

The Digital Economy Act 2017 – a Landowner’s update

As the Government announces that high speed broadband should be a legal right to all business’ and consumers alike, the telecommunications infrastructure is under pressure to deliver across the board. Together with an increasing reliance on telecoms and the emergence of a new era of 5G, the Government has drafted and effected new policy to expedite operators reaching such targets.

28th December 2017 marked the debut of the Digital Economy Act 2017 amendments to the Electronic Communications Code (previously revised by the Communications Act 2003), which have chiefly shifted rights further in favour of operators and infrastructure providers in telecoms agreements.

The code is set to regulate and clarify the relationship between operators/infrastructure providers and landowners. In the past the previous code has been subject to much confusion and legal challenge, with accusations of poor drafting because of notoriously tangled links with the Landlord and Tenant Act 1954 (L&T ‘54). The code does not just apply to telecoms masts but also overhead or underground fibre cables, roof top apparatus, broadband infrastructure and BT copper wire.

The key changes include:

Assignment & Site Sharing: Operators will have the right to assign their lease or share the site with other code operators without recourse to the Landowner. Keeping track of who is actually occupying a site could therefore become more difficult. Any attempt by the site provider to limit or prevent this will be void and so the days of “payaways” are limited.

Upgrading equipment: Operators will also have the ability to upgrade and share equipment without recourse to the Landowner on the conditions that there is no adverse impact on its appearance, and that it will impose no additional burden on the other party in the agreement.

The code also provides rights for access to land ‘to install, keep installed, inspect, maintain, adjust, alter, repair or operate electronic communications apparatus on, under or over land’, in the means of the following:

- To connect to a power supply.
- To interfere with or obstruct a means of access to the land.
- To lop trees and vegetation on land interfering with apparatus.

Security of Tenure & Termination: new telecoms leases are completely removed from any security of tenure provisions under the L&T ‘54. This will save site providers from having to seek terms excluding such security of tenure, or in some cases unknowingly signing themselves into an onerous uphill battle to regain possession of their land. Instead, however, there will be statutory rights under the new code granted to telecoms operators providing an alternative form of security.

Landowners must now give operators 18 months’ prior notice to terminate the lease and the grounds on which they can ask for possession are very limited. The notice to terminate the agreement does not mean that the equipment will be removed with Landowners needing to serve a further notice specifying a “reasonable” period for the equipment to be removed. This could cause considerable delays in the case of redevelopment.

Valuation: The rent paid by the Operator will be based on “market value” as defined by the Code. However, there are a number of disregards such as the availability of potential sites and the potential profitability of the site to the operator which have been specifically excluded. This is likely to have the effect of reducing the rent payable by Operators especially where the underlying value

of the land is low. The starting position of many Operators' agents has been to offer "compensation" rather than "market value" for these sites which has the potential to create a dangerous precedent.

Disputes: The intention of the new code is to move disputes towards the Upper Tribunal and First Tier Tribunal (Lands Tribunal in Scotland) where courts will award orders and compensation as it sees fit.

So where do we go from here?

It is not possible to "opt out" of this Code but the legislation makes it clear that site providers and operators must attempt to reach an agreement before recourse to the Courts. Any agreement in place before 28th December 2017 will remain effective and the far-reaching rights for site sharing, assignment and upgrading provided for in this new code will not be automatically applied, however the termination provisions will apply to all subsisting agreements.

Although there is little that can be done to change the new statutory rights of telecoms operators and infrastructure providers, prudent and informed negotiations of both current and future agreements can work in the interests of the landowner. Should you require further information please do not hesitate to contact, Kerry Holbrook-Bull.