

On Tower UK Limited -v- British Telecommunications PLC



Two major code operators came to blows in this years' most recent electronic communications case – On Tower UK Ltd v British Telecommunications PLC.

The imposing structure of the telephone exchange, Kenton Road Harrow – once home to substantial telecommunications equipment, offices, store rooms, dining and a large games room, now stands largely empty, storing significantly less equipment and providing limited shelter and welfare facilities for engineers working in the immediate vicinity. Reflective of a number of telephone exchanges across the country built in the 1920's and 30's that have now become surplus to requirements given the significant developments in telecommunications technology and size reduction, over the last century.

The flat roof of the Kenton Road exchange, has, for the past twenty years hosted mobile phone masts and equipment, owned by On Tower. In 2021, BT granted On Tower a lease of a number of its properties, including Kenton Road. Provision was made in the lease for BT to terminate the lease on notice as BT had clear intention at the time to sell off and reduce their exchange building stock and land holdings over the coming years. Seeking to exercise the landlord's option to break, BT served On Tower with a section 25 of the Landlord and Tenant Act ("LTA 1954") notice. Separately, a notice to terminate the Code Agreement was also served, although BT considered that this was *not* a Code Agreement – both On Tower and BT being Code Operators.

The 2017 Electronic Communications Code regulates legal rights as between code operators and land owners hosting code operations equipment. The code can provide considerable powers of security of tenure to code operators. Code rights include the right to install and keep installed electronic communications apparatus on, under or over *land*. The first question for the Tribunal (and the first time that a Tribunal has considered the

point) was whether the telephone exchange was “*land*”. BT argued that the telephone exchange was not *land* as defined under the code and On Tower could not therefore benefit from the code rights. BT said that the exchange was itself “electronic *communications apparatus*” – which under the code definition would include any building where the *sole purpose* of that building is to enclose other electronic communications. The telephone exchange had always contained the electronic communication apparatus and the building was a structure designed and adapted for use in connection with the provision of an electronic communications network.

The Tribunal disagreed with BT’s argument that the sole purpose of the building was to enclose electronic communication. The exchange contained other facilities and items that were not electronic communications apparatus. In reality, it is likely to be extremely difficult for buildings to satisfy the sole purpose test.

The purpose of the wording of the code is to prevent one operator making use of another operator’s equipment at a price determined under the code. The Tribunal found that On Tower’s apparatus on the roof of BT telephone exchange did not deprive BT of its investment in its own equipment or damage BT’s business model. The agreement enabling a mobile operator to install electronic communications apparatus on the roof of a building, the purpose of the building being far wider than merely the enclosure of apparatus. The lease was therefore a code agreement, irrespective of whether that building belongs to another code operator and infrastructure provider.

In addition to providing the first guidance on when a building may constitute electronic communications apparatus, the Tribunal confirmed that code agreements provide code operators with a separate form of security of tenure, beyond the provisions of the LTA 1954. Code rights enable code agreements to continue where the lease might otherwise have contractually come to an end – whether by the expiry of the lease term or following the service of a break notice or notice to quit. Given that the code rights will override and replace any contractual obligations as between the parties, notice under the code was all that was required to terminate the lease and a separate section 25 LTA 1954 notice was not necessary.

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