



ELECTRONIC COMMUNICATIONS CODE

Strategy to respond to a network operator's notice

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Michael outlines the options now available to property owners when faced with a network operator: for an owner "trying to be reasonable can be counter-productive". The options to receipt of a notice from network operators are explained below and should be thought about carefully before engaging.

A changing world

It is now nearly 2 years since the new Electronic Communications Code was brought into effect, as a consequence of the Digital Economy Act 2017. Many property owners are just starting to realise what the new code means for them, their properties and in some cases their businesses.

A wide range of property owners including Individual landowners, public bodies, residential management companies and commercial property investors, are all now starting to have to deal with volumes of correspondence from agents acting for telecommunications network operators, the essence of which is to say "give us the rights we want over your property assets or we will see you in court".

Many are finding themselves taken to court with all the ensuing inconvenience and expense that involves.

Previously 2G, 3G and 4G networks were built, and maintained, by way of a process whereby network operators worked with landlords to agree consensually the terms of agreements, which worked for both the property owner and the telecoms company. A process of negotiation would take place, terms would be agreed, documentation followed, and the mast was built. The world has changed; and it has changed fundamentally from the perspective of property owners.

Unfortunately, many property owners, often professionally advised, have not

recognised these changes. In many cases property owners, faced with an approach from a network operator, prefer not to accept the harsh reality of the situation and still believe that with a reasonable approach to negotiations, they will be able to come to an agreement that works for them and the network operator. Unless they are prepared to agree to the demands of the network operator, this is most unlikely and they will be taken to court.

Property owners who make naïve, early responses to network operators' agents can in fact prejudice their position (or that of their clients). Without clearly defined strategic objectives and a strategy for implementing them, trying to be reasonable can be counter-productive.

The first thing that any landowner should do upon receiving correspondence from network operators or their agents is pause. Even if the correspondence demands an acknowledgment within a specific period, then it is worth thinking about strategy before putting pen to paper, picking up the phone or even tapping out an email.

Property owner's responses to a notice

Upon receipt of a notice from the operators seeking to impose rights over their property, the landowner has a number of possible responses:

- Agree
- Agree in principle subject to terms being negotiated further
- Refuse.

Agree

If the landowner is minded to just agree to the demands of the network operator, then they should simply seek professional advice in terms of the drafting of the agreement and possibly the legal effects of it. This will cost money. It is a specialist and technical area of law and there are few experienced specialists in the field. Of course, a property owner does not need to take advice. The network operator will be quite content to provide a proforma agreement which the property owner can execute, and this will indeed save them significant professional fees. It is a brave property owner, though, who just signs up to a "standard" form of agreement prepared by the network operators.

These agreements will be creating rights over property which will exist for many years. The extent of the rights will be important in terms of what apparatus may be installed, where, and of course the arrangements for access to service and repair the apparatus. This can be burdensome and, therefore, property owners need to give very careful thought as to whether they will agree to the imposition of apparatus on their property. Once an agreement has been entered into, then it can be a challenge to remove apparatus in the absence of the appropriate provisions in the agreement, and the ability to address the statutory requirements for removal of apparatus, such as the ability to prove an intention to redevelop the site. There is only one opportunity to secure such terms, if they are likely to be required by the property owner.

In short, any property owner who is contemplating simply executing a standard form of agreement is adopting a low-cost approach, but potentially a high risk one. Even if the decision taken is to accede to the request of the operators for rights over the property, careful consideration should be given to the specific terms of the agreement imposing those rights over the property.

Agree subject to further negotiation

Prior to the implementation of the new legislation, the typical approach to telecoms

apparatus was for the network operator to use agents to approach a property owner, who would themselves appoint an agent; then there would be negotiations, with ultimately mutually acceptable terms being agreed, and solicitors then instructed to document the terms of the agreement. This worked well for 2G, 3G and 4G. The networks were built and operated, and the property owners were willing to make their assets available for telecoms use.

There is a natural tendency in the property world to think that everything is resolved by negotiating and doing deals. To this end, when approached by network operators for an agreement under the terms of the new code, many property owners not finding the terms offered attractive, particularly with regard to payment for use of their property, will naturally seek to engage in a process of negotiation with the network operator or their agents, to try to better those terms.

In the current climate this is most unlikely to be productive, and indeed, could be detrimental to the interests of the property owner. Before even acknowledging an approach from the operator or their agents, the property owner needs to consider their position carefully, look at what they want to achieve in terms of strategic outcomes, and then they need to put in place a plan to help achieve those aims.

The first response to an approach from a network operator or their agents could be of key importance when the property owner is taken to court and, therefore, it must be a very carefully considered and thought through response.

Property owners that immediately attempt to engage in a process of negotiation with the network operators may be both surprised and disappointed that their genuine attempts to reach accommodation with the operator are not making progress towards a consensual agreement. They may be even more disappointed to be threatened with court action, when they are trying to get a deal done. Their disappointment is likely to peak when they are served with their court papers.

The reality is that the sticking point is most likely to be in relation to payments; experience suggests that at the moment, attempts to negotiate on this with network operators are futile, potentially prejudicial to the landowner, and do not avoid court action by the operator. The reason for this is the operators taking the position that if they

proceed to court, then the sums the court will order to be paid under the terms of the legislation will be negligible.

Refuse

A property owner may not want electronic communications apparatus on their property for a variety of reasons. For example, they may consider it to be aesthetically detrimental to their property. They may consider the burden of repeated access at all hours of day and night to be something they do not want. They may be agreeable in principle, but not at the price being offered.

Whatever their reason, if they wish to refuse a request for a code rights agreement, they need to be prepared to defend their position at court; consequently, they need to have a strategy for doing so from day one.

All documentation that is created in relation to a site and a proposed agreement will potentially be disclosable, including emails, notes and so on. It is important, therefore, to think about the grounds upon which an agreement might be resisted, and the evidence that will be required to support that resistance at court.

Documentation that indicates the property owner has no objection in principle to a mast agreement, but is just not happy about the price being offered, will not be helpful. This will make a defence of the property difficult, with the network operators arguing that the only issue for the tribunal to consider is that of payment.

Conclusion

The reality of the situation at the moment appears to be that unless property owners are prepared to accede to the demands of the network operators, in terms of the form of an agreement and the payments for the use of the property, then they should expect to be dragged into court.

This is unfortunate, because the reality is that the country needs to roll out new telecoms apparatus as quickly as possible, to be competitive on the global stage, and the court process is not swift. Very few sites are being delivered through the courts, with cases sometimes taking well in excess of a year.

While many property owners would support the need for UK Plc to develop better connectivity, they do not see why they should have to subsidise the network operators, or their shareholders,

by effectively donating the use of their property assets. Unless they are prepared to do this, then they need to be prepared to defend them at court.

There are a number of issues that may be relevant to any such strategy; each case will need to be considered on its individual circumstances. In some cases, landlords may have leverage and may be able to resist the imposition of agreements. In some they may not.

Whatever their position, the key thing must be to make sure they do nothing to

prejudice their position, or that of those who instruct them, prior to carefully considered decisions being taken as to the desired outcome, and the options for delivering it. Even what appears to be nothing more than just polite routine correspondence affording the courtesy of a reply to an approach from an operator may ultimately come to be scrutinised by a court, and the contents of such correspondence could be important to the ultimate decision of that court.

Property owners who do not just want

to surrender to the imposition of rights over their property should not rush in, but instead should take time and advice before responding to an approach to place electronic communications apparatus on their property assets. Many property owners are now having to face the being taken to court, and are having to defend themselves. That is the reality of the situation, following the new code; property owners need to do all they can to ensure they are in the best possible position to defend their assets