

## TELEPHONE MASTS

# An aerial view of the 1987 Act

*Robert Barham shows how the Landlord and Tenant Act 1987 could be used by residential tenants to challenge the erection of an aerial, and how landlords can guard against that risk when entering into negotiations with a telephone operator*



*Robert Barham is the head of the residential property group at Pemberton Greenish*

**'If the documentation has been properly prepared, the landlord should end up in the position where it will receive rent for the aerial whether it is paid by the telephone company or by the tenants themselves.'**

Over the last decade mobile telephones have become a fact of life. Most people now own one, and everyone expects them to work most of the time. This does not, however, mean that people are keen to have telephone aerials erected on or near their own homes. Although no link between telephone aerials and health problems has ever been proven, many people suspect that a link does exist (see box on page 7). Consequently, residents are increasingly prepared to use whatever legal means possible to challenge or prevent the erection of new aerials near their homes. Surprisingly, one of the instruments at their disposal is potentially the Landlord and Tenant Act 1987.

The 1987 Act was designed to give lessees the right of first refusal in the event that the ownership of their block changed hands. It is well known as one of the worst drafted pieces of legislation to be enacted in recent times, and its inadequacies led to a substantial redrafting in 1996 when significant changes were brought in by the Housing Act. It was probably never intended that the Act could apply to something like the erection of a telephone aerial, but in fact there is no reason why it should not. To commercial property lawyers who do not normally have to consider the implications of the Act this may come as something of a nasty shock.

### Does the Act apply?

The first step is to decide whether the Act can apply to the proposed transaction. For this purpose it is assumed that a landlord is to grant a lease to a telephone operating company which will

then erect its base station equipment within the area demised by the lease, with aerials either within that area or on other parts of the building.

### A 'relevant disposal'

Whether or not a transaction is a 'relevant disposal' is covered by s4(1) of the Act. It is worth quoting this section in full:

In this Part references to a relevant disposal affecting any premises to which this Part applies are references to the disposal by the landlord of any estate or interest (whether legal or equitable) in any such premises, including the disposal of any such estate or interest in any common parts of any such premises but excluding –

- (a) the grant of any tenancy under which the demised premises consist of a single flat (whether with or without any appurtenant premises); and
- (b) any disposals falling within subsection (2)

The meaning of the word 'disposal' is considered further in ss4(3) and 4A of the Act, and is in effect an all-embracing definition. Disposal therefore includes the entering into a contract, an option, a lease, a transfer, the grant of rights, the assignment of rights and any other method by which a landlord passes on an interest to another party. Both equitable and legal interests are covered. It is generally accepted that there is no satisfactory way of circumventing this provision.

## TELEPHONE MASTS

### The premises to which the Act applies

These are set out in s1 of the Act. Subsection 2 states that the premises must consist of the whole or part of a building, the building must contain two or more flats held by qualifying tenants and the number of flats held

by virtue of their employment. The two most common categories of qualifying tenants are therefore long lessees and Rent Act protected tenants.

This definition is therefore likely to include most mansion block flats and most houses converted into flats.

relative floor areas of the residential and commercial premises. An exemption also exists for certain exempt landlords and resident landlords (s1(4)).

### 'Common parts'

The term 'common parts' is defined in s60 of the Act and means:

... in relation to any building or part of a building... the structure and exterior of that building or part and any common facilities within it.

It therefore seems reasonably clear that this includes the roof of a building but probably does not include gardens or grounds surrounding a building. Interestingly, the internal parts of a building are only covered in so far as they are structural or are common facilities. Arguably, therefore, the provisions of the Act would not apply to an aerial constructed within the roof void of a building.

### Exempt disposals

Section 4(2) sets out a long list of disposals that are exempt. Most of these

*It might be best to serve option notices at an early stage before planning permission is sought, so that the telephone company knows that if it goes to the expense of obtaining planning permission it will actually be able to take up the proposed lease.*

by such tenants must exceed 50% of the total number of flats contained in the premises.

The expression 'qualifying tenants' is considered further in s3 but basically means anyone who has a leasehold interest in a flat other than business tenants, assured tenants, protected shorthold tenants and those who occupy

Section 1(3) excludes the operation of the Act where more than half of the premises are occupied for some purpose other than residential purposes. Therefore, a three-storey building with ground and basement used for a shop, and with two flats on the first and second floors may or may not be covered by the Act depending on the



are situations where a landlord is compelled to make a disposal, such as under a court order, in pursuance of bankruptcy proceedings or a forced sale under enfranchisement legislation. The one that is most commonly invoked by landlords is the last exemption: a disposal by a body corporate to a company which has been an associated company of that body for at least two years. While this is unlikely to have significance in the normal circumstance where a lease is granted to a telephone company, it does raise the possibility of the landlord granting a lease to its own associated company and for that associated company to then assign it to a telephone company, thereby circumventing the provisions of the Act.

Obviously each particular transaction needs to be considered on its own merits, and the landlord will need to consider in particular the layout and occupation of the relevant building, but generally it would appear likely that the Act will apply to the grant of a lease or easement for erection of telephone aerials. The next point to consider is therefore how the landlord should then proceed.

### Service of notices

The very first subsection of the Act imposes a duty on a landlord not to make a relevant disposal unless notices under s5 of the Act have been served and other procedures set out in the Act have been complied with. Section 5 sets out the basic obligation to serve notices and ss5A to 5E set out the requirements

in particular circumstances. The most likely to be applicable are s5A where the landlord wishes to enter into a contract, s5C where the landlord wishes to grant an option, or s5D where, without a contract, the landlord intends to proceed directly to conveyance. Although none of these specifically make reference to the grant of a lease, a section 5D notice would appear to be the appropriate one if a lease is not to be preceded by a contract. Formal notices must be given to not less than 90% of the qualifying tenants in the building or, if there are less

than ten, to all but one of them. Given the difficulty of ensuring that notice is served on the right tenant and is received by them, it would be advisable for a landlord to serve notices on all the tenants and not try to exclude certain of them.

In each case the notice must:

... contain particulars of the principal terms of the disposal proposed by the landlord, including in particular – (a) the property to which it relates and the estate or interest in that property proposed to be disposed of, and (b) the consideration required by the landlord for making the disposal.

This does raise some difficulties where the disposal is to be a lease. Should the landlord set out the principle terms of the lease such as the rent, the term and the extent of the demise, or is it required to give details of the lease covenants – or indeed to annex a copy of the lease itself?

There appears to be no authority on this point. Leases of telephone aerials often run to some 40 or 50 pages, and to annex an entire draft of the lease to each notice would make service of the notices cumbersome to say the least. On the other hand, if the whole document is not annexed disputes might arise at some later date over the precise wording of the lease.

### When should notice be given?

The landlord also needs to consider at what stage notice should be given to the tenant. Should it be done at an early stage in the transaction before the telephone company has obtained planning permission, or should the landlord wait until planning permission has been obtained and the telephone company is ready to proceed subject only to knowing that the tenants do not want to take the lease themselves? Ideally, it might be best to serve option notices at an early stage before planning

*In practice, convictions under the Act are almost unheard of, but nevertheless the threat is enough to ensure compliance. There is a defence where the landlord has 'reasonable excuse', but what is meant by that expression is not clear.*

permission is sought, so that the telephone company knows that if it goes to the expense of obtaining planning permission it will actually be able to take up the proposed lease. This would avoid the position where, after a lengthy planning process possibly including an appeal, a telephone company finally obtains planning permission only to find that the tenants are able to block the erection of an aerial by offering to take up the lease themselves.

Probably the best solution is for the landlord and the telephone company to agree the precise terms of the transaction prior to an application for planning permission, and to then serve section 5C option notices on the qualifying tenants. The option notices would set out the principal terms of the transaction such as the rent, the length of the term, any review dates and use and alienation restrictions (not forgetting a plan showing the extent of the demise), and make reference to a standard form of lease that has already been agreed between the parties and is available for inspection if requested. If the tenants then fail to take up their rights, both parties can proceed with the planning application in the safe knowledge that if they are successful they will be able to complete the proposed lease.

While this may result in some additional legal costs at an earlier stage, the cost is probably less than the cost of

## Health concerns

Those wishing to object to new telephone masts often seek to do so on the grounds of health concerns. In the light of the recent case of *T-Mobile v First Secretary of State* [2004] this is now going to be very difficult.

In that case the Court of Appeal decided that, provided a phone mast application contains a certificate that international health standard guidelines have been complied with, the planning authority should not consider health issues unless there are exceptional reasons for doing so.

This position could of course change if new reports raise health concerns about the use of mobile phones.

## TELEPHONE MASTS

pursuing a planning application only to find that the tenants ultimately block the lease.

### Acceptance by tenants

What happens if the tenants actually decide to accept the landlords' offer and agree to take up the new lease themselves? This is where things really get interesting. A typical lease for a telephone aerial might be for term of, say, ten years at an annual rent of, say, £15,000, reviewable to market rent after five years (upwards only). It is likely to

majority of tenants do serve an acceptance notice within two months of the section 5 notice, they then still have two further months in which to nominate the purchasing vehicle. After that the landlord must submit a draft contract or lease to the tenants within one month of the receipt of nomination. The tenants then have two months to offer to exchange contracts, failing which they will be deemed to have withdrawn. It is only after the end of the first month of the nomination period, which is probably three months after the date of the

*From a landlord's point of view the ideal solution might be for the tenants to take up their rights and to take the lease themselves so that it receives the rent for absolutely nothing.*

also provide that the premises demised may only be used for the purpose of a telephone aerial and that at all times the tenant must be a licensed operator under the Telecommunications Act 1984. There is unlikely to be any provision for guarantors or for the payment of a rent deposit given that most telephone companies would be considered to be a first class covenant.

How can the tenants themselves take over and complete such a lease? A landlord would be unlikely to want to complete a lease to a group of tenants of unknown financial standing, and the tenants themselves would not be in a position to comply with the terms of the lease. Could the landlord insist upon the tenants providing some form of financial security? The answer to all of these questions is unknown, and the possibilities for legal argument and dispute are considerable.

The tenants may of course seek to use this as a tactic to block the erection of an unwanted aerial. After all, there are no immediate cost consequences of serving an acceptance notice. If a requisite

service of notices, that the tenants suffer cost consequences if they subsequently withdraw.

In those circumstances, the tenants become responsible for the landlord's costs reasonably incurred between the end of the first month of the nomination period and the receipt of the notice of withdrawal.

### Failure to comply with the Act

The Act is rare in landlord and tenant law in imposing criminal sanctions on a landlord who makes a disposal without complying with its requirements. This means the landlord could be fined an amount not exceeding level five on the standard scale and also obtain a criminal record.

In practice, convictions under the Act are almost unheard of, but nevertheless the threat is enough to ensure compliance. There is a defence where the landlord has 'reasonable excuse', but what is meant by that expression is not clear. Ignorance of the law certainly would not be a reasonable excuse, but possibly obtaining legal advice and acting on it would constitute a reasonable excuse.

Therefore, a landlord who instructs a firm of solicitors experienced in landlord and tenant matters to deal with the grant of a lease of a telephone aerial may have a defence if they completely overlook the provisions of the Act, but a landlord ought not to rely on this. Those who aid

## Reference

For more on *T-Mobile v First Secretary of State* see 'Planning and environment focus' by Joann Bainton in *PLJ* 142.

and abet the landlord in breaching the Act could also potentially be guilty of an offence.

Interestingly, any transaction entered into in breach of the Act is not void and remains perfectly valid. Sections 11 to 18 of the Act give tenants the right to seek information about transactions which they consider may be in breach of the Act, and give them rights to step into the shoes of the purchaser or the tenants as the case may be. In the case of a lease of a telephone aerial this raises considerable further problems.

If, for example, the landlord has already granted a lease for a telephone aerial in breach of the Act, are the tenants entitled to take over that lease without the consent of the landlord? Can the landlord insist upon the outgoing tenant entering into an authorised guarantee agreement and/or seek financial security from the incoming tenants? Again, in the absence of a decision of the court, the position appears to be unclear.

### Conclusion

The message is clear. Telephone companies and landlords of residential blocks should think carefully before proceeding with the grant of a lease for a telephone mast on the roof of a residential block. Lawyers should be involved at an early stage and the provisions of the 1987 Act should be given careful consideration. Compliance with the Act should not be left as an afterthought, as all too often appears to be the case.

With careful planning at an early stage a landlord should be able to proceed with the grant of a lease in full compliance with the Act. If the documentation has been properly prepared, the landlord should end up in the position where it will receive rent for the aerial whether it is paid by the telephone company or by the tenants themselves.

Indeed you could say that from a landlord's point of view the ideal solution might be for the tenants to take up their rights and to take the lease themselves so that it receives the rent for absolutely nothing. After all, most roofs have space for more than one telephone aerial! ■

*T-Mobile UK Ltd (1), Hutchison 3G UK Ltd (2), Orange Personal Communication Services Ltd (3) v The First Secretary of State (1), Harrogate Borough Council (2)* [2004] EWCA Civ 1763; C3/2004/1454