Written Evidence submitted by Blacks Solicitors LLP, Leeds

Introduction

This submission is made by the telecoms team at Blacks Solicitors LLP in Leeds. As a team of solicitors and legally trained individuals, we regularly act for landowners and occupiers of land affected by telecoms apparatus nationwide.

We also work alongside other industry professionals – agents, surveyors and so forth – who predominantly, if not exclusively, act for landlords. We have the benefit of hearing the observations of these professionals and their different perspectives.

Individuals in our team also have significant experience acting for operators during the currency of the "New Code", including direct involvement in the case of CTIL v Compton Beauchamp Estates Limited at Tribunal and Court of Appeal level. This case is being appealed in the Supreme Court and the Committee will no doubt be aware that Part 2 of the PTSI Bill ("**Bill**") is, in part, a response to the difficulties arising from that decision, and the definition in the Code of "Occupier".

Our submissions address Part 2 of the Bill only, and the proposed changes to the Code. Our reasons for submitting evidence are to ensure the concerns of those we regularly act for are properly highlighted and considered as the Bill progresses through Parliament.

Submissions

(1) ADR

The increased emphasis on ADR is welcomed but we would respectfully suggest that the process must be given "teeth" through the introduction of clear and specific costs consequences for a party which unreasonably refuses to engage in the process. The concern is that operators may otherwise pay lip service to the process as a stepping-stone towards a Tribunal determination, which they can more easily afford to progress to.

Chief amongst landlord concerns currently is that determination by a Tribunal (either through the landlords' application or in response to an operator's application) is prohibitively expensive but is the only forum in which disputes are being determined. For new sites, it is also not possible to rely on Code compensation provisions unless the agreement is imposed by the Tribunal.

This leaves landlords feeling they may need to accept terms which leave them exposed, or spend vast sums of money in the Tribunal which may never be recovered by an operator. Operators routinely offer fixed contributions towards legal/professional costs which cover only the most straightforward of cases involving no real dispute over terms.

The mandatory use of ADR (recently considered lawful by the CJC) could be one way in which parties are required to take the process seriously and find a solution outside of the Court/Tribunal process. Fixed rules on the recovery of costs and capped fees for appointed mediators could assist in reducing overall costs for landlords, many of whom simply cannot afford the alternative, but feel they are being bullied into accepting terms which they might otherwise properly challenge in an affordable ADR environment.

This could also drive behaviour changes in operators and the agents which negotiate on their behalf.

The training of specialist mediators with telecoms expertise must be encouraged by appropriate industry bodies such as RICS. There is currently a shortfall in mediators with specialist experience in this area, which requires a detailed understanding of the Code together with valuation principles and market knowledge.

There is a risk that certain mediators will be considered too "aligned" with landlord or operator interests due to previous experience, which may lead to parties becoming entrenched in refusing to appoint those they do not consider to be fully independent, rightly or wrongly.

We would respectfully suggest that the mandatory arbitration scheme being proposed by the Commercial Rent (Coronavirus) Bill may provide procedural solutions by analogy with telecommunications disputes/renewals.

(2) 1954 Act amendments

The Government's consultation confirmed that the statutory valuation regime in the Code would not be revisited in the Bill.

Whilst this was disappointing to many who see this issue as the principal reason for the slowdown in the market rollout of apparatus and deteriorating landlord/operator relationships, it was surprising to see that proposals have been made to incorporate the Code's valuation regime into the 1954 Act.

The purpose of the transitional provisions accompanying the Code were clearly aligned with the Law Commission's recommendations – those landlords who freely negotiated primary-purpose leases with the protection of Part 2 of the 1954 Act, still in term in December 2017, were assured those statutory rights to renew would not be taken away by the Code which, in many cases, would intervene in contracts completed many years before its introduction.

The development of the law in this area since December 2017 has recently resulted in decisions which provide helpful guidance on valuation under the 1954 Act and a growing consensus among valuers, albeit this is not always reflected in the terms being offered by operators. It is clear the hypothetical open market valuation must take place in the "shadow" of the Code and that the valuation regime is relevant to a degree. This appears to be a satisfactory regime in which negotiations can now take place.

To effectively alter the existing transitional arrangements would undermine the balance that was sought to be achieved when introducing the new Code. Very large, commercial advised organisations entered legally binding contracts which both parties understood would be subject to the 1954 Act regime. Operators have the "comfort blanket" of knowing that renewal will bring the renewed agreement into the Code regime. Landlords can be assured they are able to rely on 1954 Act principles in relation to valuation and existing terms.

Operators can of course vary those terms but, as per settled 1954 Act principles, must show good reason to depart from those terms.

There are further concerns as to the consequences for parties who were served with Section 26 requests a significantly long time ago by an operator. In many cases, while the law was being developed on valuation, repeated extensions of time were agreed, and continue to be agreed, under Section 29B of the 1954 Act.

A re-writing of the 1954 Act to align it with Code valuations will likely see many of these cases becoming County Court (or Tribunal) claims with accompanying applications to determine a backdated interim rent.

Our reading of the Bill suggests that the valuation regime may, feasibly, be given retrospective effect, meaning certain landlords could be exposed to significant backdated claims for an interim rent to be set which is lower (often significantly so) than the passing rent which has been paid in the intervening period, sometimes over several years. This could result in large and, in many cases, unaffordable backdated rent credits which landlords would need to account for.

Interim rent is payable from the earliest date which could have been specified in the S26 request/S25 notice. An extreme example could involve a renewal claim leading to an interim rent payable from June 2018, but at a valuation imposed under the Code with its no-network assumption for a period of over four years. T

We respectfully suggest that to retrospectively amend the 1954 Act-affected agreements in this manner and remove the transitional arrangements would be to undermine landlord confidence further, and increase the prospect of entrenched parties once more finding their way around a new valuation regime. Inevitably, fresh litigation will follow whilst negotiations which have recently picked up will once again slow down while guidance is awaited.

There is now sufficient guidance, and market comparables, to allow the County Court/Tribunal to make reasoned determinations by reference to settled 1954 Act principles, which factor in the Code accordingly (e.g. ***Pipingford***).

We would also respectfully suggest that, if amendments are to be made, strict provisions are put in place to avoid the Bill having retrospective effect on interim rent applications and in respect of notices/requests which have been served prior to the Bill coming into force.

(3) Increased use of Tribunals

We welcome the increased use of the Tribunals as the forums in which all Code/1954 Act telecoms matters may be determined. The expertise being developed within the Tribunals will ensure a more consistent approach across the judiciary.

The Upper Tribunal (LC) Rules and PD have been developed over recent years to take into account the unique nature of telecoms disputes and accommodate their procedural quirks. Sensible steps were also taken to limit the size of bundles following a culture of inserting ever possible page into statements of case by certain operators, rather than following established equivalent principles in the CPR relating to relevance and conciseness.

We would respectfully suggest that a review of the FTT rules be fast-tracked to accommodate the increased use of that forum in future telecoms disputes – the current rules are unlikely to be fit-for-purpose in dealing with the sorts of claims which the UT has typically dealt with to date.

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