

TELECOMMUNICATION MASTS

The mobile phone market is ever-growing, particularly the data market, where demand for fast mobile data, particularly 4G, is predicted to grow rapidly, requiring increasing numbers of telephone masts around the country in order to provide effective coverage. Mobile phone masts can be located on rooftops as well as open land and many property owners have benefited by leasing roof space on their buildings.

The level of rent paid may be very lucrative for property owners. However, there are hidden dangers for those who grant leases of this kind.

The Telecommunications Code

The Telecommunications Act 1984 ('1984 Act') contains the Telecommunications Code ('Code') which governs the relationship between certain telecommunication companies known as Licensed Operators and the owners of land over which rights have been granted.

Operators benefit from the various protections of the Code when they are granted consent to place equipment on land or on a building.

Consent

The Code entitles an Operator to approach a property owner and require a grant of consent to place its equipment on that person's property. If the owner refuses to grant such consent, the Operator may apply to court for an order, compelling the owner to grant consent.

Although commentators have suggested that this provision is only likely to be enforced in situations where the owner grants consent and then attempts to retract it, the statutory provisions do in fact envisage a situation where an Operator having served notice on an owner requiring an agreement and having been refused consent then applies to the court for an order conferring the proposed right. The court can make an order if satisfied that any prejudice caused by the order (to the Owner) can be adequately compensated for by money or is outweighed by the benefit accruing to users for whom access to a telecommunications system will thereby be secured.

It is important to realise that consent to the placing of a mast on land can be granted by a letter, email or fax. If the consent is in writing, you will be bound by the Code.

It is important that during negotiation of the terms for the grant of a lease, it is made clear that the grant of consent will only occur on completion of the lease. All correspondence should be clearly marked “subject to contract”.

Statutory right to retain equipment on site

Having granted consent to an Operator to occupy your land or roof space, the Operator will have a statutory right to leave its equipment exactly where it is even after the lease has terminated or expired. Whilst a well advised Owner may have excluded the Operator's right to security of tenure under the Landlord and Tenant Act 1954, this will not avoid the rights conferred under the Code.

Redevelopment

Where an Owner plans to redevelop a site it may serve notice on the Operator requiring the removal of the equipment on the grounds that it is necessary to enable the proposed redevelopment to take place. The Operator has 28 days within which to serve a counter notice objecting to the notice. If the Operator does not respond, it is deemed to have accepted the notice and must remove its equipment. If the Operator serves a counter notice, the Owner must then seek a court order for the removal of the equipment. This is by no means straightforward.

The court will not order in favour of the Owner, if the Operator can demonstrate that the removal of the equipment would substantially interfere with any service provided by the Operator’s system on the grounds that no person should be denied access to a public telecom system. The Owner may wish to argue that alternative sites are available within the area and that its request for the removal of the equipment is not therefore unreasonable. However, this argument will become difficult to sustain with the expansion of the market and the decrease in the number of available sites. If a court order is made the court can order that the Owner defrays the Operator’s costs of complying with the order.

The only way for an Owner to protect itself is to include, so far as legally able to do so, a provision whereby the Operator contracts out of its rights under the legislation. Even if you include a clause to that effect, some commentators believe that legally it is not possible to contract out of these provisions. This means that the Operator will still be able to retain the equipment on the building, but this would be without prejudice to any other contractual agreement they have reached. So for example, the Operator may agree to unattractive commercial obligations which it would not wish to fulfil.

Termination of Leases in non-redevelopment situations

In circumstances where an Owner

- wishes to exercise a break clause or
- the lease has expired and the Owner now wants to regain possession and control of the premises or

- where the Operator is in breach of its lease and the Owner wishes to forfeit

the Owner must serve notice on the Operator requiring the removal of the equipment. The Operator has 28 days within which to serve a counter notice objecting to the notice. If the Operator does not respond, it is deemed to have accepted the notice and must comply. The Operator may respond by stating that the Owner is not entitled to require removal of the apparatus and stating how it proposes to secure a right as against the Owner to keep the equipment on the land. If the Operator serves a counter notice, the Owner must then seek a Court Order for the removal of the equipment.

It is important to appreciate that the parties cannot contract out of these rights and restrictions.

If a counter notice is served the Owner cannot regain possession without a court order.

Court orders are not granted automatically.

The court will not order in favour of the Owner, unless satisfied either that the Operator

- is not intending to take the steps that it specified in its counter notice stating how it proposes to secure a right as against the Owner to keep the equipment on the land or is being unreasonably dilatory in taking those steps or
- that the steps proposed by the Operator will not secure any right for the Operator as against the Owner

Where an order is granted permitting the Owner to remove the apparatus the court can require the Operator against whom the order is made to bear the Owner's cost of relocating the apparatus and permit the Owner to sell the apparatus to defray expenses.

Landlords and Tenants

Landlords will obviously be anxious to make sure that Tenants do not grant leases (whether of open land or roof top space) to telecommunications operators. The traditional method of control has been for a Landlord to rely on the alienation provisions contained within a lease.

Landlords may wish to consider whether to impose an absolute prohibition on the Tenant entering into any agreement with an Operator. However, Owners of land also need to remember that Operators do have the ability to approach a property owner or occupier and require a grant of consent to place its equipment on that person's property.

From a Tenant's point of view, an agreement with an Operator will be a tenancy of part and so a licence to sub-let part will need to be obtained from the Landlord.

Other points to consider

- 1 It is commonplace for aerials to be “shared” with other Operators. The Government in the interests of reducing the proliferation of masts encourages mast sharing. Owners should ensure that they are entitled to share in these arrangements by securing an increase in rent. There should be an absolute prohibition on sharing or subletting other than by way of a formal lease outside of the security of tenure provisions of the Landlord and Tenant Act 1954.
- 2 You should be able to require the Operator to adjust, alter or remove the aerials if they interfere with the Owner or a Tenant's enjoyment and use of the building or any of the Tenant's equipment, or on health grounds.
- 3 It is uncertain whether or not the Code applies after termination of a lease by a Landlord for example for non payment of rent or breach of covenant (i.e. forfeiture). It would however seem incongruous for the Code to kick in so that the Operator can keep its equipment on a building even though it is not paying rent.
- 4 At the end of a lease the Code will apply so that the Operator can keep its equipment in position. There is nothing in the Code to say what the Operator should then pay for future occupation. You should consider imposing a review to open market rent every year following termination of the contractual term of the lease.
- 5 There is an open question as to whether or not it would be better to review rents to the “open market rental value” for the use of such equipment or whether it should be linked to RPI - take valuation advice from surveyors experienced in this type of negotiation.

Effect on value on nearby properties

Press attention has on occasions been given to the allegedly adverse effect of the proximity of a telecommunications mast on the value of nearby residential property. Residential valuers have confirmed to us that the close proximity of the mast to residential properties can make them more difficult to sell. Care needs to be taken to ensure that the telecoms operator provides the Landlord with an indemnity against any proceedings that may be instituted against the Landlord as a result of the rights enjoyed by the telecoms operator under such leases.

Current Position

Up until now, Owners and Licensed Operators have managed to resolve their disputes without the need to resort to the courts. This is because there are still many available alternative sites for the Operators to move to. However, with the arrival of the 4G Network and possible future introduction of 5G, new rural and urban sites will be sought for occupation in the next few years. This will impact on the way in which telecom companies view their statutory position. It is probable that they will be less willing to give up the statutory protection afforded by the Code and will increasingly defend their

position in court, rather than seek alternative sites. Owners may of course be in a position to demand higher annual rents, as the demand site increases.

In 2013 the Law Commission published recommendations to update the Code. Some of the recommendations favour Owners, but others, if adopted, would give increased flexibility to Operators to share equipment with third parties, and greater freedom to assign their leases. These recommendations are, we understand, currently being considered by the Department for Culture, Media and Sport and there is no clear timetable for implementing a revised Code.

Conclusion

The provisions of the Code are onerous and favour the telecom companies. Clients should always take professional advice from surveyors experienced in negotiating with telecom companies before agreeing heads of terms – which must always be expressed to be subject to contract.

Should you have any concerns or queries about any aspect of the information contained in this briefing note, please contact Mark Robertson in our Real Estate Department on 01483 302264.

The above information is designed to provide, for guidance purposes only, a general introductory summary of the subject matters covered. It does not purport to be exhaustive, nor to provide legal advice, nor should it be used as a substitute for such advice.

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