

GENERAL SYNOD
LEGAL ADVISORY COMMISSION

CHURCH BUILDINGS: TELECOMMUNICATIONS APPARATUS

1. Introduction
2. Licence Agreements and Leases
3. Security of tenure and other Code issues affecting churches
4. The Faculty Jurisdiction
5. Other Issues

Introduction

1. In the last 30 years or so, a number of churches have agreed to host commercial telecommunications equipment, particularly antennae for transmission and reception of telephonic, broadband and other forms of electronic communications. Telecommunications operators have welcomed the facility to use church towers since this has avoided the need for a dedicated mast to be built, church towers often offering an elevated location with good reception for the local area. Historically this has generated a useful rental income for host churches. The purpose of this paper is to assist PCCs and their legal advisers in considering the issues engaged by the installation of telecommunications apparatus within church buildings or their curtilage.
2. In the late 1990's the Archbishops' Council produced a template licence agreement for use by Incumbents and PCCs to document the terms agreed with the operators. An updated standard template licence agreement, based on the original Archbishops' Council agreement, has now been settled with a company called Network Coverage Solutions Ltd., with variants for Parish and Guild churches, but PCCs and Guild Church Councils are free to negotiate their own form of licence.
3. The Telecommunications Act 1984 incorporated a Telecommunications Code¹, which regulated lightly the use of third-party property by operators to host telecommunications equipment.

¹ <https://www.legislation.gov.uk/ukpga/1984/12/schedule/2/2017-08-29>

4. In 2017, the Telecommunications Code was replaced by a new Electronic Communications Code², which offered operators significantly increased powers, including greater security of tenure; rights to assign and share the use of their equipment with other operators; rights to add new equipment without making any additional payment to host landlords; and a new mechanism to value the payments made to landlords hosting telecommunications equipment, based on the diminution in the value of the host land occasioned by the introduction and use of the equipment.
5. In this paper, the following definitions are used:
 - a. “Code” means the Electronic Communications Code;
 - b. “Faculty jurisdiction” means the jurisdiction conferred upon the Consistory Courts by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and regulated by the Faculty Jurisdiction Rules 2015-2023;
 - c. “Incumbent” means the incumbent for the time being of a church, in whom the freehold of the building and any churchyard will be vested by virtue of their office;
 - d. “PCC” means the parochial church council of the parish, which shares with the Incumbent the duty to repair, maintain and insure the church building by virtue of s4 of the Parochial Church Councils (Powers) Measure 1956³;
 - e. “Operator” means an operator of telecommunications apparatus; and
 - f. “Code Operator” means an Operator listed on the ‘Register of persons with powers under the Electronic Communications Code’ by Ofcom.⁴

Licence Agreements and Leases

6. An Incumbent and PCC proposing to agree the hosting of telecommunications equipment in a church building should normally document the agreement with an Operator with a form of licence agreement or lease. Section 68 of the Mission and Pastoral Measure 2011⁵ provides power for a lease to be granted in respect of part of a church building provided that a faculty has first been obtained. Prior to the introduction of this legislative provision, only a licence under faculty could be granted.
7. Agreements with Operators may be drafted either as Leases or as licence agreements. A lease confers a right of exclusive occupation upon the tenant Operator whereas a licence agreement does not confer any such right. The more usual, and the preferred, approach is for the agreement to be drafted as a licence. Drafting the agreement as a

² The Code was introduced by section 4 of the Digital Economy Act 2017 as Schedule 3A of the Communications Act 2003, replacing an earlier Telecommunications Code previously found as Schedule 2 to the Telecommunications Act 1984. The Code is at <https://www.legislation.gov.uk/ukpga/2003/21/schedule/3A>

³ s4(1)(ii)(b) of the Parochial Church Councils (Powers) Measure 1956 at <https://www.legislation.gov.uk/ukcm/Eliz2/4-5/3/section/4>

⁴ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code/register-of-persons-with-powers-under-the-electronic-communications-code>

⁵ Mission and Pastoral Measure 2011, s68 at <https://www.legislation.gov.uk/ukcm/2011/3/section/68>

lease would confer additional rights upon the Operator, which may interfere with the ability of the Incumbent and the PCC to access all parts of the church building, or to ask the Operator to relocate their apparatus to an alternative location within the Church. Whether an agreement is described as a lease or a licence agreement, however, it may be capable of being construed as a lease if the true intention is that the Operator should have exclusive occupation of the area occupied by their apparatus throughout the period of the agreement.

8. Section 68 of the 2011 Measure, in so far as relevant, provides that,

“(2) Subject to subsections (3) and (4), it shall not be lawful to sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or section 44.

(3) Without prejudice to subsection (15)(a), on an application by the incumbent of the benefice comprising or including the parish in which the church is situated or, where the benefice is vacant, the bishop in the name and on behalf of the incumbent in the corporate capacity of the incumbent, the court may grant a faculty for a lease to be granted by the incumbent or, as the case may be, the bishop, of part of a church, provided that the court shall ensure that the premises remaining unlet, together with the premises let, under any lease or leases granted under this subsection, are, taken as a whole, used primarily as a place of worship.

(4) On an application by any person referred to in subsection (3) the court may, whether or not it grants a faculty under that subsection, grant a faculty for the lease of any land belonging to or annexed to a church.

9. There is therefore statutory provision enabling a lease to be granted. That a licence also remains legally possible is endorsed by recent decisions in the ecclesiastical courts, such as e.g., *Re St Peter the Great, Chichester* [1961] 1 WLR 907 (electricity sub-station); *Re Bentley Emmanuel Church, Bentley* [2006] Fam 39 (telecommunications aerials).
10. The grantor of a lease (or licence) in respect of a church building will normally be the incumbent. In a vacancy, the diocesan bishop is empowered to make the grant in the name and on behalf of the incumbent in the corporate capacity of the incumbent⁶. The PCC is also required to join in the grant of such a lease and shall have the same rights as the lessor to enforce any term of the lease which may be binding on the lessee, including any rights to forfeit the lease.⁷ In either case the rent reserved by the lease, or

⁶ s68(3) *ibid*

⁷ s68(5) *ibid*

fee reserved by a licence will, subject to any directions by the Consistory Court, be payable to the PCC⁸.

11. The lease or licence agreement will set out the duration of the agreement, the amount of the rent (or licence fee) payable each year, and will describe the equipment authorised to be installed, often by reference to the description in the faculty petition. There may be some plans or drawings included to show the detail of the apparatus to be installed. The agreement will also make provision for matters such as repairs and maintenance, insurance, payment for electricity usage, removal of the equipment at the end of the term and responsibility for making good of the church fabric when the equipment is removed. There will also normally be provisions restricting the ability of the Operator to assign or underlet the benefit of the agreement to another operator, and requiring the grant of a further faculty and approval from the Incumbent and PCC before any new equipment is added.
12. The agreement is likely to be in place for a term of 15 or more years, so it is important that it should be properly drafted and that the Incumbent and PCC should take professional advice before entering into it. The faculty authorising the grant of the lease or licence agreement will normally specify either that the agreement should be in a form already agreed and attached to the faculty petition, or that it should be in a form to be approved by the Diocesan Registrar. In any event the Incumbent and PCC should take legal advice on the form of the draft agreement and should ask expressly to be advised on the implications of the Code on the proposed agreement and installation.
13. Incumbents and PCCs should of course also take valuation advice from a designated advisor⁹ who has experience of agreements for the installation of telecommunications equipment. As the PCC is a charity, the advice should comply with the requirements of s119 of the Charities Act 2011 and Part 2 of the Charities Act 2022, and in particular should enable the PCC to decide that they are satisfied, having considered the surveyor's report, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the PCC.¹⁰
14. Often the Operator will agree to meet the PCC's reasonable legal and surveyor's costs in relation to this type of agreement, and they should certainly be invited to do so.

Security of tenure and other Code issues affecting churches

15. Business tenancies, where a tenant leases property for commercial purposes, normally give the tenant (the Operator in these cases) security of tenure, i.e., the right to the grant of a further tenancy at the end of the original tenancy¹¹. This right can be excluded by agreement. However, in the case of leases relating to parts of church buildings, this right is expressly excluded by s68(9)(b) of the Mission and Pastoral Measure 2011. In

⁸ s68(6) *ibid*

⁹ The Charities (Dispositions of Land: Designated Advisers and Reports) Regulations 2023

¹⁰ s119(1)(c), Charities Act 2011 at <https://www.legislation.gov.uk/ukpga/2011/25/section/119>

¹¹ Part II of the Landlord and Tenant Act 1954

the case of equipment covered by the Code, however, Part 5 of the Code enables Code Operators to continue to exercise rights after the expiry of an initial agreement¹². This means that it may be difficult to remove a Code Operator and to enforce provisions in the lease or licence agreement requiring the removal of the equipment and the making good of the church fabric at the end of the agreement. The Code provides in paragraphs 20 and 21 that the court (which, by paragraph 94, is a county court) may make an order, “which imposes on the operator and the relevant person an agreement between them which ... confers [Code rights] on the occupier, or provides for the Code right to bind the relevant person”. There is no exception in the Code for works to a church requiring a faculty, or requiring a faculty for the grant of a new lease or licence. However, it is thought that a faculty would still be required to authorise works or the grant of a new or further lease or licence, since the execution of such works or the grant of a lease or licence without a faculty would be unlawful for the purposes of the faculty jurisdiction.

16. The Code is silent on the question of how it relates to the faculty jurisdiction, and whether the Code or the faculty jurisdiction would take priority. There is a risk that Code rights might entitle an Operator to a new licence or lease on terms dictated by the County Court when an original lease or licence expires. Whilst the Code gives the Court the power to incorporate “such modifications as the Court thinks appropriate”¹³ into any agreement which the Court may impose, the Court is not bound to incorporate any reference to the faculty jurisdiction.
17. The Code also incorporates provisions¹⁴ which may have the effect of suppressing rents for leases authorising the installation of telecommunications equipment where a Code Operator is concerned. These provisions link the rent to the reduction in the value of the host property attributable to the telecommunications installation, the rent being intended to reflect or offset the loss in value of the host property. In the case of a church building, an initial rent may be agreed before allowing the Operator to install any equipment, but it might be difficult to argue that there is any reduction in the value of the church building as a result, and Code Operators may therefore seek to reflect this by arguing for a much lower rent on any rent review or any renewal of the agreement. Rent review provisions and any provisions allowing for a further lease or licence to be granted could therefore specify indexation of rents by reference to RPI or another common index.
18. There are numerous other provisions in the Code which are generally intended to assist Code Operators rather than landlords. Rights granted to Code Operators include rights to:
 - a. install electronic communications apparatus on, under or over the land;
 - b. keep installed apparatus which is on, under or over land;

¹² ECC, Part 5, para 30

¹³ Para 20 of the Code

¹⁴ Part 14 of the Code

- c. inspect, maintain, and operate apparatus;
 - d. carry out any works on the land to enable apparatus to be installed and maintained;
 - e. gain access to land to maintain or operate apparatus;
 - f. connect to a power supply;
 - g. interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land); and
 - h. lop or cut back any tree or other vegetation that could interfere with apparatus.
19. In addition, in the event that agreement cannot be reached with the owner or occupier of private land (i.e., the Incumbent and PCC in the case of a church building), the Code allows a Code Operator to apply to the Court to impose an agreement which confers the Code rights being sought or for the Code rights to bind the landowner or occupier. As mentioned above, the Court has power to include modifications to the agreement to reflect the requirements of the faculty jurisdiction, but is not obliged to do so. In all cases where an application to the Court is made, the Court should be invited to make an order for an agreement only where the agreement contains terms that no works will be carried out under it (nor lease or licence granted) unless and until a faculty has first been obtained, so that any Court Order was consistent with the faculty jurisdiction. It is thought that it would be unlawful for works to be undertaken to a church building subject to the faculty jurisdiction on the authority of an agreement imposed by the Code alone, without a faculty having first been granted. If no faculty were granted, a Code agreement could be of doubtful validity, and the Consistory Court might seek to make a restoration order requiring the removal of any apparatus which had been installed, potentially leaving the Incumbent and PCC in a position of uncertainty.

The Faculty Jurisdiction

20. As mentioned above, a faculty is required to enable the grant of a lease or a licence to an Operator to authorise the installation and use of telecommunications equipment in a church. The dangers of proceeding without a faculty are illustrated by the case of *Re The Venerable Bede, Wyther*¹⁵ in the diocese of Leeds. Chancellor Mark Hill commented with some asperity on the failure of the church to obtain a faculty before various works had been undertaken, and made an award in respect of the significant costs incurred by the Registrar and the Court in resolving matters.
21. It will be seen that the provisions of the Code are at odds with the faculty jurisdiction, in that the Code seeks to appropriate to Code Operators and to the County Court or the First-tier tribunal matters which properly lie in the discretion of the Consistory Court. For example, the grant of a new lease following the expiry of an existing lease would properly require a faculty, but the Code asserts in favour of Code Operators a right to

¹⁵ *Re The Venerable Bede, Wyther* [2018] ECC Lee 3

continue enjoying the 'Code rights' notwithstanding the end of an existing lease or licence.

22. Similarly, although a lease or licence granted under the authority of a faculty may prohibit assignment of the lease or licence, or sharing of the rights granted by it with another operator, the Code rights allow a Code Operator to assign or to share with another operator without reference to the landlord and without making any further payment to the landlord. Alteration or addition to the originally installed equipment is also permitted by the Code rights, notwithstanding what the lease or licence agreement may say.
23. The Code makes no reference to the faculty jurisdiction, nor to its secular counterpart, the listed buildings jurisdiction.
24. There has to date been no case law on the question of whether Code Operators may simply rely on their Code rights in relation to church buildings without regard to the faculty jurisdiction. However, it is thought that at the least the formal grant of a renewed lease or licence and the introduction of new or substantially altered apparatus would both require a faculty.
25. It is worth noting that only those operators who are registered with Ofcom can benefit from the provisions of the Code. There are some unregistered operators, and PCCs may prefer to deal with Operators who are not Code Operators in order to avoid the creation of Code rights. It may be possible to insist that an operator to whom a new Lease or Licence is being granted should not later seek to register with Ofcom so as to obtain Code rights during the currency of the Lease or Licence Agreement.¹⁶ However, since it may be adjudged contrary to current public policy to seek to circumvent to Code provisions, PCCs should be aware of the possibility that the Code may have application and should seek appropriate advice before committing to a relationship with an operator, whether they are Code Operators or not.
26. It is worth noting that either the Operator or the PCC/Incumbent could petition for a faculty. Where the Operator does so, the Chancellor will normally be concerned to see that the Incumbent and PCC are supportive of the petitioner's proposals.
27. In drafting leases or licence agreements in favour of Operators, or in petitioning for a faculty, Incumbents and PCCs are recommended to include provisions requiring the approval of the Consistory Court to:
 - a. The grant of any further lease or licence;
 - b. The addition of new equipment or substantial alteration to existing equipment;
 - c. The removal of redundant equipment both during the currency and on termination of the Lease or Licence Agreement
 - d. Material alteration to the terms of the lease or licence agreementand

¹⁶ See *Re St. Peter & St. Paul Burton Pidsea* [2019] ECC Yor 4

- e. An agreement by the tenant/licensee that it will not become registered as a Code Operator during the currency of the Lease or Licence Agreement, and if it does apply to do so so, a requirement to notify the PCC of this proposed change of status, and a right for the PCC to terminate the Agreement.

Note that although the company referred to above, NET CS, is not itself at the date of this advice a Code Operator, the template agreements referred to above do not include the provision in paragraph e. Even if starting with one of these template agreements, therefore, PCCs should take competent legal advice to ensure that the agreement they end up with meets their needs.

28. When submitting a petition for a faculty to authorise the introduction of telecommunications apparatus to their church, the petitioners should include the following:

- a. The completed faculty petition
- b. A copy of the original PCC (or GCC) resolution
- c. Completed Statements of Significance and Needs
- d. Historic England and amenity society correspondence
- e. DAC Notification of Advice and stamped drawings
- f. A copy of the Public Notice displayed during consultation
- g. Planning correspondence and approvals (if required)
- h. Insurance company correspondence and approvals
- i. Proposed Head Licence, signed by surveyor (or valuer) and solicitor (or other qualified legal advisor)
- j. Design drawings
- k. ICNIRP certificate (to be provided by the prospective operator)
- l. Contacts

29. Lists A and B in the Faculty Jurisdiction Rules 2015-23 do allow works to be undertaken without a faculty. These include:

- a. Under List A (no permission required) works of maintenance, repair and adaptation (not amounting to substantial addition or replacement but including re-wiring) to existing electrical installations (including lighting installations) and other electrical equipment¹⁷; and
- b. Under List B (permission required from the Archdeacon) the installation of equipment for receiving, or for receiving and sharing, wireless broadband services¹⁸;

¹⁷ Para A1(6)(c), Schedule 1 of the Faculty Jurisdiction Rules 2015, inserted by Faculty Jurisdiction (Amendment) Rules 2019, Rule 20

¹⁸ Para B(1)(11A), Schedule 1 of the Faculty Jurisdiction Rules 2015, inserted by the Faculty Jurisdiction (Amendment) Rules 2022, Rule 4 and paragraph 15 of the related Schedule.

subject in each case to compliance with various conditions. These provisions do not however extend to the introduction of new telephonic transmission equipment, for which a faculty must still be obtained.

Other Issues

Radiofrequency Electromagnetic Radiation

30. In the course of several petitions for faculties to authorise the installation of telecommunications apparatus, objections have been received on the grounds that the apparatus might emit harmful levels of radiofrequency electromagnetic radiation, which would be damaging to local residents. In the Court of Arches case of *Re Emmanuel Church Bentley* [2005], there had been a faculty application to authorise the installation of telecommunications equipment at the church and the completion of a licence agreement between the Parochial Church Council and the telecommunications operator. The Chancellor had refused to grant a faculty. The petitioners appealed. The appeal was allowed. The Court determined that the Government had issued guidelines to planning authorities that planning consent should not be refused for telecommunications equipment on the grounds of arguments as to danger to human health, if installations complied with international guidelines.
31. In the NET CS template agreements referred to above, there are provisions requiring the Operator to monitor the emission of radiofrequency electromagnetic radiation from their apparatus, to ensure that emissions remain within safe levels.
32. In *Re All Saints, Postwick*¹⁹ a telecoms company wished to erect wireless transmission equipment on the tower of the church, to facilitate broadband reception in the area and to provide CCTV security protection for the church roof. The transmission equipment and receivers were small in size. A number of people objected that the effects of the radiation emitted from the transmission equipment would be deleterious to their and others' health. The Court received evidence that there was no evidence of health risk related to equipment of the type proposed, and a faculty was granted.
33. In *Re All Saints, Sharrington*²⁰ a faculty was granted for the installation of wireless broadband equipment at the parish church. The judgment considered *inter alia* the question of whether the electromagnetic radiation emanating from the proposed wireless broadband equipment would be harmful to health, and concluded that there was no evidence to support this, but the faculty included conditions requiring the operator to monitor emissions and ensure that they remained within safe limits.
34. In *re St James, Kidbrooke*²¹ the party opponent claimed that the transmission of electronic data by telecoms aerials was generally a threat to health. She also said that

¹⁹ *Re All Saints Postwick* [2011] Paul Downes Ch. (Norwich)

²⁰ *Re All Saints, Sharrington* [2014] Ruth Arlow Ch. (Norwich)

²¹ *Re St. James, Kidbrooke* [2016] ECC Swk 16

she was personally hypersensitive to existing electro-magnetic fields. The Chancellor reiterated the basis of the Court of Arches decision in *Re Emmanuel, Bentley* [2006] that in the absence of compelling evidence of a real risk to human health as a result of transmitting radio waves up to the levels set by the United Kingdom Government in their adoption of the ICNIRP guidelines, it would be wrong for the consistory court to adopt more rigorous guidelines than those recommended by the government for application in a secular context.

Transmission of unlawful and immoral material

35. In *Re St Thomas and St James, Worsbrough Dale*²² the Chancellor granted a faculty to authorise a twenty year licence permitting the installation and maintenance of mobile telephone antennae and dishes in the tower of the Grade II listed church. Apart from arguments about health issues, one member of the PCC objected on the ground that mobile telephones could be used to transmit material that was both unlawful and immoral. In relation to this question, the Chancellor cited *Re Chingford, St. Peter and St. Paul*²³, in which the Court of Arches had decided that this was not a sufficient basis on which to refuse a faculty.

Structural Issues

36. Telecommunications apparatus will often be installed in the tower or spire of a church, to take advantage of the additional height above ground. Careful consideration should be given to increased lateral and vertical loads likely to be imposed on the structure by the new apparatus, particularly if large dishes or antennae are to be placed outside where they may increase the stress on the structure in high winds. The petitioners should take advice from the church's inspecting architect and if necessary from a properly qualified structural engineer to confirm that the new apparatus will not place the structure at risk, and this advice should be made available to the Chancellor with the petition.

Planning Permission

37. Telecommunications equipment is likely to constitute 'development' within S.55 Town and Country Planning Act 1990 and therefore require planning permission. Part 16 of the Town and Country Planning (General Development) (England) Order 2015 grants a general planning permission for much apparatus. There are detailed tolerances specified in the Order. Operators generally design their equipment to fit within the tolerances, but this should always be checked with them and/or with the Local Planning Authority. Slightly different provisions apply in Wales and the position should, likewise, be checked.

²² *Re St Thomas and St James, Worsbrough Dale* [2016] ECC She 1

²³ *Re Chingford, St. Peter and St. Paul* [2007] 1 Fam 67

This opinion was agreed by the Legal Advisory Commission at its meeting on 2 October 2023.