"CAN I 'PHONE A FRIEND, PLEASE?"

A SORT OF "YELLOW PAGES" TO THE ELECTRONIC COMMUNICATIONS CODE

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1 Introduction - Can I Phone a Friend?

1.1 The Electronic Communications Code has no friends to 'phone. For example, Lewison J is *really* not a fan:[1]

> The code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the 2003 Act says that the code set out in Schedule 2 to the 1984 Act is referred to as "the electronic communications code" in "this Chapter", the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called "The Telecommunications Code".

Later on in his judgment, he commented on the point he was being asked to decide, "It is lamentable that the drafting does not make *[the answer]* clear".[2] He is not the only one to find it impenetrable. HH Judge Marder QC, when sitting as President of the Lands Tribunal, was not that keen on the drafting either:[3]

> I think it is unfortunate that what is literally a matter of household and daily import should be phrased in the way that it is, which is very difficult indeed - even for a lawyer and certainly for a non-lawyer to understand.

Following the lead given by Lewison J, I shall call it the "Code" for short.[4] In this paper, I shall give you a communications satellite's view of these aspect of the Code:

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1 *Bridgewater Canal Company Ltd. v. Geo Networks Ltd.* [2010] 1 WLR 2576, [7].

2 At [26].

3 *Finsbury Business Centre Ltd. v. Mercury Communications Ltd.* (Lands Tribunal Ref. 99/1993).

4 If we are going to be formal about this, the Code is to be found in the Telecommunications Act 1984, Schedule 2, as amended by the Communications Act 2003.

1.1.1 why some form of Code is necessary;

1.1.2 how politics and lobbying affected the initial drafting of the Code - and why this still matters;

1.1.3 an introduction to the "General Regime", which covers most forms of property over which telecommunications Operators have rights;

1.1.4 the general valuation regime, which determines what Operators must pay if they exercise their statutory powers; and

1.1.5 an introduction to the dark art of removing electronic communications apparatus from your land.

2 Dropped Calls - Why There is a Need for Some Form of Code:

2.1 In a civilized, modern society, or even in England and Wales today, it is taken as read the public need access to water, power, and - apparently - the internet. In order to get those essential services to where the consumer wants to drink, surf the internet on a p.c. and then flush the toilet, all utilities companies need rights to cross land which are both cheap and effective. Could the common law have provide a consensual solution. Not really...

2.2 When a telecoms company comes onto your land and either buries its cable or erects its poles to run its cables over your head, the traditionally minded land-lawyer might struggle to identify the nature of the right being asserted. It is not obviously the compulsory acquisition of a freehold, because the right may well be terminable at the whim of the utility company, abandoning its rights. It does not look like a lease either: it is an odd lease that is imposed from the outset unilaterally on the landlord by the tenant, for a sum decided by a third party. Even more so, if the "lease" is of nothing

more than that part of the ground through which its cables are passing, but not any of the supporting soil.

2.3 Your traditionally minded land-lawyer might say these rights could not be the two estates in land, freehold and leasehold, so the only right that fitted the bill was a non-possessory interest, such as the easement. There is much to be said for this: there is no difficulty at all with recognising that one adjoining landowner may acquire, by grant or by prescription and so on, the right to run a water pipe or a sewer through the land of an adjoining owner.

2.4 However, the primary difficulty with the utility companies actually using easements as the legal device by which they enter onto land and install whatever it is they propose to install is this: what and where is the dominant tenement? It is, often said that the case of *Re Salvin's Indenture* is authority for the proposition that the whole undertaking of a public utility is the dominant tenement for the purposes of supporting an easement.[5] In that case, an express easement granted to a water authority to lay and use drains was challenged on the basis that there was no dominant tenement. Farwell J, disagreed. He considered that the entirety of the water authority's land and property rights constituted the "dominant tenement":[6]

> The undertaking, in my judgment, being composed of corporeal and incorporeal hereditaments, is capable of being the dominant tenement in respect of such a grant as this. It is plain that the dominant tenement need not be contiguous to the servient tenement.

2.5 There must be some room for doubt as to whether this is correct. If the whole of the water company's property, corporeal and incorporeal, is "the dominant tenement", it almost certainly cannot be identified from the document granting the easement, either at the time of grant, or subsequently, because the extent and network must change

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5 [1938] 2 All ER 498.

6 At 506.

from time to time. A valid easement needs a certain, specified dominant tenement, not an amorphous network of corporeal and incorporeal property which changes from day to day - or even hour to hour.[7]

2.6 Parliament devised the wayleave as way of avoiding that particular problem, by creating the statutory wayleave: like an easement, but not an easement. The device has its roots in the Nineteenth Century, when the Public Health Act 1848 began the process of nationalising the sewage and drainage pipes laid under private land. Such pipes and sewers were vested in the relevant statutory body, such as the Metropolitan Board of Works. When the Courts came to consider this vesting, it was held the statutory vesting meant that the undertaker did not gain ownership of the appropriate pipe, or the land surrounding it, but only such ownership and such rights as were necessary for the purpose of carrying out the duties of the statutory undertaker.[8]

2.7 So what, then, is a wayleave?[9]

2.7.1 It is a right for a statutory undertaker to enter onto land belonging to another person for the purposes of laying, operating and maintaining apparatus associated with the undertaking.

2.7.2 It also encompasses the right to retain and use the apparatus thus installed for the purposes of the statutory undertaking, without that apparatus constituting a trespass or a nuisance to the landowner.

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7 See, for example, *re Ellenborough Park* [1956] Ch 131 (CA).

8 In *Bradford v. The Mayor of Eastbourne* [1896] 2 QB, 205, 211 (QBDC) Lord Russell CJ said, "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter".

9 These derive from *Bradford v. The Mayor of Eastbourne*. For another collection of the principles see *per* Morton LJ in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.*[1947] Ch 427, 457 (CA), in relation to a gas pipe, laid under the Gas Works Clauses Act 1847, section 6.

2.7.3 It confers no right of ownership or proprietorship in the land over which it has been granted and therefore it is not a legal or equitable interest in the land. It is not a lease or an easement. It confers no right to exclusive possession of the land it burdens, although it imposes obligations on the landowner not to interfere with it, whatever space it occupies.

2.7.4 Subject to those limitations, it has otherwise all the characteristics of a freehold interest in the exact land subject to the wayleave, save that it is determined if the statutory undertaker ceases to require the apparatus for its statutory purposes.

2.7.5 Because they are not interests in land, true wayleaves are not registerable under the Land Registration Act 2002.[10] The extent to which successors in title are bound is controlled by whichever Act which supports their creation, not by the principles of Land Registration. In the case of communications apparatus, that is the Code.

2.8 The Code is, as we shall see, a very flexible instrument. As it is popularly interpreted, it allows Operators to negotiate or impose not only these wayleaves, but any other form of property interest, without limitation. But before we get into that, where did the Code come from?

3 "If You See Sid..." Politics, Lobbyists and the Drafting of the Code:

3.1 The sale of the telephone network was the first of big privatisation of the 1980s. When construing the Code, it is helpful to recall that the Telecommunications Act 1984 had

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[10] Paragraph 2(7) of the Code states that Code rights are "not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land", which gives rise to some interesting arguments as to whether the Code was only intended to create wayleaves. There are a number of other arguments which suggest that this was the original intention, but these are beyond the scope of this paper. See my paper "*Thinking Outside the 'Phone Box*", delivered to the RICS Annual Telecommunications Conference in 2012 for a full discussion.

a distinct policy. If one looks to *Hansard* for a steer on the policies underlying that statement. Introducing the Bill in the Lords, Lord Cockfield indicated the policy was not just to privatise British Telecom, as it was then known, but to:[11]

> greatly to increase competition, to the universal benefit and to remove the obstacles which stood in the way of the development of a fully competitive telecommunications industry.

3.2 Lord Cockfield's initial introduction to the Code, which he referred to as Schedule 2, was pretty laconic:

> The Bill also provides - in .... the related Schedule 2 - a new Telecommunications Code controlling the way in which telecommunications apparatus is placed in streets and on private land..... the arrangements for compensation were considerably improved and extended by Government amendment in another place.

That was a touch of an understatement. One can see from the amendments to the draft Bill in that "other place" that the lobbyists had been having fun, particularly on the question of who was to be bound by the Operator's rights to place apparatus onto land. This lobbying still echoes. To the extent to which the present drafting of the Code is an omnishambles, it is a consequence of the hard negotiating between the landowners and the Operators, who wanted a simple "occupier-only consent" mechanism, to avoid having to go through a complex chain of titles, especially in urban areas.[12] Lord Glenarthur gave the game away when he said:[13]

> ... in relation to the Telecommunications Code in Schedule 2 - an important aspect of the Bill but virtually undebated so far but which has been the subject of strong representations by outside bodies the Government have made very substantial changes to meet genuine concerns.

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11 Lord Cockfield, the Chancellor the Duchy of Lancaster, *Hansard (HL Deb)* 16th January 1984, 2.55pm.

12 There is some discussion of the lobbying in the exchanges between Lord Howard, Lord Middleton, Lord Glenarthur and Lady Saltoun in *Hansard (HL Deb)* 20 March 1984, from 7.15pm onwards.

13 *Hansard (HL Deb)* 20th March 1984 page 895 (7.45pm).

The government might have bent over too far backwards, as Lord Middleton ruefully observed: "We shall still have a schedule which is convoluted and by no means easy to interpret".[14]

3.3 However, one thing shines though about the Code. Because it was meant to promote the expansion of the telecommunications industry, and its diversification, it has a discernable "pro-Operator" bias. Overturning the decision of Lewison J in the *Geo Networks* case, Sir Andrew Morritt C drew attention to the central policy of the Code, which is repeated in a number of different paragraphs within the Code and in the 1984 Act itself: "no person should unreasonably be denied access to an electronic communications network". The Chancellor said:[15]

> [25] ... In my view it is necessary first to consider the ambit of the Code in general and of paragraphs 12 and 13 in particular before, not after, subjecting the words used in specific sub-paragraphs to a textual analysis. The Code was originally enacted as part of the privatisation of British Telecommunications and consequential expansion of the telecommunications market. It was substantially amended by the Communications Act 2003 which was enacted for the like purpose but in the light of all the technological developments in the intervening period. Thus the overriding principle proclaimed in paragraphs 5(4), 13(5) and elsewhere is that "no person should unreasonably be denied access to an electronics communications network or to electronic communications services".

It is clear from this that, when construing the Code, the overriding principle is that construed in a way which facilitates Operators in establishing and maintaining networks, and arguments about the Code being construed so not to impose unreasonable burdens on freeholders are not going to flourish. The Code rules, OK?

4 Dial "O" for Operator - The Basics of How the Code Works:

4.1 In a sentence, the Code is a statutory scheme of rights and obligations which enables providers of electronic communications networks to enter onto land belonging to others, in order to install, erect, maintain and use any form of electronic

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14 *ibid*.

15 [2011] 1 WLR 1487 (CA).

communications apparatus, together with all associated ancillary equipment, for the purposes of their network.

4.2 The class of persons entitled to rely on the Code are referred to therein as "Operators". Primarily, "Operators" are persons who have been designated as providers an electronic communications network by OFCOM or by the Secretary of State, under Communications Act 2003, section 106.[16] It is usually obvious who has a designation under section 106, but OFCOM has a list on-line.[17]

4.3 An electronic communications network is defined by section 32 of the 2003 Act as:

> a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description

In the real world, it covers digital and analogue land-lines, mobile phone masts and fibre-optic cables. It also includes any equipment designed to be used for electronic communications, or from which such apparatus can be suspended or supported for the purposes of an electronic communications network. All the tech-y bits.

4.4 Although it was overruled, Lewison J's judgment in the *Geo* case is very useful for its clear and uncontroversial explanation of the way that the Code divides land and landowners into two categories, and then applies the Code to them in slightly different ways. Lewison J referred to these as the General Regime and the Special Regimes. I shall focus on the General Regime, because it applies to the vast majority of landowners: with one exception, the Special Regimes are of little relevance to most of our clients, because they cover land forming adopted highways, ports, harbours and "linear obstacles" such as canals and railway lines. I will say a few words about one of the Special Regimes later.

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[16] The definition of "Operators" now can extend to conduit providers, such as the gas or water utility companies, provided their conduits are being used to carry electronic communications apparatus, whether or not the cables belong to them. See the Communications Act 2003, sections 106-7.

[17] http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/register-persons-power.

4.5 This is an overview of the way in which the General Regime operates:

4.5.1 *Prima facie*, Operators should negotiate with the occupiers of land, not necessarily the freeholders or superior landlords, for such rights as the Operator requires.

4.5.2 If the Operator wishes to negotiate further up a chain of titles, he can do so as a matter of choice, but he does not have to under the Code.

4.5.3 If the Operator cannot secure agreement, or wishes to force superior owners to be bound by his rights, he has a right to compulsorily acquire such rights as he requires, by seeking an Order "dispensing with consent" from the County Court.

4.5.4 If the Operator uses these powers, he must pay consideration and/or compensation. The legal basis on which this is payable is controversial, which gives rise to some odd valuation arguments. There is almost no guidance as to what the other terms of the rights to be granted to the Operator might be.

4.5.5 Once an Operator is on land, his rights are not absolute. Any occupier of the land, including a superior landlord whether or not formally bound by the Operator's rights, can make an application to Court requiring the Operator to "lift and shift" his apparatus, if it is impeding re-development of the land. This power is in Paragraph 20, and includes a right to require complete removal of the apparatus. The Operator has limited defences to such an application, but those defences which it has are powerful.

4.5.6 If the agreement permitting the Operator to remain ceases to bind the occupier, for whatever reason, the Occupier has an unstinted right to require the

Operator to remove all his apparatus. This right is in Paragraph 21. Legally, the Operator has a near cast-iron defence to any such claim, but in practical terms, it is extremely rare for an Operator to exercise its rights all the way to trial of any claim under this Paragraph.

5 "It's Good to Talk" - How Operators Can Get Onto Land:

5.1 I shall next look at the way Operators get onto land in a bit more detail. As I have said, Paragraph 2 proceeds on the assumption that the Operator starts by way of negotiating rights. These rights can be as ephemeral as a wayleave, but the Code imposes no limit on the nature of the rights Operators can request. Paragraph 2(1) provides:

> The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—
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> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
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> (b) to keep electronic communications apparatus installed on, under or over that land; or
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> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network.

Note how sweepingly wide that is. Despite the width, in my experience, most Operators request either "proper" leases, which may or may not get contracted out, or they request rather vague "agreements" which may or may not amount to licences or tenancy agreements in any given circumstances. For reasons which will become very clear when we get to Paragraph 21, as a landowner, the only really safe option is a lease which has been "contracted out" of the Landlord and Tenant Act 1954.

5.2 Also of interest is that Code focusses on the rights given to an Operator by an *occupier* of land. If granted by agreement, these rights only bind either the freeholder,

or any superior landlord with a term of more than a year, when granted in these four circumstances:

5.2.1 the occupier is the freeholder, and has conferred the right himself;

5.2.2 the freeholder has previously agreed in writing to be so bound;

5.2.3 the freeholder is deemed to have agreed by reason of Paragraph 2(3) of the Code, namely because-

5.2.3.1 any person who is either a person owning the freehold estate in the land or a lessee of the land under a lease for a term of a year or more has agreed in writing that his interest in the land should be bound by the right, and

5.2.3.2 for as long as a person who agreed the rights remains in occupation, or someone who is bound by that agreement is in occupation, everyone with an interest in that land is deemed to have agreed to the grant of the Operator's rights; and

5.2.4 provided that the person who granted the rights under the Code owns an interest in the land, then any right he grants an Operator binds his successors in title and those who derive interests from such a person.

5.3 That looks like landlords *may* easily escape being bound by Code rights granted by their tenants, but put that on "hold" for a moment, until we come to examine Operators' security of occupation. For now, just note that Paragraph 27(2) of the Code emphasises the essentially consensual nature of the Code:

> The provisions of this code, except paragraphs 8(5) and 21 and sub-paragraph (1) above, shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.

In other words, the parties have complete autonomy to "contract out" of much of the Code, but it is still not possible to exclude the parties' rights under Paragraph 21. That is going to cause pain, as we shall see.

6 How Operators Get "Everything Everywhere" - Compulsion Under the Code:

6.1 If an Operator cannot secure the agreement he needs to get onto the land in question, he has a power to ask the Court to dispense with the necessary consent. This power is contained in Paragraph 5 of the Code:

> (1) Where the Operator requires any person to agree for the purposes of paragraph 2 or 3 above that any right should be conferred on the Operator, or that any right should bind that person or any interest in land, the Operator may give a notice to that person of the right and of the agreement that he requires.
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> (2) Where the period of 28 days beginning with the giving of a notice under sub-paragraph (1) above has expired without the giving of the required agreement, the Operator may apply to the court for an order conferring the proposed right, or providing for it to bind any person or any interest in land, and (in either case) dispensing with the need for the agreement of the person to whom the notice was given.

Again note the width of the Court's power. Because there are no limits to what the Operator can ask for under Paragraph 2, there would seem to be no limit on what rights the Operator can obtain from the Court. If an Operator is already in occupation, then Paragraph 6 provides for the Operator to remain in occupation pending any application he might make under Paragraph 5 for long-term rights to remain. Effectively, Paragraph 5 relates to getting on without consent **and** staying on without consent.

6.2 When it comes to Paragraph 5, the Court does not have much discretion. Paragraph 5(3) is highly prescriptive, as it *requires* the Court to grant the Operator whatever rights it has requested, provided that:

6.2.1 any prejudice to the landowner or occupier caused by the making of the Order is capable of being compensated by money; and that

6.2.2 any such prejudice is outweighed by the benefit accruing from the order, having regard to, "the principle that no person should unreasonably be denied access to an electronic communications network".

In light of the Chancellor's judgment in *Geo*, describing "the principle that no person should unreasonably be denied access to an electronic communications network" as the "overriding principle" of the Code, it is very difficult so see how an Operator's claim under Paragraph 5 can be readily defeated in law. Commercially, Operators do seem to shy away from using it, perhaps because it is so Draconian that they fear revealing to the public how difficult it can be to get rid of an Operator who has Paragraph 5 available to them.

6.3 One argument open to defeat Paragraph 5, presently untried in the Courts, focusses on the word "an" in "access to ***an*** electronic communications network". Imagine an area of the Country where there is, say, good coverage for users of the O_2 network, but there is no coverage for Vodafone: in telecom jargon, there is a Vodafone "not-spot". Can a landowner defeat a claim under Paragraph 5 by saying there is perfectly good coverage for customers of "an electronic communications network", but that network is O_2, not Vodafone?

6.4 In my view, it will be Vodafone who can "make the most of now". When one goes back to the 1984 Act and the amending 2003 Act, one sees that the creation of competition in the telecom market was at the forefront of the policy. Indeed, the whole purpose of the 1984 Act was to create competition for BT, which was created as a

separate private entity by that Act: as the Court of Appeal said in *Geo Networks*, this is a material consideration when construing the Code.[18]

7 On the Wrong Tariff- Consideration and Compensation Under the Code:

7.1 Assuming the Operator has resorted to Paragraph 5 to either get on, or stay on, land, what are the terms on which he stays and what must he pay? When the Court has made an order under Paragraph 5, it must then make an order under Paragraph 7, setting out the financial and other terms on which the Operator must exercise its rights, including:[19]

7.1.1 such terms and conditions necessary to ensure that the least possible loss and damage to the occupier (or any superior landowners bound) is caused by the exercise of the right conferred;

7.1.2 payment of such consideration as appear to the Court would have been "fair and reasonable", if the agreement had been given willingly;

7.1.3 adequately compensation for any loss and damage suffered by such persons as are bound by the right granted;

7.1.4 who is to receive any such payments;[20] and

7.1.5 whether these various payments should be made as a lump sum, or periodically.

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18 [2011] 1 WLR 1487, [25] *per* Sir Andrew Morritt C. Leveson and Patten LJJ agreed.

19 Paragraph 7(4)(b) allows the Court to make an Order that there should be an arbitration as to the questions arising in consequence of the terms it determines. Whether that means the Court can ship the whole thing off to an arbitration is wholly unclear. Equally undefined is who choose the arbitrator, what the terms of the arbitration are and pays who pays his fees.

20 This might be a wider class of persons than just the occupier. The Operator may also be liable to pay compensation for "injurious affection" to *neighbouring* land, assessed in the same way as compensation for injurious affection under section 10 of the Compulsory Purchase Act 1965.

7.2 Paragraph 7(1) is a bit mysterious. It provides for two distinct payments: a payment of "fair and reasonable" "consideration" for the grant of the rights conferred, and "adequate compensation" for "any loss and damage sustained":

> (a) such terms with respect to the payment of **consideration** in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court **would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order**; and
>
> (b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are **adequately compensated (whether by the payment of such consideration or otherwise) for any loss or damage sustained by them** in consequence of the exercise of those rights.

My emphasis.

7.3 One might think that those are obviously distinct, in that "compensation" is a payment for disruption or damage to the occupier's premises, whereas "consideration" is a payment for the grant of the right, over and above paying for any losses flowing from it. You might think that, but the Court of Appeal have managed to come to different conclusions, at least in another context.

7.3.1 The Electricity Act 1989, Schedule 4, paragraph 7 provides that landowners should receive compensation "in respect of the grant" for the imposition of electricity wayleaves. The Court of Appeal held in *Welford v. EDF Energy Networks (LPN) plc* that "compensation" includes an element of price, upholding an award by the Lands Tribunal of £2,360.00, "in respect of the value of the wayleave".[21]

7.3.2 In the special regimes case of *Geo Networks*, the Court of Appeal held that the payment of consideration and compensation for crossing a canal included

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[21] [2007] 2 P & CR 15 (CA).

something for the grant of the right to initially install the apparatus, but nothing for the rights to retain it once the electronic communications apparatus, once it was installed: a construction Lewison J had rejected as a statutory "buy one get one free".[22] In other words, the reference to "consideration" had no real content.

7.4 In the context of the general regime, there has only been one considered judgment on the subject of compensation: the decision of HH Judge Hague QC, in *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd*.[23] It is sometimes said that this decision has been approved by the Court of Appeal in *Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.*, but that is not really the case, for the reason Mance LJ gave:[24]

> [6] So far as concerns the interpretation of these paragraphs [5 and 7], both parties were content before the judge (and before us) to adopt as correct the statements of principle in a judgment of His Honour Judge Hague QC in *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd.* We have not therefore heard argument on any point which might or might be thought to arise as to the proper approach, and we are not in the circumstances to be taken as expressing any concluded view on any such point. However, we can, we think, highlight certain aspects which emerge from the judgment in *Mercury*, since they are, as we say, common ground before us.

7.5 In *Mercury Communications*, Mercury argued that Paragraph 7 had to be interpreted in accordance with compulsory purchase principles, so that (put crudely) the value **to Mercury** of laying its cables under LIDI's land would be disregarded. Mercury relied on *BP Petroleum Developments Ltd. v. Ryder*, a case under the Petroleum (Production) Act 1934 and the Mines (Working Facilities and Support) Act 1966, which was said by Mercury to be analogous to the Code.[25]

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22 Lewison J at [2010] 1 WLR 2576, [39]; Court of Appeal at [2011] 1 WLR 1487, [25]-[30].

23 (1993) 69 P&CR 135 (Mayor's and City County Court).

24 [2002] EWCA Civ 720.

25 [1987] 2 EGLR 233 (Peter Gibson J).

7.6 HH Judge Hague QC refused to do follow the *BP Petroleum Developments* case, stating that it was "quite untenable" to apply compulsory purchase principles to the Code and that "the Code must be applied without regard to compulsory purchase principles".[26] He decided that the Code created its own valuation mechanism, which required him to decide what was "fair and reasonable" consideration:

7.6.1 which excludes any element of profit share or ransom, but

7.6.2 going beyond a figure which simply reflects the diminution in value of the occupier's interest in the land.

7.7 The Judge went on to decide that such consideration was best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right to the grantee. That of course requires the use of comparables; the best comparables available in *Mercury* were deals made between the same parties, but the Judge then took the view that what was required was not simply market value, because "fair and reasonable consideration" meant something more than a determination of the market value of the rights. Determining a "market value" would involve an "objective assessment of a factual matter", but "fair and reasonable consideration" required "an element of subjective judicial opinion", depending on a Judge's own perception of what was fair and reasonable:[27]

> It is in my judgment clear that what I have to determine is not the same as what the result in the market would have if the grant had been given willingly. That is, however, far from saying that the market result is irrelevant or can afford no guidance. Indeed, in my view the market result is the obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable" … But there may be circumstances, of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable"

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[26] Page 156. The following passage attempts to summarise pages 161-164 and 168-169.

[27] At 144-5.

7.8 In so holding, Judge Hague decided that the so-called *Pointe Gourde* principle had no application to the Code.[28] This matters. In a sentence, *Pointe Gourde* principle is this: the calculation of compensation for the compulsory purchase of land must exclude any increase in value of the land acquired attributable solely to the scheme of development giving rise to the compulsory acquisition.[29] In other words, the land acquired is valued by reference to its value to the owner, in a world where there is no scheme for compulsory acquisition, and not by reference to the value to the person exercising compulsory acquisition powers.[30]

7.9 This disregard of the effect of the scheme does not require the valuer to value *only* the present use of the land being acquired. He must also take into account also any other more beneficial purpose to which it could be put in the foreseeable future, unless that future value is wholly the consequence of the very scheme which is otherwise to be disregarded. The valuer may, therefore, take the view that the land acquired had an inherent value as a ransom strip, but irrespective of the existence of the scheme for which it was being appropriated. However, in the vast majority of cases, *Pointe Gourde* destroys any form or ransom value or profit-share based valuation.

7.10 HH Judge Hague had rejected any reliance on the *Star Ryder* case on the wording of the Petroleum (Production) Act 1934. That statute has subsequently been considered by the Supreme Court, and in a way which makes the decision in *Mercury* very difficult

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28 Named after *Pointe Gourde Quarrying and Transport Co.Ltd. v. Sub-Intendent of Crown Lands* [1947] AC 565, 572 *per* Lord MacDermott (PC);.

29 *Pointe Gourde* at page 572 *per* Lord MacDermott. See also *Transport for London v. Spirerose Ltd.* [2009] UKHL 44; [2009] 1 WLR 1797, [88] *per* Lord Collins.

30 In *Stebbing v. Metropolitan Board of Works* (1870) LR 6 QB 37, 42, cited by Lord Collins in *Spirerose*, Cockburn CJ said that the landowner should be compensated to the extent of his loss, "tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it".

to sustain. This is the case of *Bocardo SA v. Star Energy UK Onshore Ltd*.[31] The 1934 Act nationalised all underground reserves of oil and petroleum, and created a system of licencing companies to extract petrol. Star had such a licence, but failed to use its compulsory acquisition powers when extracting oil and natural gas from a naturally occurring reserve in, of all places, Oxted, Surrey: it simply drilled its pipe in at an angle from its land, some distance away, and slurped the oil out from under.

7.11 For our purposes, all we need to do is note that the operative words of the 1934 Act are the same as those in Paragraphs 5 and 7 of the Code, and note that the majority of the Court interpreted them as importing standard compulsory purchase principles, including the *Pointe Gourde* principle. Only one Justice, Lord Clarke, directly commented on the decision of Judge Hague in *Mercury*, but he was one of the two dissenters on this issue.[32] Giving the leading judgment for the majority Lord Brown was unimpressed with the logic used in *Mercury*, even though he did not refer to the case directly. Lord Brown thought that the use of particular words was not necessary to invoke the general principles of how to compensate for a compulsory purchase.[33]

7.12 On the contrary, provisions in *any* statute which facilitate the compulsory purchase of land should be analysed by reference to the policy underlying such statutes, because, quoting from Lord Nicholls in *Waters*, he said, "Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of *[that]* power".[34] Lord Brown continued:

> [74] This issue cannot be resolved by reference simply to the language of section 8(2): what is fair and reasonable compensation as between a willing grantor and a willing grantee must inevitably depend upon whether the willing grantee is or is not

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31 [2010] UKSC 35; [2011] 1 AC 380 (SC).

32 Lord Hope DPSC also dissented on this issue, on a similar basis to Lord Clarke, but without reference to *Mercury Communications*.

33 Lord Collins agreed at [101].

34 Paragraph [18] of Lord Nicholls' speech in *Waters v. Welsh Development Agency*.

> entitled in the notional negotiation between the parties to exploit the position he would be in but for the grant of compulsory purchase powers to deny the licence-holder access to the petroleum he is statutorily empowered to win. It depends, in short, upon whether the court construing section 8(2) should approach it with the same general attitude and expectation as ordinarily it brings to the construction of statutory provisions dealing with compensation for compulsory land acquisition. If so, the *Pointe Gourde* principle applies: the landowner's compensation should not be assessed at more than he could reasonably have attained for the grant of the ancillary right had the licence-holder not enjoyed a statutory power to acquire it compulsorily for a particular purpose...

This is not the right talk to go into microscopic detail, so please take it from me that all of the arguments which were put to, and accepted by, HH Judge Hague in *Mercury Communications* were also run before the Supreme Court and rejected by a 3/2 majority. It follows that the correctness of *Mercury Communications* is now definitely up for grabs...

7.13 Whatever the correct analysis of the Code in that respect, Operators now do have access to true powers of compulsory purchase. The Communications Act 2003, section 118 and Schedule 4, state that, where an Operator requires, or reasonably foresees that it will require, land or rights over land for or in connection with the establishment or running of its network, the Secretary of State and OFCOM may authorise the Operator to acquire land compulsorily. The full scheme of compulsory purchase powers in the Acquisition of Land Act 1981 will apply to the making of any compulsory purchase order.

7.14 In short, total confusion now reigns.

8 (Getting the) Bird on a Wire - A Brief Word on the Special Regimes:

8.1 As I have mentioned, the special regimes largely apply to infrastructure providers, such as highway authorities, rail and canal companies. There is an exception to that, which is surprising, even by the quirky standards of the Code. Paragraph 10 is a part of the special regime, because the compensation provisions are not the "standard"

ones in Paragraph 7, but the persons affected by it are likely to be ordinary landowners, not infrastructure providers. It is surprisingly robust:

> (1) Subject to paragraph 3 above and the following provisions of this code, where any electronic communications apparatus is kept installed on or over any land for the purposes of the operator's network, the operator shall, for the statutory purposes, **have the right to install and keep installed lines which**
>
> (a) pass over other land adjacent to or in the vicinity of the land on or over which that apparatus is so kept;
> (b) are connected to that apparatus; and
> (c) are not at any point in the course of passing over the other land less than 3 metres above the ground or within 2 metres of any building over which they pass.

Paragraph 10(2) states that the installation of telegraph poles, etc., is not permitted under this paragraph. Paragraph 10(3) contains some further exceptions, but as long as flying a line does not obstruct access to the land, does not prevent any business activity on the land and the line is higher than 3m above ground and 2m from any building, an Operator can fly a line wherever he likes: even over your back garden. There is no compensation payable by Operators for these rights. A bit much?

9 Time to Hang Up - Can You Ever Get Rid of an Operator:

9.1 Let us start with the bad news. No matter what an agreement made with an Operator says,[35] and no matter who may claim not to be bound by an Operator's rights, once an Operator is there he has a right to remain in occupation until a Court orders him to leave. This is buried in Paragraph 21(9):

> Any electronic communications apparatus kept installed on, under or over any land shall (***except for the purposes of this paragraph*** and without prejudice to paragraphs 6(3) and 7(3) above) be deemed, as against any person who was at any time entitled to require the removal of the apparatus, ***but by virtue of this paragraph not entitled to enforce its removal***, to have been lawfully so kept at that time.

My emphasis: it is by reason of those words that Paragraph 21(9) renders all occupation for Code purposes lawful, until an Order is made under Paragraph 21(6)

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[35] There is one recherché exception, which I discuss in paragraphs 9.16 *et.seq.*

or any of the other grounds on which an Order can be made.[36] Remember that Paragraph 27(2) **prevents** contracting out of Paragraph 21.

9.2 Further, the Operator has no liability for damages for trespass or breach of the covenant to yield up. Not only does this follow from the apparatus being deemed to be lawfully on the Property, but Paragraph 27(3) expressly confirms the position:

> Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with this code.

If an agreement expires, the Operator has no obligation to continue paying any "rent" or licence fee, unless he actually is subject to an Order under Paragraph 5: Paragraphs 4(4) and 7(3) expressly provide that the Operator pays up *only* at the end of the process.

The standard method of removing an Operator

9.3 The "standard" method of removal is in Paragraph 21 of the Code. It is expressed as a bar on landowners asserting a right to possession against an Operator. Unfortunately, one has to go through quite a lot of Paragraph 21 to see how it works.

9.3.1 Paragraph 21(1) provides that no person entitled to require the removal of electronic communications apparatus is entitled to enforce the removal of that apparatus other than by the procedure set out in Paragraph 21, or one of the other Paragraphs later referred to.

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[36] Or any of the other grounds on which the Court could order removal, such as Paragraph 20, where the landlord requires the apparatus to be removed to facilitate demolition. The right in Paragraph 21(9) to lawfully retain the apparatus *in situ* is applied to those other removal provisions by Paragraph 21(12).

9.3.2 By Sub-Paragraph (2), if the landowner requires the removal of any such apparatus, he must give a notice to the Operator, requiring its removal of the apparatus.

9.3.3 Where a person gives a notice under sub-Paragraph (2) above and the Operator does not give that person a counter-notice within the period of 28 days, that person shall be entitled to enforce the removal of the apparatus.

9.3.4 If the Operator gives a counter-notice, it must either:

9.3.4.1 state that the person giving the Notice is not entitled to require the removal of the apparatus; and/or

9.3.4.2 specify the steps which the Operator proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land.

9.4 Then comes the all-important Paragraph 21(6). Where a counter-notice is given under by the Operator, the occupier may only enforce the removal of the apparatus pursuant to an order of the court; and, where the counter-notice specifies steps which the operator is proposing to take to secure a right to keep the apparatus on the land, the court shall not make such an order unless it is satisfied:

9.4.1 that the Operator is not intending to take those steps or is being unreasonably dilatory in the taking of those steps; or

9.4.2 that the taking of those steps has not secured, or will not secure, for the Operator as against that person any right to keep the apparatus installed on, under or over the land or, as the case may be, to re-install it if it is removed.

In light of Paragraph 5, the Operator can almost always secure the necessary rights. In practical terms, an Operator who invokes Paragraph 5 is extremely unlikely to lose a Paragraph Claim unless it either fails to serve a counter-notice and/or is "unreasonably dilatory" in taking such steps as it has said it will take. No-one knows what "unreasonably dilatory" is, because there has never been a case.

9.5 Paragraph 20 is, effectively, useless against an Operator who really wants to stay. Moreover, there is worse to come. The Code kills any claim under "Ground (f)". As we all know, Ground (f) requires the landlord to prove that:

> that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding ...

9.6 We also all know that the Act gives an expanded meaning to the word "intends", because of *Cunliffe v. Goodman*:[37]

> An "intention" to my mind connotes a state of affairs which the party "intending" -I will call him X- does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. ...
>
> Not merely is the "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the payment will be commercially worthwhile.
>
> In the case of neither scheme did *[the landlord]* form a settled intention to proceed. Neither project moved out of the zone of contemplation -out of the sphere of the tentative, the provisional and the exploratory- into the valley of decision.

The test of intention, therefore, breaks down into two parts:

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[37] *Cunliffe v. Goodman* [1950] 2 KB 237 (CA). The case was actually concerned with the Landlord and Tenant Act 1927, but was approved as appropriate for section 30(1)(f) in *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* [1959] AC 20 (HL), *per* Viscount Dilhorne.

9.6.1 does the landlord subjectively have the stated "intention" (meaning "desire"); and

9.6.2 does the landlord objectively have the practical means to actually implement that desire?

9.7 It is that latter limb of intention that causes the problem. To prove that he has an intention, the landlord has to show that he can practically implement his scheme. The relevant date for proving that intention is upon "the termination of the current tenancy". By reason of section 64 of the Act, this date is three months and 21 days after the judgment in any trial of the landlord's grounds of opposition.[38] If the relevant intention cannot be shown, but the Court is satisfied that the landlord will have the necessary intention within twelve months of the date named in the section 25 Notice, the Court may so declare and the tenant can apply for the tenancy to end on that date, rather than in accordance with section 64.[39]

9.8 Thus, if an Operator can show that, on the balance of probabilities, he still has Code rights which will be in place at that stage, he can defeat the landlord's case. Paragraph 21(1) of the Code again:

> Where any person *is for the time being entitled to require the removal of any of the operator's electronic communications apparatus from any land* (whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub-paragraph (12) below, in accordance with the following provisions of this paragraph.

My italics. Sub-Paragraph (12) contains some saving provisions, which are not relevant here.

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38 *Dutch Oven Ltd. v. Egham Estate & Investment Co.Ltd.* [1968] 1 WLR 1483; *Somerfield Stores Ltd v. Spring (Sutton Coldfield) Ltd. (in administration) (Nº.2)* [2010] EWHC 2084 (Ch); [2010] 3 EGLR 37 (HH Judge Purle QC, sitting as a High Court judge).

39 Section 31(2).

9.9 Accordingly, the landlord is not entitled to rely on Paragraph 21 on this hypothesis, because he is not "entitled to require the removal of any of the operator's electronic communications apparatus" until the Operator's tenancy is disposed of under the 1954 Act. Indeed, he cannot even give a notice under Paragraph 21(2) until he is so entitled.

9.10 But, the landlord cannot show that entitlement unless he has disposed of the tenancy under the 1954 Act. That he cannot do, unless he can prove that the Code will not prevent him from redeveloping the premises, "on the termination of the current tenancy". Accordingly, he cannot terminate the rights under the Code because of the continuation of the tenancy under the Act, and he cannot terminate the tenancy under the Act, because he cannot even begin the process to terminate the rights under the Code. It is a near-perfect "Catch-22".[40]

The "lift and shift" method of removing an Operator

9.11 Fortunately, the story does not end there. Paragraph 20 can rescue the beleaguered landowner. To explain how Paragraph 20 works, one needs to start with Sub-Paragraph (1):

> Where any electronic communications apparatus is kept installed on, under or over any land for the purposes of the operator's network, any person with an interest in that land or adjacent land may (notwithstanding the terms of any agreement binding that person) by notice given to the operator require the alteration of the apparatus on the ground that the alteration is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest.

One of the many surprising things in the Code is the width of the definition of "alteration", in Paragraph 1(2):

> In this code, references to the alteration of any apparatus include references to the moving, **removal** or replacement of the apparatus.

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[40] *Per* Heller, J.

My emphasis. A little less surprising is the definition of "improvement", in Paragraph 20(9):

> In sub-paragraph (1) above "improvement" includes development and change of use.

Thus, under Paragraph 20, an occupier can serve a notice requiring an Operator to remove its apparatus, provided that it can show its removal is, "necessary to enable *[the landowner]* to carry out a proposed *[development]* of *[the property]*".

9.12 Note also that Paragraph 20 is predicated upon there being a "proposed development".[41] So far as I am aware, there is no authority on how advanced the "proposals" need to be. There is, therefore, no guidance as to how far the landowner needs to have proceeded with its plans. It may be that evidence that the local planning authority would be minded to grant permission might also suffice.[42]

9.13 Sub-Paragraphs 20(2)-(3) contain a notice and counter-notice provision, broadly similar to that in Paragraph 21.[43] If the Operator serves a counter-notice, it does not have to do anything to comply with the notice, unless the Court make an Order compelling it to do so. However, the terms of the Court's jurisdiction here are a little more pro-landowner here. Under Paragraph 20(5), the Court will make an Order in the landowner's favour if:

9.13.1 the alteration is necessary for the carrying out of the improvement; and

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41 In fact, so far as I know, there is no authority at all on Paragraphs 20 and 21 of the Code, such is the historic reluctance of the Operators to fight.

42 By an analogy with the comparable cases on "intention" under the 1954 Act: *Westminster City Council v. British Waterways Board* [1985] AC 676 (HL) and *Coppen (Trustees of the Thames Ditton Lawn Tennis Club) v. Bruce-Smith* (1998) 77 P&CR 239 (CA).

43 One notable difference is that the Operator who fails to counter-notice then has a statutory duty to remove himself, as opposed to the landowner having to seek an order for his removal.

9.13.2 the alteration will not substantially interfere with any service which is, or is likely to be, provided by the Operator's network; **and**

9.13.3 either:

9.13.3.1 the Operator already has all the rights he needs to make the alteration, or

9.13.3.2 the Operator could obtain them on an application made to the court under Paragraph 5 and that an application under Paragraph 5 would be likely to succeed.

9.14 That last provision looks more harmless than it is: if the Operator serves a counter-notice, he can certainly then use Paragraph 5 in an attempt to then compulsorily acquire all the rights he would need to stay on the land. So, if an Operator can make out a case under Paragraph 5, he can defeat the Paragraph 20 notice. He will, of course have to pay the landowner compensation for the loss of the development value of the Property, which can be a very serious commercial disincentive. But the apparatus stays on site.

9.15 No-body knows if any of this is actually right, because there have been no reported decisions on Paragraphs 20 and/or 21. Indeed, as far as I know, there have been no cases *at all* on these Paragraphs - even unreported ones.

9.16 Equally untried is to what extent it is *actually* possible to contract out of the Code. Obviously, if it can be done, the problem can be headed off with some cautious and preventative drafting. Here is how it might be made to work.

9.17 Paragraph 27(2) states that the parties have complete autonomy to contract out of the Code, with the critical exception of Paragraph 21. For convenience, here is Paragraph 27(2) again:

> The provisions of this code, except paragraphs 8(5) and 21 and sub-paragraph (1) above, shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.

In the General Regime, Paragraph 21 is the only relevant way an Operator can be made to remove its apparatus from land, apart from Paragraph 20. However, to demonstrate a right to possession under Paragraph 20, the landowner has to prove that it has a relevant intention *and* defeat any defence the Operator might run in reliance on Paragraph 20(5), as set out above. Hardly a practical contracting out mechanism?

9.18 But wait: Paragraph 20 has hidden depths. Let us look more carefully at the Operator's response to the service of a Paragraph 20 Notice, as mandated by Paragraph 20(2):

> Where a notice is given under sub-paragraph (1) above by any person to the operator, the operator **shall comply with it unless he gives a counter-notice under this sub-paragraph** within the period of 28 days beginning with the giving of the notice.

So, as the Code permits the "contracting out" of Paragraph 20, the theory goes that the Operator and the landowner can agree that, if the Operator is served with a notice under Paragraph 20(1), it will not serve a counter-notice under Paragraph 20(2). The theory then goes that the landowner no longer has to rely on the Code as such to obtain possession. The words emphasised amount to the imposition of a statutory duty on the Operator to vacate, which can be enforced by an injunction to restrain an ongoing breach of statutory duty by the Operator. Neat.

9.19 There are two problems. This is the first. I had a case, acting for a landowner, where the Operator served the counter-notice late, by accident not design. The Operator accepted that it had a statutory duty to go, but has actually responded with a claim under Paragraph 5, to compulsorily acquire all the rights it has lost by failing to counter-notice. We are arguing that Parliament cannot have intended Paragraph

20(2) to have no real content, by permitting the Operator to put itself into a better position by not serving a counter-notice than it might have been in by serving one. Assuming that the case may never see light of day (and Code cases have this habit of evaporating) the only prudent course is to "contract out" of the serving of a Paragraph 20(2) counter-notice ***and*** the subsequent service of a Paragraph 5 notice. Whilst contracting out of Paragraph 5 is obviously possible, I have never seen it done. One suspects Operators think that that is going a bridge too far.

9.20 Secondly, there may be a good argument that this tactic only works is the landowner who serves the Paragraph 20 notice has at least an intention, in the desire sense, to undertake works of "improvement". The argument would go this way: the Paragraph 20 notice is not a break-right as such, but is conditional upon an "alteration *[being]* necessary to enable *[the landowner]* to carry out a proposed improvement of the land." If the landowner has no such intention, then the notice he serves may not be "genuine", and so not actually effective as a section 20 notice at all.[44] So, it is probably prudent to have some plan ready to implement, before using this gimmick to side-step the Code.

10 The Future's Bright; the Future's ... The Law Commission, Actually:

10.1 In December 2010, the a Report was produced by The Department of Culture, Media, Sport and the Olympics, together with the Department for Business, Innovation and Skills., entitled Report, "Britain's Superfast Broadband Future".[45] It was signed by the Secretary of State for Culture, Media, Sport and the Olympics and the Minister for Culture, Communications and The Creative Industries.

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[44] For a case where a notice served without a genuine intention to give effect to it rendered it ineffective as a notice, see *Earl of Stradbroke v. Mitchell* [1989] 2 EGLR 5 (Aldous J).

[45] http://www.culture.gov.uk/images/publications/10-1320-britains-superfast-broadband-future.pdf.

10.2 The Report was intended to promote a key promise made by the Coalition Government, namely that the UK should have the best "super-fast" broadband network in the European Union by 2015.[46] Apparently:[47]

> Local participation in deciding what is the most useful and appropriate communications solution for your own community is one of the themes of this strategy. We want to do more than bridge the digital divide – we want communities to have the tools to participate fully in the Big Society"

This involves a commitment to bring super-fast broadband to all but the most remote rural areas. The central premise of the Report is that "Private sector investment *[need to be]* freed from unnecessary barriers". I think that they mean the Code:

> 5.12 The vast majority of wayleaves are agreed commercially with property and landowners. Increasingly, this not always possible, usually because the parties are unable to agree a compensation fee. Where wayleaves are not agreed, Code operators can apply to the County or Sheriff's court for an order in order to gain access to the land.
>
> 5.13 The Court process is time-consuming, with cases currently taking anything up to and beyond 2 years to decide; although it is anticipated that implementation of Article 11 of the Framework Directive will shorten this. Following implementation of the Directive, a decision on rights of way will be made within 6 months. Code operators agree that remuneration for access to land should be given, and that is right, but there are some inconsistencies in the Code, which refers to both "compensation" and "consideration", and agreeing appropriate compensation is often difficult as a result, with compensation packages varying wildly.
>
> 5.14 These factors create uncertainty for investment decisions. Government will therefore revisit some of these issues, as part of an overall review of the Communications Act during the lifetime of this Parliament.
>
> 5.15 We will consider whether it is appropriate to separate the grant of rights of way from the compensation element, which would at least allow companies to deploy networks more quickly. We will also be reviewing whether it is still appropriate that the County Court award compensation, or whether another body may be more suitable.

The buck got passed to The Law Commission, which has now published a truly magnificent Report, which is not only a very clear and perceptive statement of the current state of the Code in law and practice, but it is full of jolly good ideas for the

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46 "Superfast Broadband" is defined as an ability to download in excess of 50 MB per second: the current UK *average* download speed of 5.2 MB/s.

47 This and the following quote just come from the Foreword.

reform of the Code.[48]. Professor Elizabeth Cooke, who led the project, is here to tell us all about the Commission's work on the Code.

11 Conclusion - "Keep Calm and ...":

11.1 Drawing all of that together, then, if there have been no cases, there are no answers and the whole thing might be wholly reformed in the next few years, why should you continue listening to me? I have no idea either, so in the circumstances, it must be time for me to hang up...[49]

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48 Law Com Nº..336, *The Electronic Communications Code*, published in February 2013.

49 Many of the ideas in this paper have emerged from discussions with my fellow "Code Warriors". Some of the ideas I have, frankly, just stolen from them; other ideas are mine, but which have cooly appraised by my fellows as "just bonkers". I am particularly grateful for the kindness, generosity and tolerance shown to me by Ms Alicia Foo of Pinsent Masons LLP, Ms. Jane Fox-Edwards of Allen & Overy LLP, Mr. Malcolm Dowden of Charles Russell LLP, Ms. Lesley Hughes and Mr. Robert Moss of DAC Beachcroft LLP, Mr. Nicholas Eden FRICS of Messrs. Kinney Green and Professor Elizabeth Cooke of The Law Commission. The many and varied sins of omission and commission in this paper are all of my own making.