# Lessons from the tribunals

What practical advice do the recent flurry of telecoms cases provide on dealing with agreements under the Electronic Communications Code? By Chloe Postlethwaite, Kai Ricciardiello, Clare Hartley and Luke Maidens

Thirty months since coming into force, there is a good deal of judicial guidance on the application and extent of the Electronic Communications Code (ECC), although everyone agrees that much more is still required.

Here we take a look at the patterns emerging from some of the key tribunal decisions involving code agreements and the practical lessons to take from them.

## Interim agreements under paragraph 26 of the ECC

### i. *Lillian Penson*

In the first decision published under the ECC (*Cornerstone Telecommunications Infrastructure Ltd* v *The University of London* [2018] UKUT 356 (LC); [2018] PLSCS 188), the Upper Tribunal (UT) confirmed that a stand-alone application for interim rights under paragraph 26 was competent.

It therefore granted an order imposing an agreement for interim rights in favour of the claimant. However, the UT left it to the parties to agree on terms and nothing further was said in the judgment itself on what that agreement should look like.

### ii. *Threadgold no 1*

At the same time, the decision in *EE Ltd and another* v *Islington London Borough Council* [2018] UKUT 361 (LC); [2018] PLSCS 191 was published. This related to interim build rights under paragraph 26.

This decision gave more direction on the terms and format of an interim agreement. In particular:

- The only term the UT imposed was the value of interim consideration, although it was not prepared to delve into a detailed determination for the sake of the interim agreement. Instead, consideration was fixed in line with the lower assessment given by the operator. It added that, if a higher figure was fixed in the subsequent paragraph 20 application, this would be payable retrospectively.
- The UT left it to the parties to agree the remaining terms and format of the interim agreement. It said that it was not appropriate to simply impose a paragraph 20 agreement on an interim basis, as there was no need for such an elaborate document for only three or four months' duration.

To that end, it offered the following guidance: "... it ought to impose no obligations on the site owner other than an obligation not to derogate from the rights which have been granted. It should require no covenants or undertakings from the site owner. It should put the full risk of the operation which the operator wishes to embark on the operator and none of the risk on the site provider."

### iii. *Gelly Wood*

This was developed in Scotland with *Cornerstone Telecommunications Infrastructure Ltd* v *Fothringham* LTS/ECC/2019/06.

Here, parties had largely already agreed terms in the form of a working draft, subject to three outstanding issues.

As with *Threadgold*, the Lands Tribunal for Scotland (LTS) said the draft agreement was more elaborate than what was really needed for interim rights. However, it was prepared to go along

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with it, noting that something simpler may need to be considered in later cases.

To give effect to its decision, the LTS said: "... what we have done is amend the clauses in the draft agreement affected by our foregoing decisions and subscribed that revised document as relative to our order. The draft agreement, as so amended, is, therefore, the agreement which is being imposed."

In a slight departure from *Threadgold*, the LTS also decided to meet in the middle on fixing interim consideration, rather than opting for the lower figure presented to it. It stressed that nothing should be read into this, as consideration would also be examined more fully as part of the subsequent paragraph 20 application.

## Longer term agreements under paragraph 20

### i. *Threadgold no 2*

The approach is different for longer-term agreements, as shown in the second *Threadgold* decision: *EE Ltd* v *London Borough of Islington* [2019] UKUT 53 (LC).

Here, parties agreed that a tribunal order should be made identifying the ECC rights and terms to be imposed, and that they would then give effect to those terms by entering into an agreement.

The UT disagreed – it said that under paragraph 20, the operative instrument giving effect to the terms is the order itself, ie once the order is made, the agreement is imposed.

It effectively therefore incorporated the parties' latest working draft of the Code agreement, subject to imposing the term and fixing consideration. It also confirmed that the ECC gives it jurisdiction to impose a lease where appropriate, rather than just a contractual agreement.

Another interesting point to come out of this decision was that, as the respondent had refused to negotiate terms by using the travelling draft agreement (against tribunal directions), its submissions on the terms of the agreement were struck out.

### ii. *Meyrick*

The importance of co-operation was examined further in *EE Ltd and another* v *Trustees of the Meyrick 1968 Trust* [2020] UKUT 105 (LC).

This followed a working draft Code agreement that had been largely agreed, subject to two minor issues. After failing to respond to the claimant's latest amendments for several months, the respondent tried to include new issues at the last minute.

The UT regarded this as vexatious conduct and refused to consider the new issues raised by the respondent. Costs were also granted against the respondent on an indemnity basis.

As for the content and format of the Code agreement, the UT indicated that in practice, a draft Code agreement would be appended to the paragraph 20 notice and that parties should negotiate terms by way of exchanging a travelling draft. It then expected parties "to enter without-prejudice negotiations, and... before the hearing to provide the tribunal with a schedule of points still in dispute".

It did not say this is the way negotiations must be approached, but it is how the tribunal anticipates it should be best approached in practice.

## Key practical lessons

As far as interim agreements are concerned, the decisions tell us the following:

- Both tribunals support the idea that an interim agreement under paragraph 26 should be simpler than a longer-term paragraph 20 Code agreement. However, this is not mandatory, so parties are in principle free to agree on whatever they consider appropriate.
- The tribunals can also simply grant an order for interim rights and leave it to parties to agree on the document giving effect to those rights.
- Where consideration is a point of contention (and it almost always is), extensive valuation evidence is unlikely to be considered in any detail at the interim stage. Rather, the tribunals will opt for a figure and leave the more detailed determination for the paragraph 20 hearing.

The position is different for longer-term code agreements. In particular:

- Operators should append their first draft Code agreement to the back of their paragraph 20 notice, which can be a lease, if appropriate. That agreement then forms the basis of parties' negotiations by way of a travelling draft.
- Before a hearing takes place, parties will also be expected to have entered without-prejudice negotiations and provided the tribunals with a schedule of outstanding points still in dispute. Any party that fails to co-operate in this way could face harsh consequences, as set out above.
- A paragraph 20 agreement is imposed by the tribunal order itself. This is usually done by incorporating the latest version working draft Code agreement into the tribunal order, subject to the tribunal's determination on the issues in dispute.

There is overall a strong emphasis on the need for parties to make every effort to agree on terms, or at least narrow the points in dispute, before proceedings are raised.

The tribunals will take more of a "hands-off" approach when it comes to granting interim agreements, which they prefer to be kept simple. By the time a paragraph 20 hearing comes around, the tribunals take a more active role and expect parties to have comprehensively considered and negotiated the terms of a draft agreement, and clearly identified the issues to be determined.

These decisions also only scratch the surface on how key terms within the Code agreements themselves should be handled. The tribunals have not yet had the opportunity to delve into some other key terms that commonly cause problems, such as the extent of upgrade and sharing rights under paragraph 17 of the ECC. We hope to see more detailed judicial guidance on terms as more applications advance through the tribunals in the coming months.

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