

## Surveyors and phone masts

**Michael Watson**

*Received: 18th December, 2012*

Shulmans LLP, 120 Wellington St, Leeds LS1 4LT, UK. Tel: +44 (0)113 245 2833;  
e-mail: mwatson@shulmans.co.uk



Michael Watson

**Michael Watson** is a partner at Shulmans Solicitors, who has spent most of his career advising upon contentious commercial property issues. He is a member of the Property Litigation Association and the RICS Dilapidations Forum. He has previously served on the Steering Group of the Forum and spoken at a number of annual conferences held by the Forum. He is also a member of the RICS Telecoms Forum. Michael has a particular expertise in relation to mobile phone masts and telecommunications, having previously acted for and advised a number of mobile network operators. Michael regularly presents continuing professional development seminars to RICS Members throughout the country. He has a broad range of experience in relation to property related disputes and has acted for clients ranging from government departments to institutional investors and private clients. Michael has had a number of published articles in journals such as the *Landlord and Tenant Review* and *Estates Gazette*.

### ABSTRACT

*This paper considers some of the issues that may arise for property owners who are considering permitting, or already have permitted, mobile phone masts and other electronic communications equipment on their premises. The paper looks at a number of issues likely to be of importance to property owners including the nature of telecommunications agreements and the proliferation of electronic communications equipment. Specifically of interest to those property owners with potential development sites, the paper considers security of tenure under*

*various statutes and the processes by which electronic communications equipment can be removed from properties.*

**Keywords:** *phone masts, telecommunications, electronic communications code, lease, mobile phone law, property development*

### SOURCE OF INCOME OR COSTLY MISTAKE?

For many years mobile phone network operators competed against each other to construct bigger and better networks in order to provide the best possible level of coverage to their customers. As a consequence, telecommunications equipment has been installed in a myriad of different locations with common examples being rooftops, stand-alone towers and the facade of buildings. With the growth of the various networks the total number of mast sites has grown to a total of 54,403 (Ofcom website data). This includes transmission sites operated by the cellular telephone network operators and also the private GSM stations operated by Network Rail and the TETRA network operated by Airwave Solutions Ltd for the emergency services. In practical terms this means there are a large number of buildings with transmission equipment of some sort on them and therefore it is highly likely that building surveyors are going to come across equipment of this nature at some point during the course of their professional activities.

Many clients use their surveyor as a first point of contact for advice on any property related matters and therefore it is quite possible that this may include the seeking of advice in relation to mast sites and electronic communications equipment.

Whether acting for owners of property, potential purchasers or potential occupiers, building surveyors need to have an understanding of the nature of electronic communications equipment and the implications this may have for their clients. This is not based in health concerns but rather in the impact that electronic communications equipment may have on their client's ability to deal with the property and the potential impact it may have on the value of their property interests.

Phone masts can be a good source of additional income for property owners, and surveyors will no doubt be keen to ensure that their clients exploit every opportunity open to them in order to maximise that income. There is a ready market for leasehold or freehold stand-alone mast sites but there is also demand for the income streams that can be generated from all sites, and therefore they not only provide the opportunity for income but also the potential for realising significant capital sums. If thought is not given to the issues discussed in this paper, however, they can prove to be an expensive mistake

## **THE NATURE OF AGREEMENTS FOR MAST SITES**

There are a wide variety of agreements relating to mobile phone mast sites and indeed there are a wide range of mobile phone mast sites. Sometimes the form of agreement will be provided by the network operator or their solicitors or it may be drafted by the landlord or their advisers. Because of the relatively low rental value of many mast sites there can be reluctance on the part of some site providers to invest resources in professional

advice at the point of entering into an agreement. This may seem quite surprising when one considers that what may be being created are rights in and over land which will endure for a significant period of time.

The first question that should be asked in considering an agreement is what is the nature of the agreement?

Is it to be a lease — that is to say something that creates an interest in land or is it to be a mere permission to use the land or premises? A licence in other words. Is there exclusive possession, that is, does the tenant have the right to occupy a defined area and exclude all others? If so it will be a lease. Is it merely a permission to place equipment upon the premises? If so, it will be a licence.

## **SECURITY OF TENURE**

The relevance of this question is that where premises, or part of premises, are occupied by a tenant for the purposes of a business then the Landlord and Tenant Act 1954 needs to be considered. This gives tenants (as opposed to licensees) the right to seek a new lease at the end of their current one.

Now of course that is not something that is unique to telecoms agreements but it is something that should be specifically considered when looking at telecoms issues. The granting of an agreement to install a mast may seem to be a good way of bringing in some income from a site but if there is a potential for redevelopment at some point in time then this needs to be considered very carefully.

But surely this should not be a problem? Of course the security of tenure provisions in the 1954 Act can be excluded — hence we refer to 'excluded leases' — with the consequence that at the end of the lease the landlord is guaranteed to be able to recover possession of the demised premises or part of the premises.

It is not unheard of to come across examples of mast site providers who were given

such advice by their professional advisers before granting a lease to a telecoms operator and who are then somewhat disappointed to find that even though they went through the correct procedure for excluding the provisions of the Landlord and Tenant Act they still cannot recover possession of the site. This is because of additional statutory powers that the telecommunications operator has under the provisions of the Electronic Communications Code (hereafter, the Code) which is set out in Schedule 2 to the Telecommunications Act 1984 as amended by Schedule 3 to the Communications Act 2003. It sets out powers given to providers of electronic communications networks and providers of conduit systems to enable them to install and maintain electronic communications apparatus.

### THE CODE

Among other things the Code enables an operator of electronic communications apparatus to serve a counter-notice where an occupier of land on which its electronic communications apparatus is sited has requested the removal or alteration of that apparatus:

- (1) 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.
- (2) The person entitled to require the removal of any of the operator's [electronic communications apparatus] shall give a notice to the operator requiring the removal of the apparatus.
- (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 beginning with the giving of the notice, that person shall be entitled to enforce the removal of the apparatus.
- (4) A counter-notice given under sub-paragraph (3) above to any person by the operator shall do one or both of the following, that is to say—
  - (a) state that that person is not entitled to require the removal of the apparatus;
  - (b) 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.
- (5) Those steps may include any steps which the operator could take for the purpose of enabling him, if the apparatus is removed, to re-install the apparatus; and the fact that by reason of the following provisions of this paragraph any proposed re-installation is only hypothetical shall not prevent the operator from taking those steps or any court or person from exercising any function in consequence of those steps having been taken.
- (6) Where a counter-notice is given under sub-paragraph (3) above to any person, that person may only enforce the removal of the apparatus in pursuance of an order of the court.

What this means is that if a surveyor is acting for a client in relation to a property with electronic communications equipment installed on it then if the client needs to remove that equipment, for example, to repair a flat roof, then the process is unlikely to be straightforward. It could be time consuming and costly with possibly the need for court proceedings too. For building surveyors who come across telecoms equipment during the survey process then it is important that they (and their clients) are alert to

the fact that it may be difficult to remove the equipment, even temporarily for the purposes of repairs and so forth and, therefore, before agreements for installation are completed the impact of the relevant legislation should be brought to the attention of clients. Telecommunications equipment may be not much more than a unit on the outside of a building which is about the size of a burglar alarm bell box. Such equipment may though have the full protection of the legislation and therefore is probably something to be included in a survey report.

Of course in many circumstances property owners may have no issues with the presence of electronic communications equipment on their property but again there may be opportunities for building surveyors to add value. Most agreements can be long term with rent payable annually by way of direct bank transfer. The agreement is completed and then filed away and the money keeps arriving year after year. Most mast agreements incorporate rent review provisions but often these are simply not initiated. A building surveyor who comes across transmission equipment while inspecting premises could usefully raise these issues with their client who is likely to be most grateful should it prove to be the case that there are thousands of pounds due in back rent.

## **NETWORK CONSOLIDATION**

There are many changes underway in the telecoms market at the moment. Network operators are consolidating and sharing mast sites with the consequence that in some circumstances additional income may be available to site providers because the network operator is effectively seeking to sublet the site. Depending on the drafting of the agreement it may be the case that such 'sharing' of the site entitles the site provider to additional payment for the further use of the site. Where any consent to sharing is requested then site providers (and their advisers) should review

the detail of the agreement to establish the position *vis-à-vis* additional payments.

It may also be the case that the agreement provides for only specific equipment to be placed on a site. On an inspection a building surveyor may note that new transmission equipment has been installed and therefore it may just be worth a review of the agreement and a discussion with the client to check that any new equipment added to a site is not in excess of that permitted under the terms of the agreement. Building surveyors undertaking routine property inspections can do a great deal in relation to policing mast agreements. For example, if on inspection there is equipment on site which is marked as being the property of network operator 'A', but the surveyor knows that the client only has an agreement with operator 'B', then this should ring alarm bells. The sudden appearance of new antennas or microwave dishes should also trigger enquiries. If requests for access to sites for maintenance are received then engineers should be asked to confirm which network operator they represent and the purpose of the visit and, again, requests for access on behalf of a network operator with whom the client does not have an agreement should cause questions to be asked.

Similarly, site providers may receive correspondence from network operators, or their agents, in circumstances where the network operators may be seeking to extract themselves from agreements by apparently operating 'break clauses'. The consequence of this may be that the site provider will potentially lose the benefit of an income stream for many years in the future and therefore any such notice needs to be scrutinised and evaluated by a trained and experienced eye. A surveyor consulted in relation to the reinstatement of premises upon which a mast site has been situated might usefully ask some questions of their client as to whether they have considered (and had advice on) the validity of the notice in the first instance.

## **CONCLUSION**

Surveyors may be the first point of contact for many property owners when an issue arises in relation to electronic communications equipment on their property and therefore an understanding of some of the potential issues may enable them to deliver significant

additional value to their clients. Even if they do not know the answer to a question the ability to recognise that there is an issue may protect their client's interests and enable further specialist advice to be sought, thereby protecting the value in their client's property or indeed potentially enhancing it.