruments (including subsections (1)-(4) of section 196 of the Law of Property Act 1925 and section 394 of the Communications Act 2003), express provision is made with regard to the contents and/or service of notices which are required or authorised to be given or served under the relevant provisions.
and 20(1)—and in relation to paragraph 5(1) it should also be noted that OFCOM does publish\(^7\) an approved form of notice for use by operators—it would nonetheless seem to be arguable that a notice under paragraph 5(1) or paragraph 20(1) is merely “authorised” rather than “required” to be given so that the provisions of paragraph 24(2) (and, in relation to paragraph 5(1), the provisions of paragraph 24(1)) do not apply.

66 Further anomalies concerning the provisions of the Code in relation to notices, this time in relation to one of the special regimes, are evident in the Court of Appeal’s decision in Lloyd Jones v T Mobile (UK) Ltd [2003] EWCA Civ 1162. This case was concerned the provisions of paragraph 17 of the Code which, as previously mentioned, concerns objections to overhead apparatus, and in relation to which the special notice provisions of paragraph 18 are applicable. The defendant, T Mobile, obtained planning permission to erect a lattice tower of 30 metres in height to support antennae on land adjacent to a railway track at Kingswood in Surrey. The claimants were the owners and/or occupiers of adjacent land, who sought an order under paragraph 17 for the removal of the tower.

67 So far as material for present purposes, paragraph 17 provides:

“(1) This paragraph applies where the operator has completed the installation for the purposes of the operator’s network of any electronic communications apparatus the whole or part of which is at a height of 3 metres or more above the ground.

(2) At any time before the expiration of the period of 3 months beginning with the completion of the installation of the apparatus a person who is the occupier of or owns an interest in—

(a) any land over or on which the apparatus has been installed, or

(b) any land the enjoyment of which, or any interest in which, is, because of the nearness of the land to the land on or over which the apparatus has been installed, capable of being prejudiced by the apparatus,

may give the operator notice of objection in respect of that apparatus.

(3) No notice of objection may be given in respect of any apparatus if the apparatus—

(a) replaces any electronic communications apparatus which is not substantially different from the new apparatus; and

(b) is not in a significantly different position.

...  

\(^7\) http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/5_1_2.doc (complete with Explanatory Notes showing tracked changes).
(5) At any time after the expiration of the period of 2 months beginning with the giving of a notice of objection but before the expiration of the period of 4 months beginning with the giving of that notice, the person who gave the notice may apply to the court to have the objection upheld.”

68 And paragraph 18 (Obligation to affix notices to overhead apparatus) provides, so far as relevant:

“(1) Where the operator has for the purposes of the operator’s network installed any electronic communications apparatus the whole or part of which is at a height of 3 metres or more above the ground, the operator shall, before the expiration of the period of 3 days beginning with the completion of the installation, affix a notice—

(a) to every major item of apparatus installed; or

(b) if no major item of apparatus is installed, to the nearest major item of electronic communications apparatus to which the apparatus that is installed is directly or indirectly connected.

(2) A notice affixed under sub-paragraph (1) above shall be affixed in a position where it is reasonably legible and shall give the name of the operator and an address in the United Kingdom at which any notice of objection may be given under paragraph 17 above in respect of the apparatus in question; and any person giving such a notice at that address in respect of that apparatus shall be deemed to have been furnished with that address for the purposes of paragraph 24(2A)(a) below.

(3) If the operator contravenes the requirements of this paragraph he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.”

69 The physical installation of the tower was complete by 15 July 2001. The following day, a notice purporting to comply with the requirements of paragraph 18 was affixed to the fence surrounding the tower. As to this, Kennedy LJ recorded in his Judgment at [9] that “It was legible from 2 or 3 metres away but no member of the public could get close enough to read it without entering a builder’s yard and then land owned by Railtrack.” On 25 January 2002, some six months after the physical installation of the tower had been completed, the claimants purported to give notice pursuant to paragraph 17(2) of the Code (the relevant requirement being that such notice must be given “At any time before the expiration of the period of 3 months beginning with the completion of the installation of the apparatus”).

70 At first instance, in the Kingston County Court, the Judge held that the installation was complete for the purposes of paragraph 17(2) when its physical installation was complete, rather than at the later date when it became operational; that for the purposes of paragraph 17(2) time only started to run when notice was affixed in accordance with paragraph 18(1)-(2); and that the
notice which had been affixed was not reasonably legible, as required by paragraph 18(2), because potential objectors could not as a matter of right get close enough to it to be able to read it. In his view the claimants were not, therefore, out of time for giving notice of objection when they purported to do so in January 2002.

The Court of Appeal came to a rather different conclusion. Kennedy LJ held:

“[13] … Mr Humphreys [counsel for T Mobile] submits, and this is his first ground of appeal, that there is nothing in paragraph 18 of the 1984 Act to suggest that the notice is intended to advise a potential objector that the operator has completed the installation, or that the time for giving notice pursuant to paragraph 17(2) will run from the time when the notice is affixed. In my judgment that is right, and, as Mr Humphreys submits, the potential objector is not disadvantaged, because he can usually see for himself when the installation has been completed. It is then that paragraph 17(2) gives him the right to give notice of objection, and that right is not deferred, as it could have been, until the operator affixes notice pursuant to paragraph 18(1). As was put to Mr Hall-Taylor [counsel for the claimants] during the course of argument, one has only to postulate a situation in which a potential objector becomes aware of completion of the installation as the workmen finish their task, and at once gives notice of objection pursuant to paragraph 17(2). Clearly that is a valid notice of objection because under paragraph 17(2) time has started to run, even if the operator has not yet complied with his obligation under paragraph 18. He has 3 days in which to do so, and it cannot be seriously suggested that for the objector time stops running if the operator fails to comply with his obligation under paragraph 18.

[14] The reality, as it seems to me, is that the requirement in paragraph 18 to affix a notice, which has its own penal sanction, will in almost every case assist potential objectors who wish to give notice pursuant to paragraph 17(2). If a legible notice is affixed to the apparatus within 3 days of completion of the installation potential objectors will be able to read it and will have nearly the whole of the 3 months period in which to give notice of objection. The requirement of legibility means that the notice must be at such a height on the apparatus, not masked by part of the apparatus or other obstruction, and of such size that it can be read with reasonable comfort. It is reasonable to infer that the potential reader should not have to get on to the apparatus itself to read it, but there is nothing in Schedule 2 to suggest that he must be able to read it from land to which, as a member of the public, he has the right of access. To my mind that is not surprising because the reality is that even where, as in this case, there is no such land adjacent to the apparatus, those who want to see what the notice says can usually obtain permission from the adjacent landowner to go close enough to read it. Even where that is not possible the information conveyed by the notice can easily be obtained in other ways, for example by reference to the planning permission.”
And Holman J, to similar effect, said as follows:

“[33] The judge made a clear finding of fact that the completion of the installation of the apparatus took place on 15<sup>th</sup> July 2001. That should have been determinative of the case, for it meant that notice under paragraph 17 had to be given on or before 14<sup>th</sup> October 2001 whereas the claimants only gave their notice on 25<sup>th</sup> January 2002.

[34] However the judge then turned to what he described as a "sub-issue: whether time for the purpose of the three month limit in paragraph 17 of Schedule 2 only begins to run if a notice has been affixed to the apparatus in a position where it is reasonably legible, pursuant to paragraph 18." He concluded that a notice had not been so affixed and that the three month time limit never began to run.

[35] In my view, and with respect to the judge, this was a complete red herring for the following reasons.

[36] First, the words in paragraphs 17(1) and 17(2) are themselves quite clear and, as I have already said, simply do not require or import any reference to the notice under paragraph 18 at all.

[37] Second, Parliament could not have intended that affixing a notice to the apparatus under paragraph 18 should be the trigger for giving a notice under paragraph 17, because paragraph 18 is too imprecise as to date. It only requires the operator to affix a notice "before the expiration of the period of 3 days beginning with the completion of the installation." But a time limit for objectors to give a notice must run from a precise or specific date, not from a bracket of three days. Further, paragraph 18 does not require the paragraph 18 notice itself to be dated, nor that it should specify the date upon which the installation of the apparatus was completed. So if time were to run from the date when the notice was affixed, it would require a potential objector to be daily looking out for the moment when a notice was affixed to the apparatus, which would be absurd.

[38] These conclusions mean that the issue about the legibility of the paragraph 18 notice, which was the subject of much evidence and argument, was, and is, also a red herring and irrelevant, and I will express my own views briefly. The dominant requirement of paragraph 18 is that the notice must be affixed "(a) to every major item of apparatus installed; or (b) ... to the nearest major item of telecommunications apparatus to which the apparatus that is installed is directly or indirectly connected." The word "to" is clear and is critical. Paragraph 18(2) requires the notice to be affixed in a position where it is reasonably legible, but paragraph 18(2) is only referring to "A notice affixed under sub-paragraph (1) above ..."; in other words, to a notice which, by sub-paragraph (1), must be affixed to the apparatus. Further, the reference in sub-paragraph (2) is to the "position" in which the notice must be affixed. The definition of "telecommunications apparatus" in paragraph 1(1) of the Code (viz Schedule 2) clearly extends the apparatus to include a fence, wall or other "structure"
within which the apparatus itself is installed and extends it, therefore, to the surrounding fence in the present case, but no further. So in my view the operator had to affix a notice to the mast itself and, on the facts of this case, to the surrounding fence. Upon those structures it had to be in a position where it was reasonably legible—i.e. not too high, nor too low, nor obscured by some other part of the structure. But the requirements of paragraph 18 go no further.

[39] I agree that a notice so affixed may be very difficult for the public to see, or to gain access to, in some circumstances, including, on the judge's findings, the circumstances of this case. But that flows from the clear language of paragraph 18 itself and the reference to affixing "to" the apparatus. It is not a warrant for substituting completely different requirements as to notice for the statutory scheme; the more so as contravention of paragraph 18 is a criminal offence so the paragraph must be construed strictly.”

73 The Court of Appeal’s decision has been subject to sustained and trenchant criticism by Joanna Tansley in an article in the Journal of Planning & Environment Law.8 In relation to Holman J’s remarks at [39] she suggests that the learned Judge “should clearly have indicated the need for the developer to make binoculars available to those with the need to question the development by reading a notice not visible from the highway”, before going on to argue that:

“It is clearly unreasonable that a notice must be affixed to telecommunications apparatus for a statutory purpose of informing when it is unable to be read by the public at large. If one strictly follows this reasoning, this would cause problems where apparatus is placed upon a large block of flats by a mobile operator as it is likely to be accessed via a locked trap door to the roof. Thus the only telecommunications apparatus available upon which to affix notices is another operator’s mast, telephone kiosk or telegraph pole or footway box cover. Some apparatus may not even be considered under the Code para. 18(1) as a "major item of apparatus" and may also be remotely located on a very large site. …

The requirement to access from a landowner is unconscionable, especially if the landowner in question has sold part of his birthright to the current user. It is likely that the deal continues to generate a generous income by site lease and wayleave rights and the landowner now protects his new source of income using several well-starved rottweilers. What makes this interpretation even more unacceptable is that the Court decided that the unfortunate embryonic objector could always look at the planning permission application. Now erection of an antenna often requires no form of permission, only a radio structure that is a mast would always require planning permission and some structures in protected land, for example, telegraph poles would require permitted development permission. Otherwise, a Code operator may create erections with great abandon, so long as he

8 Tansley, Fence over the River Kwai—a comparative view of noticing under the Electronic Communications Code considered against planning noticing under the permitted development orders through a review of a recent case [2004] JPL 273
follows planning law and the Electronic Communications Code. It is clear that the judges in this case were only thinking of mast structures, but the words imply all applicable structures. There are other issues. Planning permission is granted, where necessary, before the start of development and provides permission to create the development. A Code notice is posted only after the development is completed. Once the Code notice is necessary the planning application would be achieved, then archived, and retrieval is likely to be problematic for any busy planning authority. Clearly this reasoning is faulty and the previously successful claimants in this case would have every right to feel aggrieved at their objectionable and unacceptable loss.”

74 Whilst some of this criticism might perhaps more appropriately be directed at those responsible for drafting the Code rather than those with the unenviable task of interpreting it, the actual outcome of the appeal in Lloyd Jones v T Mobile (UK) Ltd is clearly unsatisfactory insofar as it contemplates that a notice which is illegible to members of the public may nonetheless be effective for the purposes of paragraph 18 of the Code.

Litigating under the Code

75 As appears from paragraph 1 of the Code, references in the Code to “the court” mean the county court, to which all applications for orders under paragraphs 5 20 and 21 of the Code must therefore be made. In Mercury Communications Ltd v London and India Dock Investments Ltd, the first application under the Code to reach the stage of a judicial decision, HH Judge Hague QC wryly observed:

“Presumably Parliament thought that cases under the Code would be relatively straightforward and could be accommodated in the normal county court listings without difficulty. The hearing before me extended over seven full days. The papers are contained in eight lever-arch files, some of them quite bulky. As well as considering the several reports from each expert and hearing their oral evidence, I have read statements from seven other persons and four of them also gave oral evidence. Counsel made their submissions to me with economy, but their written outline submissions together covered 60 pages. Further, the valuation issues which I have considered are of the kind which are familiar to the Lands Tribunal, but not to most county court judges.”

76 He went on to suggest that in future, in any proceedings under the Code which were likely to be of substance, consideration should be given at an early stage to transferring the proceedings to the Mayor’s and City of London County Court, which at that time still had a specific Chancery jurisdiction and whose judges had particularly extensive experience in Chancery matters. This is no longer the case, and as far as the writer is aware the judges of the Central London County Court, which has a specific Chancery List, have no more experience of hearing applications under the Code than the judges of any other County Court. That said, they may have greater experience of dealing with matters under the 1954 Act and the leasehold enfranchisement legislation than judges in some County
Courts and may also, therefore, be more familiar with dealing with cases turning on the validity or service of notices under opaque statutory provisions.

77 Petursson v Hutchison 3G UK Ltd was tried (at the Birmingham Civil Justice Centre) over three days. As appears from the Judgment dealing with the claimants’ application for a pre-emptive costs capping order ([2004] EWHC 2609 (TCC)), the allocation questionnaire filed on behalf of Hutchison 3G estimated that its likely overall costs would be in the region of £233,000 plus VAT together with estimated disbursements of £33,250 plus VAT. Thus in cases involving witness evidence, including expert evidence—which are likely to include applications under paragraph 5 and paragraph 20—applications under the Code may give rise to substantial litigation at considerable expense. It is therefore suggested that in such cases consideration should be given to transferring the matter to a court centre which is used to dealing with substantial litigation.

78 It is not just members of the judiciary who are likely to be unfamiliar with applications under the Code: court staff may also be baffled by such proceedings. In one case, in the writer’s experience, where the relief sought by the landowner in its particulars of claim included a permanent injunction to enforce the removal of the relevant apparatus, the court listed the application for a hearing shortly after the claim form was issued on the mistaken understanding that an interim injunction was being sought. In fact, in all likelihood this was ultimately to the claimant’s advantage, as it had the effect of preventing the operator from dragging its heels and gave the parties a “target” date with regard to reaching a compromise and embodying this in a consent order.

79 This reflects the fact that one possible advantage to a landowner of bringing proceedings which include a claim for possession, to which CPR Part 55 will apply, is that the court will fix a date for the hearing when it issues the claim form (see CPR 55.5(1)), and even if, as is probably likely in the case of any application under the Code, that hearing is used to give case management directions (see CPR 55.8(1)), this should mean that the operator is unable to drag its heels indefinitely. In view of the nature of the rights conferred by the relevant agreement, however, it will not always be appropriate to include a claim for possession; in such a case, consideration should be given to applying for directions at an early stage.

80 In the writer’s experience, operators are generally keen to arrive at a consensual solution and to avoid the reputational damage which might ensue from the publicity which hard-fought litigation against a landowner would be likely to generate. At the same time, they are generally keen to preserve the status quo and thereby keep their apparatus in situ and operational for as long as possible, chiefly to prevent any disruption to their service, and therefore have no interest in seeing that applications under the Code are resolved quickly. In some instances, in the writer’s experience, the service of proceedings under the Code is enough to bring the operator to the negotiating table. But a landowner should always be alert to the possibility of persuading the operator to migrate to alternative premises, which the landowner might himself be able to offer: for one thing, if he can show that an appropriate alternative site is available (and a fortiori if it is within his own portfolio and hence within his own gift), then this will be powerful evidence for the purposes of paragraph 20(4)(b) that, in all the circumstances, the removal of the apparatus from its present location “will not
substantially interfere with any service provided by the operator’s system”. Landowners who wish to redevelop should also keep in mind the possibility of a “build around” whereby the apparatus remains operational; and, if the removal of the apparatus is necessary to enable the redevelopment to proceed, should bear in mind that offering the operator the opportunity to return to the site following its redevelopment may be attractive to the operator and indeed may be sufficient to persuade the operator to remove its apparatus on a temporary basis.

All in all, given the eagerness of operators to avoid reputational damage, the unfamiliarity of the Code to practitioners and the judiciary, the almost complete absence of guidance in terms of authority and the fact that, in the words of Lewison J, the Code is “one of the least coherent and thought-through pieces of legislation on the statute book”, there is undoubtedly much to be said—no matter how unpalatable this may be to an audience of litigators—for exploring the possibility of a consensual resolution (by negotiation or, perhaps, mediation) whenever a dispute of substance under the Code arises.

© Daniel Margolin