UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 142 (LC)
UTLC Case Numbers: LC-2021-190

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – INTERIM RIGHTS – form of indemnity to be included in Code agreement – whether restricted to third-party claims – paras. 23, 26, Electronic Communications Code, Sch. 3A, Communications Act 2003

A REFERENCE UNDER SCHEDULE 3A, COMMUNICATIONS ACT 2003

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LIMITED

Claimants

-and-

THE MAYOR AND BURGESSES
OF THE LONDON BOROUGH OF HACKNEY

Respondent

Re: Shoreditch House,
239 Old Street,
London EC1

Martin Rodger QC, Deputy Chamber President

Hearing by remote video platform

11 June 2021

Mr James Tipler, instructed by Winckworth Sherwood LLP, for the claimants
Mr Jonathan Wills, instructed by Freeths LLP, for the respondent

The following case are referred to in this decision:

CTIL v Fotheringham LTS/ECC/2019/06

CTIL v University of the Arts [2020] UKUT 248 (LC)

Director of Buildings and Lands v. Shun Fung Ironworks Ltd [1995] UKPC 7

EE Ltd v Islington LBC [2018] UKUT 361 (LC)

1. The application before the Tribunal this afternoon is brought under paragraph 26 of the Electronic Communications Code and seeks the imposition on the parties of an agreement conferring interim Code rights. Once again, the Code right in issue is the right to undertake a "multi-skilled visit", or "MSV", involving a survey or surveys of different types by appropriately qualified professionals and contractors to determine the suitability of a site to host the installation of electronic communications apparatus. If confirmed to be suitable it is likely that the site will then either be the subject of an agreement between the parties or an application to the Tribunal under paragraph 20 of the Code for longer term comprehensive Code rights.

2. The parties are EE and Hutchison 3G UK Limited, who are both telecommunications operators, and the London Borough of Hackney, which is the owner of the intended subject of the MSV, a building called Shoreditch House at 239 Old Street, London EC1. Shoreditch House is a residential tower block with commercial units on the ground floor. The operators seek the right to go onto the roof of the building to determine if it is suitable as a replacement for an existing mast site close by, which they are required to vacate because of redevelopment.

3. There is no dispute between the parties that the relevant qualifying conditions are satisfied, and that the Tribunal ought to impose an agreement on them permitting the MSV surveys to be undertaken. The terms of the proposed agreement are very largely agreed between the parties and are in a form acceptable to Hackney. The only outstanding issue relates to one of the terms.

4. The disputed term is an indemnity to be given by the operators to the site provider. The indemnity proposed by Hackney is in the following terms, which are found in paragraph 5.1 of the draft agreement:

> "The Licensee shall indemnify the Licensor against all liabilities costs expenses damages and losses including but not limited to legal costs and all other legal professional costs and expenses suffered or incurred by the licensor arising out of or in connection with:
>
> 5.1.1 this agreement;
>
> 5.1.2 any breach of the Licensee's undertakings contained in clause 3;
>
> 5.1.3 the exercise of any rights given under clause 2;
>
> 5.1.4 the enforcement of this agreement,
>
> such indemnity to be limited to £10,000,000 (ten million pounds)."

Some flavour of the relative complexity of the agreement can be detected in this indemnity clause. Despite the limited scope of the rights being conferred, this is not a simple agreement. Nonetheless it is the site provider's preferred form for the many sites where it hosts electronic communications apparatus and, whatever the Tribunal's preference for simplicity, there is no difficulty in imposing it subject to resolution of the dispute over clause 5.1.

5. The operators' position is that the indemnity should be modified, and limited in its effect, by the insertion of the words "third-party" in the first line of clause 5.1 so that the indemnity extends only to "all third-party liabilities costs expenses damages etc" so that it would not cover costs, expenses, damages, or losses incurred by the site provider itself. A secondary case sought more extensive changes, but I will not consider that at this stage. Although the dispute is over a small point it is a point of principle which has proved impossible for the parties to resolve by agreement. It now falls to the Tribunal to resolve it.

6. The basis on which the Tribunal determines the terms of any Code agreement which it imposes are provided by paragraph 23 of the Code. The Tribunal is required to impose an agreement which gives effect to the Code rights sought by the operator with such modification as it thinks appropriate (paragraph 23(1)). The Code right in this case is simply the right to undertake the MSV. The Tribunal is also required to include in the agreement such terms as it thinks appropriate (paragraph 23(2)). Paragraph 23(5) provides a further relevant direction to the Tribunal, that the terms of the agreement must include the terms the Tribunal thinks appropriate "for ensuring that the least possible loss and damage is caused by the exercise of the Code rights" to those who occupy the land or who own interests in it or are from time to time on the land.

7. Mr James Tipler, who appeared for the operators, first emphasised a number of provisions of the agreement which he submitted already met the requirement of paragraph 23(5) and limited the need for any indemnity for losses which might in theory be sustained by the site provider. These include detailed and quite elaborate protections for the site provider limiting those who are to be permitted to go onto the land and requiring that they possess appropriate qualifications, have undergone training, and receive supervision; they also deal with the giving of notice of when the rights are to be exercised and regulate how the investigations are to be undertaken, in accordance with approved method statements and all necessary consents. Clause 4.2.12.4 also obliges the operator to make good any damage caused to the property to the site providers reasonable satisfaction. So, Mr Tipler submitted, a comprehensive, open-ended contractual indemnity of the sort proposed by Hackney is unnecessary.

8. Secondly, Mr Tipler questioned whether it was appropriate for the terms imposed by the Tribunal to cover the same territory as Parliament has already dealt with. If the Tribunal was to adopt Hackney's suggested approach there would be an overlap between the contractual indemnity which would form part of the terms of the agreement and paragraph 25(1) of the Code, which provides a statutory right to compensation. When the Tribunal makes an order imposing an agreement under paragraph 20 or paragraph 26 it may also order the operator to pay compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the Code right to which the order relates. Compensation can be paid in a number of different ways, when the agreement is imposed or subsequently, and it can be by way of a lump sum or periodical payments or on the occurrence of a particular event.

9. Thirdly, Mr Tipler suggested the scope of any indemnity should take account of the scope of the rights being conferred which, in an MSV case, involved very restricted activity by the operators on the roof of the building during a limited number of visits of short duration over a period of no more than three months. Having said that, an MSV is not a risk-free situation; with the operators' contractors and staff using hand tools on the roof of a tall building, the potential for damage is obvious.

10. On behalf of the site provider Mr Jonathan Wills submitted that the proposed indemnity should not be limited to claims brought by third parties. Paragraph 23(5) of the Code imposes an obligation on the Tribunal to fashion terms which will ensure the least possible loss and damage will be caused by the exercise of the Code and Mr Wills urged that the Tribunal should seek to eliminate loss and damage by providing as comprehensive indemnity as possible. Mr Wills submitted that this should be seen as a powerful direction to the Tribunal to eliminate, so far as possible, any risk of loss and damage which might be caused by the exercise of the rights, and gave a strong steer in favour of a comprehensive indemnity covering not only claims brought against the site provider by third parties but also any losses incurred by the site provider itself. It was accepted by the operators that the inclusion of an indemnity was necessary so far as claims brought by third parties

were concerned and it ought equally to be necessary that losses sustained by the site provider itself should be covered by the same protection.

11. Mr Wills showed the Tribunal a number of different precedents from reputable sources which demonstrate that the sort of indemnity sought by Hackney is thought to be appropriate in comparable situations. Thus, there were examples of indemnity clauses not limited to meeting third party claims in drafts of a crane oversailing licence, an early access licence, and an environmental site investigations licence. Mr Wills suggested that the sort of indemnity which the site provider seeks in this case is relatively standard and ought not to be controversial.

12. When asked by the Tribunal why the site provider ought not to be satisfied with the right to compensation provided by the statute, Mr Wills referred first to the fact that a claim for compensation may result in some irrecoverable costs, the risk of which would be reduced in a claim on an indemnity which is likely to be rather simpler. He also relied on the fact that we are still in the very early days of the Code and there have, as yet, been no claims for compensation under paragraph 25; it would be premature to speculate how compensation claims may be resisted by operators so instead of exposing site providers to the risk of arguments which might defeat a claim for compensation they ought to have the comfort of a comprehensive indemnity.

13. Mr Wills also relied on the Tribunal's observations in *EE Ltd v Islington LBC* [2018] UKUT 361 (LC) at para [48] on the approach which should be taken to the terms of an agreement imposing interim Code rights:

> "It should put the full risk of the operation on which the operator wishes to embark on the operator and none of the risk on the site provider."

14. Very little has so far been said by the Tribunal about indemnities and this case may be the first in which there has been proper argument about how broad an indemnity is appropriate in an interim rights case. Two previous Tribunal decisions were referred to in argument, the first in time being a decision of the Lands Tribunal for Scotland, *CTIL v Fothringham* LTS/ECC/2019/06. In *Fotheringham* it was proposed by the operator applying under paragraph 26 for interim rights that the agreement should include an indemnity covering only claims brought against the grantor, (i.e. the site provider) and which did not extend to loss and damage caused to the site provider itself. The site provider wished to finesse the drafting to a very minor extent to make clear that the indemnity was without prejudice to any claims for compensation or other claims which he might have under the Code. The site provider did not suggest that the clause should be widened to cover his own potential losses. The Tribunal was surprised by the operator's resistance to this "fairly innocuous" amendment but nevertheless decided to reject it as the proposed change did not serve any useful purpose: "The distinction between rights under the Code and the rights under the indemnity clause is clear enough". All I think take from that is the recognition that any contractual right to an indemnity which a site provider is given is in addition to the statutory right to compensation enjoyed under the Code.

15. This Tribunal considered the form of an indemnity in *CTIL v University of the Arts* [2020] UKUT 248 (LC). The Tribunal's decision was that no agreement should be imposed, but it had received argument on disputed terms and expressed its views on them to provide guidance. One such term was an indemnity clause and, as in this case, the dispute was whether the indemnity should cover only third-party claims or should extend to all claims and losses. At paragraph [233] of its decision the Tribunal said this:

> "Two important points of principle shape our conclusions on this clause. The first is that the purpose of the indemnity is to regulate and manage third party claims against the respondent arising from the unlawful acts or omissions of the claimant. It is not a catch all protective provision for the benefit of the respondent covering every conceivable loss or damage, whatever the cause and regardless of the other provisions of the agreement. That being so it is plainly inappropriate for the respondent to seek an indemnity in respect of "all losses damages costs and expenses and all claims and proceedings brought against the grantor arising from any unlawful act of the operator".

16. Mr Wills invited me to place no reliance on the Tribunal's observations in the *University of the Arts* case. First, because the Tribunal had declined to impose any agreement at all its remarks did not form part of its core reasoning and were less authoritive on that account. A fair point. Secondly, because *University of the Arts* was a paragraph 20 and not a paragraph 26 case and a distinction should be drawn between the two. As to that, what is appropriate in any particular case is obviously influenced by its own circumstances but I do not think that the mere fact that one claim is for permanent rights and another only for interim rights necessarily justifies imposing a different form of obligation. One might say that a Code agreement which relates only to access for inspection and surveys ought to be correspondingly limited in its terms, which would be a consideration against a wide-ranging indemnity. Thirdly, Mr Wills submitted, the Tribunal in *University of the Arts* began with its conclusion about the purpose of the indemnity, rather than providing reasons for it. It was the site provider's case that the indemnity should not be limited to third party claims, yet the Tribunal rejected its wider formulation simply on the basis that the purpose of an indemnity was only to provide cover against such claims, which, Mr Wills respectfully suggested, did not really address the substance of the argument, which focussed on paragraph 23(5) of the Code and the obligation to ensure that least possible loss and damage is caused by the exercise of the rights being conferred.

17. I have come to the conclusion that limiting the indemnity to third party claims does not infringe the requirement in paragraph 23(5) to fashion terms appropriate for ensuring the least possible loss and damages is caused by the exercise of the Code rights. The contractual agreement has to be seen in the context of the other protections offered by the Code, in particular the paragraph 25 right to compensation for any losses caused by loss or damage sustained by the site provider as a result of the exercise of the Code right. Any statutory right of compensation is controlled or restricted by the overarching legal principles of causation, remoteness of damage and the requirement of mitigation of loss. If authority is required for that statement see Lord Nicholls discussion of the three conditions or prerequisites of fair compensation in *Director of Buildings and Lands v. Shung Fung Ironworks Ltd and Cross-Appeal Co* (Hong Kong) [1995] UKPC 7. The proposed indemnity, if applied to the site provider's own losses, would side steps those legal limitations. Yet when Parliament designed the Code it saw fit to confer on site providers a right of compensation and not a statutory indemnity against all losses free of those restrictions. It cannot have considered that statutory compensation provided inadequate protection or have intended that paragraph 23(5) should oblige the Tribunal to impose an even more comprehensive contractual indemnity. The first consideration which pushes me towards the imposition of only a third-party indemnity is therefore that it seems to me to be consistent with the basic structure and expectations of the Code. It is, in the words of paragraphs 23(2) and 23(5), what is appropriate in the context of a Code agreement.

18. I am also influenced by the fact that the OFCOM model form of Code agreement includes an indemnity clause limited to third party claims. Parliament intended OFCOM to influence the terms of Code agreements by example, so while the Tribunal is not bound by its model form of agreement, I should have regard to it. I am less influenced by the forms of indemnity common in

other types of agreement beyond the context of the Code. Those agreements are negotiated by parties in circumstances which do not include a statutory right of compensation and that distinguishes them and any market practice there might be in relation to them from rights of access imposed by the Tribunal under paragraph 26 of the Code.

19. Nor do I think the risks identified by Mr Wills (see paragraph 12 above) are a significant factor. The statutory right to compensation specifically includes a right to legal or other professional expenses, and an inability to recover costs which have not been reasonably incurred is a risk of all litigation. The possibility that some losses may be too remote, or insufficiently causally connected to the exercise of the Code right, or subject to some other defence which might not be available in answer to a claim on an indemnity, does not detract from the fact that Parliament was clearly satisfied that compensation for loss and damage was a sufficient remedy for site providers.

20. For these reasons the agreement which the Tribunal will impose will be in all respects the agreement which the parties have settled on except that in clause 5.1 the words "third party" will be inserted into the first line of the indemnity to make clear that it covers only third party claims.

Martin Rodger QC
Deputy Chamber President

Transcript approved 15 June 2021