Neutral Citation Number: [2019] EWCA Civ 1755

Case No: C3/2019/1330

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Lands Chamber)
Martin Rodger QC
[2019]UKUT 0107 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SIMON
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED	**Appellant**
- and -	
COMPTON BEAUCHAMP ESTATES LIMITED	**Respondent**

- -
- -

Stephanie Tozer QC with Myriam Stacey (instructed by **Dac Beachcroft LLP**) for the **Appellant**
Wayne Clark with Fern Horsfield-Schonhut (instructed by **Wilmot & Co Solicitors LLP**) for the **Respondent**

Hearing dates: Tuesday 8th October 2019

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Approved Judgment

Lord Justice Lewison:

1. The main issue on this appeal is whether the Upper Tribunal (the "UT") has jurisdiction to require a freeholder who is not in occupation of land to confer rights under the Electronic Communications Code ("the Code") on an operator, at a time when there is another operator in occupation of the land exercising code rights. The UT (Martin Rodger QC, Deputy President and PD McCrea FRICS) held that it had no such jurisdiction. Ms Tozer QC, for Cornerstone, disputes this conclusion. Cornerstone's appeal is brought with the permission of the UT. Their decision is at [2019] UKUT 107 (LC), [2019] RVR 247. An appeal to this court from a decision of the UT is confined to an appeal "on any point of law arising from a decision made by the [UT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 s. 11 (1).

2. Until the enactment of the Code, an operator of electronic communications equipment was entitled to acquire rights under Schedule 2 to the Telecommunications Act 1984. There was wide dissatisfaction with that code for a number of reasons. First, it was complex and extremely difficult to understand. Second, it was outdated. Third, there was evidence of concern that it was making the rollout of electronic communications equipment more difficult. These three features were noted by the Law Commission in its report (The Electronic Communications Code Law Com Report 336 paras 1.9 to 1.11). Both in its consultation paper and in its final report the Law Commission took the view that reform could not be achieved simply by amendment. Instead, it took the view that:

> "… the advantages of this review will only be felt if the revised Code is drafted from a "clean sheet of paper"; there is no point in merely amending the 2003 Code."

3. It was part of the government's strategy to achieve widespread coverage of the country by imposing obligations on operators by way of licence conditions. The government also intended to reform the electronic communications code to help operators to extend their networks, to make mast-sharing easier and infrastructure deployment and maintenance cheaper. Following the Law Commission's report, the code now in force was introduced by the Digital Economy Act 2017, which inserted section 106 and Schedule 3A to the Communications Act 2003.

4. I can take the facts from the UT's careful decision.

The facts

5. On the edge of an arable field in the Vale of White Horse, next to a cutting on the main Didcot to Swindon railway line, a telecommunications mast stands on a concrete base in a fenced compound. The mast is 15 metres high and supports two large panel antennae and two microwave dishes, with ancillary apparatus housed in three metal cabins at the foot of the structure. The mast and the apparatus on it belong to Vodafone Ltd which was granted a lease of the site in 2004 for a term of 10 years. The lease did not demise any part of the land itself; but granted Vodafone the right to install and use the mast and ancillary apparatus, together with rights of access to it. The lease excluded security of tenure under Part II of the Landlord and Tenant Act

1954. At the date of that lease the relevant code in force was that contained in Schedule 2 to the Telecommunications Act 1984.

6. Vodafone shares the use of the mast with Telefonica UK Ltd. Both companies provide separate 2G, 3G and 4G services to the surrounding area and in particular to the railway line.

7. The appellant, Cornerstone Telecommunications Infrastructure Ltd ("Cornerstone"), is a joint venture formed by Vodafone and Telefonica (which are independent and unconnected companies) to own and manage a combined portfolio of telecommunications sites contributed by each of them. Each company owns half of the shares in Cornerstone and their intention is that each shall continue to provide their own separate services using infrastructure provided to them by Cornerstone.

8. The freehold owner of the site is Compton Beauchamp Estates Ltd ("Compton"). It is part of Compton's Galleyherns Farm. Galleyherns Farm comprises about 188 acres and is within a much larger estate of about 10,000 acres also owned by Compton.

9. Since the expiry of the lease, Vodafone's apparatus has remained on site. Under paragraph 21 of the code contained in the 1984 Act Compton was not entitled to enforce the removal of Vodafone's apparatus except in accordance with a court order. Pending enforcement, the keeping of the apparatus on the land is deemed to be lawful: paragraph 21 (9).

The basic statutory framework

10. The Code deals with the acquisition, exercise and termination of "code rights". "Code rights" are defined in paragraph 3 of the Code. They include the right for the statutory purposes to install electronic communications apparatus on, under or over the land; to keep it installed; to inspect, maintain, adjust, alter, repair, upgrade or operate it; to carry out works on the land in connection with those activities; to enter the land; to connect to a power supply; to interfere with or obstruct a means of access to or from the land; and to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that may interfere with such apparatus.

11. Cornerstone, Vodafone and Telefonica are all "operators" for the purposes of the Code.

12. There are two methods by which an operator may acquire code rights. The first is by agreement. The second is by order of the UT (see Electronic Communications Code (Jurisdiction) Regulations 2017).

13. Part 2 of the Code deals with the conferral of code rights and their exercise. Part 4 of the Code deals with the power of the court (or in practice the UT) to impose an agreement. It is convenient to begin with Part 2.

14. Paragraph 9 of the Code provides:

> "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

15. Paragraph 105 of the Code elaborates on the meaning of "occupier". It provides, so far as relevant:

> "(1) References in this code to an occupier of land are to the occupier of the land for the time being.
>
> …
>
> (5) Sub-paragraph (6) applies in relation to land which—
>
> (a) is unoccupied, and
>
> (b) is not a street in England and Wales or Northern Ireland or a road in Scotland.
>
> (6) References in this code to an occupier of land, in relation to land within sub-paragraph (5), are to—
>
> (a) the person (if any) who for the time being exercises powers of management or control over the land, or
>
> (b) if there is no person within paragraph (a), to every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land."

16. If an occupier confers code rights on an operator, paragraph 10 of the code explains who else may be bound by that right. It provides:

> "(1) This paragraph applies if, in accordance with this Part, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred.
>
> (2) If O has an interest in the land when the code right is conferred, the code right also binds—
>
> (a) the successors in title to that interest,
>
> (b) a person with an interest in the land that is created after the right is conferred and is derived (directly or indirectly) out of—
>
> (i) O's interest, or
>
> (ii) the interest of a successor in title to O's interest, and
>
> (c) any other person at any time in occupation of the land whose right to occupation was granted by—
>
> (i) O, at a time when O was bound by the code right, or
>
> (ii) a person within paragraph (a) or (b).

> (3) A successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement by which O conferred the right.
>
> (4) The code right also binds any other person with an interest in the land who has agreed to be bound by it."

17. Paragraph 20 of the Code, which is in Part 4, provides:

> "(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—
>
> (a) to confer a code right on the operator, or
>
> (b) to be otherwise bound by a code right which is exercisable by the operator.
>
> (2) The operator may give the relevant person a notice in writing—
>
> (a) setting out the code right, and all of the other terms of the agreement that the operator seeks, and
>
> (b) stating that the operator seeks the person's agreement to those terms.
>
> (3) The operator may apply to the court for an order under this paragraph if—
>
> (a) the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or
>
> (b) at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.
>
> (4) An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which—
>
> (a) confers the code right on the operator, or
>
> (b) provides for the code right to bind the relevant person."

18. Paragraph 22 provides:

> "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."

19. Paragraph 23 provides:

> "(1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.
>
> (2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).
>
> (3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).
>
> (4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).
>
> (5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> (a) occupy the land in question,
>
> (b) own interests in that land, or
>
> (c) are from time to time on that land.
>
> (6) Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement."

20. Part 5 of the Code deals with the termination and modification of agreements. It also deals with the renewal of agreements. I will return to Part 5 later.

21. Part 6 of the Code deals with rights to require removal of electronic communications apparatus, and the restoration of land on which it has been placed. That Part of the Code contains paragraph 43 which provides:

> "(1) This paragraph applies if—
>
> (a) the condition of the land has been affected by the exercise of a code right, and
>
> (b) restoration of the land to its condition before the code right was exercised does not involve the removal of electronic communications apparatus from any land.
>
> (2) The occupier of the land, the owner of the freehold estate in the land or the lessee of the land ("the relevant person") has the right to require the operator to restore the land if the relevant person is not for the time being bound by the code right."

The proceedings below

22. Cornerstone served notice under paragraph 20. The critical points about the notice are:

    i) It was given to and served on Compton only. It was neither given to nor served on Vodafone.

    ii) It sought the conferral of code rights by Compton on Cornerstone. The code rights in question were all the rights summarised above. It did not ask Compton to agree to be bound by a code right already granted.

23. It was no part of Cornerstone's case before the UT that Vodafone should be party to any agreement conferring code rights on Cornerstone.

24. The UT set out the factual basis on which it approached the case at [66] and [67]. I think I should quote it in full:

> "[66] We therefore intend to approach the issue of the Tribunal's jurisdiction in this reference on the following factual basis. First, that until 25 March 2014 Vodafone was in occupation of the site pursuant to the lease granted to it in 2004. Secondly, that Vodafone's status changed and it had become a tenant at will by the middle of April 2014. That tenancy at will was brought to an end by the notice to quit served by the respondent on 20 October 2017, although Vodafone remains in occupation formally asserting a continuing right to occupy in the County Court proceedings. Vodafone has had no rights of occupation in relation to the site other than its right under the old Code which deem the continuing presence of its apparatus to be lawful and prevent its removal except by an order of the court. That was the position when notice was given by the claimant requiring the respondent to enter into an agreement to confer Code rights on it. The parties having agreed that the temporary Code rights granted by the Tribunal's order of 24 August 2018 were to be without prejudice to the respondent defence to the application under paragraph 20, it must also be taken to be the current position.
>
> [67] Although there was a hostile exchange of emails between the agents for the claimant and the respondent in July 2018 when Mr Restall suggested that if the claimant's valuer came to the site the police might be called, there is no suggestion that the respondent has taken any steps to resume possession of the site or go into occupation. At all times since March 2004 the occupier of the site has been Vodafone."

25. The UT reasoned that because it was not in occupation of the land, Compton could not have conferred code rights by agreement under paragraph 9 of the Code. It went on to decide that there was nothing in Part 4 of the Code which suggested a fundamental departure from the principle laid down in paragraph 9 that only an

occupier could confer code rights. It was necessary for the occupier to be involved in each case, either voluntarily or by compulsion. Cornerstone could have reached agreement with Vodafone for Vodafone, as occupier, to confer code rights upon Cornerstone; and then applied to the UT for an order imposing an agreement providing for those rights to bind Compton. But it did not do so. It followed that the UT had no jurisdiction to make the order sought.

The appeal

26. As Ms Tozer QC points out, paragraph 20 applies where an operator makes a request of "a" relevant person, rather than "the" relevant person. This suggests that more than one person can be the relevant person for the purposes of paragraph 20. In order to make sense of the Code as a whole, and in order to avoid practical difficulties, she argued in her skeleton argument that the "relevant person" should be interpreted in one of three ways:

> "(1) the person out of the occupier of the land, the owner of the freehold estate, or the lessee of the land who has the "title" to grant the rights sought;
>
> (2) the person with the right to control access to the site, rather than a person with physical presence in fact;
>
> (3) where the operator's rights have terminated, subject to paragraph 40 of the Code, the person who is entitled to require the operator to remove its apparatus."

The "rights-based" interpretation

27. The first of these interpretations coincides with the definition of "relevant person" in paragraph 43 (2), which is not stated to be restricted to that paragraph (or indeed to Part 6 of the Code). Although that paragraph featured strongly in Ms Tozer's skeleton argument, it did not seem to me to attract the same emphasis in her oral submissions.

28. In my judgment the difficulty with the first interpretation is that it is firmly based on the supposition that a person conferring code rights must have title to do so. It is clear from the way that paragraph 10 is drafted, however, that code rights may be granted by an occupier who has no interest in the land. That is the plain implication from the opening words of sub-paragraph (2) ("*If* O has an interest in the land"). As a matter of the general law there is no impediment preventing a person without legal title to land from granting another person rights (including a tenancy) over it. Whether such a grant binds anyone else is a different question: *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406. If O does have an interest in the land, then the persons bound by the right are those listed in paragraph 10 (2), and anyone else with an interest in the land who agrees to be bound by it under paragraph 10 (4).

29. If, on the other hand, O does not have an interest in the land, then the conferring of a code right on an operator will bind only O; and any person with an interest in the land who agrees to be bound by it. Ms Tozer argued that paragraph 10 (4) only applied if the occupier had an interest in the land. That, she said, followed from the phrase "any other person". I do not agree. In my judgment paragraph 10 (4) extends to any person

with an interest in the land other than the occupier himself or a person who is already bound by the code right by virtue of paragraph 10 (2).

30. A code right conferred by an occupier without an interest in the land will not bind any person with an interest in land who does not agree to be bound by it. In order to expand the class of person who is bound by the conferring of a code right, the operator will have to apply to the tribunal. In that situation, the operator will already have the rights conferred upon it by the agreement with the occupier. The purpose of the application under Part 4 will be to extend the class of person bound by the rights.

31. In essence this is the analysis that the UT adopted. The UT said at [79]:

> "… a clear distinction is maintained in the Code between an agreement by which rights are conferred (which may only be entered into by an occupier of the land) and an agreement to be bound by Code rights (which will have been granted by someone else). We agree with Mr Clark that paragraph 20 is drafted to accommodate this structure. Paragraph 20 refers to a "relevant person" not because an agreement to confer Code rights can be imposed on someone who is not an occupier but because two different types of order may be made by the Tribunal. The relevant person will either be an occupier who is to be compelled to confer rights, or will be a person who is to be bound by rights conferred by another."

32. The last sentence of the quotation is important. Contrary to what Ms Tozer asserts in her skeleton argument, the UT did not decide that a "relevant person" can only be an occupier. A relevant person may be another person with an interest in the land, where the purpose of the application under Part 4 of the Code is to make that person bound by the code rights conferred by the occupier.

33. I do not consider that there is any help to be gained from the parenthetical reference to the "relevant person" in paragraph 43 (2). It is not in terms expressed as a definition. On the contrary, paragraph 108 (1) of the Code states:

> "In this code:
>
> …
>
> "relevant person" has the meaning given by paragraph 20 (1)"

34. The UT's analysis also coincides with the view of the Law Commission, which said in its report (paragraph 2.68):

> "For the purpose of defining the Code Rights, the two important points to be made are therefore, first, that they can only be created in accordance with the general law, and therefore either by the grant of a property right or by contract – the latter giving rise to a licence or wayleave."

35. That point follows on from what the Commission had said earlier (paragraph 1.5 footnote 7):

> "An "occupier" may be a landowner, but it may also be someone who is on the land by permission but does not have any proprietary interest in it, such as a lodger or the holder of a grazing licence."

The occupier

36. Why the occupier? The consent of the occupier to the exercise of rights connected with telecommunications has been a feature of the legislation for many years. As long ago as 1982 the government took the view that it was often impractical for operators to establish who were the lessees and ultimate owners of a piece of land. It also took the view that some persons with remoter interests in the land could unreasonably prevent a person having access to telecommunications services. That decision was reflected in the code under the 1984 Act. In addition, the code rights concern matters which would immediately affect the enjoyment of occupation (e.g. access, inspection, the carrying out of works, and various rights of entry). As Sir Andrew Morritt C pointed out in *Bridgewater Canal Co Ltd v GEO Networks Ltd* [2010] EWCA Civ 1348, | [2011] 1 WLR 1487 at [26]:

> "The general regime concentrated at the outset on the occupier no doubt because he was primarily affected but also most easily identified."

37. Ms Tozer argues that this analysis creates a number of difficulties. Take the example of a squatter who takes possession of land without any right to do so. Such a person may well be in rateable occupation of the land: *Westminster CC v Tomlin* [1989] 1 WLR 1287. But it has been held that a squatter is not entitled to require an electricity supplier to supply him with electricity: *Woodcock v South Western Electricity Board* [1975] 1 WLR 983. Since one of the code rights is a right to connect to a power supply (see paragraph 3 (g) of the Code) it cannot be supposed that Parliament can have intended that a squatter would be the primary person from whom an operator is required to acquire code rights. It is, perhaps, unfair to point out that the authors of *The Electronic Communications Code and Property Law* (who include both Ms Tozer and Mr Clark) express the view at paragraph 16.1.2 (amplified at paragraph 16.7) that a squatter is an occupier capable of granting code rights. But as Megarry J pointed out in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9:

> "[An author] has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law."

38. So Ms Tozer is fully entitled to advance the contrary view.

39. The list of code rights in paragraph 3 of the Code does not provide for the rights that an operator *must* have. It sets limits to the rights that he *may* have under the Code, with the agreement of the occupier. The fact that a particular occupier may not be in a position to secure the effective provision of a power supply does not disqualify him from being in occupation. If the operator wants that right to bind someone with the power to require a connection to a power supply, the machinery of paragraph 10 (4) and paragraph 20 enables him to do so. Moreover, it may well be that in relation to a particular parcel of land on which an operator wishes to install apparatus there is no

electricity supply at all. It will then be up to the operator to secure it by means of a special connection agreement: see Electricity Act 1989 s 22. There are also different kinds of squatters. At one extreme there is a person who has unlawfully entered land in the first place. But there are also those whose initial entry on the land was lawful, but who have overstayed the expiry of their original right. There are also those who have been granted a right to occupy land for limited purposes, but whose occupation and possession have in fact exceeded those limited purposes. It must also not be forgotten that a squatter may have had possession of the land for many years; and may have occupied it throughout that time. In that kind of case the squatter will be immediately and directly affected by the exercise of code rights. The position of a squatter does not in fact arise for decision in this case. There may be more to be said on the subject than was possible at the hearing before us. I content myself with saying that it is not self-evident (to me at least) that a squatter cannot be an occupier for the purposes of the Code.

40. A further objection to Ms Tozer's interpretation is that it does not fit with paragraphs 9 and 20 of the Code. Paragraph 9 is clear. The only person who can agree to confer a code right on an operator is the occupier. Paragraph 20 permits an application to the UT where "the relevant person does not agree … to confer or be otherwise bound by the code right". If the "relevant person" for the purpose of *conferring* code rights is someone other than the occupier, the effect of paragraph 9 is that that person cannot agree to confer the code right. In that situation, it is inevitable that an application will have to be made to the UT. It is unlikely that Parliament would have legislated so as to compel an application to the UT with no possibility of agreement (or even of compromise of an application without an order of the UT).

41. I do not, therefore, accept Ms Tozer's first line of argument.

What is occupation?

42. The second argument is that the UT were wrong to hold that a person is in occupation of land if he has sufficient presence and control of the land. Although the formulation in the skeleton argument (which I have quoted) did not require "the occupier" to have any physical presence on the land, the submission that Ms Tozer advanced orally was that for the purposes of the Code the word "occupier" means:

> "The person with the right to physical control of the land and some physical presence on the land."

43. It is common ground that in legal usage the meaning of the words "occupier" and "occupation" is intensely sensitive to context. As Diplock LJ put it in *Wheat v E Lacon & Co Ltd* [1966] 1 QB 335, 366:

> "The title of [the Occupiers' Liability Act 1957] affords a convenient name-tag for the kind of relationship which does give rise to a duty of care - but it is a name-tag which may be deceptive if it leads one to suppose that the criterion of liability is "occupation" in the sense in which that concept is relevant to the law of property or of landlord and tenant or of fiscal, franchise or rating law."

44. In *Newnham College v HMRC* [2008] UKHL 23, [2008] 1 WLR 888 Lord Walker said at [39] that "occupation":

> "… is in general taken to import an element of physical presence and some element of control over the presence of others. But these generalities are strongly influenced by the statutory context and purpose."

45. But, as Lord Nicholls explained in *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] 1 AC 329, 336:

> "The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."

46. Moreover, in some cases (e.g. in the context of overriding interests under the Land Registration Acts) the relevant concept is not simply "occupation" but "actual occupation". The intensifier "actual" emphasises that what is required is physical presence rather than mere entitlement in law: *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 505. In other contexts the requirement will include some degree of possession. Thus, in the context of VAT, domestic legislation transposing the EU concept of "a letting of immoveable property" included within its scope a "licence to occupy land". In that context a licence "needs a quality that allows it to constitute a "leasing" or "letting" of land": *HMRC v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989 at [68]. That quality consists of two characteristics: possession and control: ibid at [73]. This was the same context as that in which the House of Lords considered the meaning of "occupation" in *Newnham*. When *Sinclair Collis* went to the ECJ that court held that the fundamental characteristic of a letting of immovable property was the conferring on a person "*the right* to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right": See *Newnham* at [11]. That is why in *Newnham* at [17] Lord Hoffmann said that the question was whether Newnham had such a right; and why it was necessary to analyse the contractual arrangements with which that case was concerned. I do not consider that it is possible to draw from that case the conclusion that occupation *always* depends upon contractual rights.

47. In yet other contexts (e.g. the exercise of an easement), the cases draw a distinction between occupation of land and use of land. In those contexts, the mere presence of physical structures on land will not amount to occupation, especially where those structures have become part of the land: *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2013] Ch 249. In this connection it is worth noting that paragraph 101 of the Code prevents property affixed to land in exercise of a code right from becoming part of the land itself. This is reinforced by paragraph 108 which provides that "land does not include electronic communications apparatus". This reading is also confirmed by paragraph 500 of the explanatory notes to the 2017 Act; and by the decision of the UT in *Cornerstone Telecommunications Infrastructure Ltd v Keast* [2019] UKUT 116 (LC).

48. Leaving aside joint occupiers, in some contexts (e.g. the Occupiers' Liability Act 1957) more than one person may simultaneously be an occupier of the same property, depending on their respective degrees of control: *Wheat v E Lacon & Co Ltd* [1966] AC 552. In other contexts (e.g. rating) only one person can be the rateable occupier of a hereditament: *Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708, 1728. Where there are rival candidates, the rateable occupier will be that candidate whose occupation is paramount: *Westminster CC v Southern Railway Co* [1936] AC 511, 529.

49. Where a person claiming to be in occupation relies on human presence as amounting to occupation, that presence must be more than fleeting: *Abbey National BS v Cann* [1991] 1 AC 56, 93. But that human presence need not be that of the person claiming to be in occupation. In many cases the courts have held that a person may occupy land through the medium of a representative (e.g. a caretaker); or through a person whom he requires to occupy the land (e.g. an employee in tied accommodation).

50. A human, as opposed to physical, presence on the land is not always necessary to establish occupation. In *Newnham* Lord Walker gave examples at [42]:

> "… some premises are designed for particular specialised purposes (unmanned bank premises were mentioned in argument, to which one might add unmanned launderettes and indeed unmanned public lavatories). Such premises may be physically occupied, to all outward appearances, only by the customers or members of the public, and the element of control may be correspondingly tenuous."

51. Even where human presence is required it need not be continuous. Thus in *Wandsworth LBC v Singh* (1991) 62 P & CR 219 a local authority was held to be in occupation of a public open space for the purposes of Part II of the Landlord and Tenant Act 1954 even though its presence or exercise of control was discontinuous, and occurred only as required by the nature of the activity for the purposes of which the tenant went on to the land. Likewise a prolonged absence from the land need not interrupt occupation, if the person claiming to be in occupation has an intention to occupy and manifests that intention (e.g. by leaving furniture or other chattels in the property): *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [2010] 2 EGLR 55.

52. Coming closer to home, Mr Clark referred us to *The Electric Telegraph Co v Salford Overseers* (1855) 11 Exch 181. In that case the company had erected telegraph poles connected by wires along the side of a railway line. The telegraph company was held to be in rateable occupation of the posts and wires. The railway company had the right to require their removal, but that made no difference. This court reached a similar conclusion in *The Lancashire and Cheshire Telephone Exchange Co v Manchester Overseers* (1884) 14 QBD 267. In *Vtesse Networks Ltd v Bradford* [2006] EWCA Civ 1339, [2006] RA 427 this court held that a telecommunications company was in rateable occupation of a network of fibre optic cables. Lloyd LJ said at [33]:

> "It seems to me that the question whether a party is in occupation of a particular hereditament must be decided by reference to the nature of the hereditament in question. …In the case of a different kind of hereditament, it could be meaningful

> to differentiate between possession, occupation and use. In relation to these optical fibres, it seems to me that the party who has the sole right to use them for the sole purpose for which they are intended can, at the very least, properly be held to be in actual occupation."

53. It is true that in relation to some code rights the exercise of those rights does not entail that the operator is the occupier of the land over which the rights are exercisable. One of the code rights, for example, is the right to lop trees, or to require another person to lop trees. It is evident that the exercise of that right (especially where it consists of requiring another person to lop trees) does not entail occupation of the land by the operator. Another would be a right of access over land to enable an operator to carry out work on land which it already owns.

54. Ms Tozer's suggested interpretation also seems to me to conflict with paragraph 105 (5) and (6) of the Code. Those paragraphs deal with land which is *unoccupied*. If land is unoccupied, then the occupier is taken to mean the person who exercises powers of management or control. No physical presence is required. The reference to the person "who exercises powers of management or control", in my judgment, means a person who *actually* exercises such powers, rather than simply a person who has the right to do so. If there is no such person, then (and only then) is the concept extended to a person with an interest in the land who would be prejudicially affected by the exercise of a code right. It would be anomalous for a person to fall within paragraph 105 (5) merely by actually exercising powers of management or control without any physical presence on the land, yet for a person who actually exercises control *and* has a physical presence to fall outside paragraph 105 (1). In my judgment, therefore, the UT were correct to hold at [71] that whether a person is an occupier for the purposes of the Code is "a question of fact rather than legal status; it means physical presence on and control of the land."

55. Where the operator is new to a site there is no practical difficulty in applying this test. The operator must reach agreement with the occupier under paragraph 9. If the occupier will not agree, or if there is a disagreement about the terms of any agreement, the UT will resolve the differences. If the operator wishes another person to be bound by the agreement, that person's agreement to be bound must be sought under paragraph 10. If that person will not agree, or if there is a disagreement about the terms, then again the UT will resolve the differences.

56. Ms Tozer raised the spectre of an entity such as Cornerstone entering into a "sweetheart deal" with Vodafone on terms that would be disadvantageous to Compton. I do not regard that as a point of substance. First, any agreement between Cornerstone and Vodafone would not bind Compton under paragraph 10 (2) of the Code. So Compton's agreement would be needed under paragraph 10 (4). Ms Tozer suggested that the UT's only power was either to impose the agreement on Compton, or to refuse to impose it. But that overlooks paragraph 23 of the Code which gives the UT power to modify the operator's proposals. If, therefore, an operator entered into a "sweetheart deal" with an occupier, the UT could modify the terms of that deal.

An operator in situ

57. There is, however, one possible difficulty that must be confronted: where the operator is already *in situ* and wishes to renew or vary his code rights. What is the position if, applying this test, the operator is the occupier? The Code clearly envisages that a sitting operator may enter into an agreement conferring new or varied code rights. It also clearly contemplates that a sitting operator may apply to the UT for interim or temporary code rights under either paragraph 26 or 27.

58. It cannot be the case that under paragraph 9 he may confer a code right on himself. Paragraph 9 contemplates an "agreement between the occupier of the land and the operator". It is legally impossible to enter into a contract with oneself. There must be (at least) two parties to an agreement.

59. Ms Tozer's solution to this conundrum is that the operator can never be an occupier, whether it is itself seeking a fresh right or another operator is seeking the right. That solution seems to me to be impossible to square with the language of the Code. If the operator is not the occupier, who is? Suppose that the operator has been granted a lease of the land on which the apparatus is installed (as in *EE Ltd v Islington LBC* [2019] UKUT 53 (LC), [2019] 2 P & CR 13). No one but the operator has the right of control of the land, and no one but the operator has any physical presence on the land. It seems to me to be very artificial in that situation to describe the land as unoccupied. And even if the land could be so described, the operator (rather than anyone else) would be exercising and entitled to exercise "powers of management and control" for the purposes of paragraph 105 (6)(a). It is only if there is no such person that paragraph 105 (6)(b) comes into play.

60. In addition, it seems to me that the renewal of rights by an operator *in situ* is not primarily governed by Parts 2 and 4. Rather, it is governed (at least principally) by Part 5.

61. In the case of an operator who seeks to renew or vary code rights, the Code introduces a new concept in paragraph 30, which is part of Part 5 of the Code. The concept is that of a "site provider". A "site provider" is a person who conferred a code right, or is otherwise bound by it. Where the code right was originally conferred by the occupier in accordance with paragraph 9, that person remains a "site provider" whether or not he remains in occupation following the conferral of the code rights. An operator is entitled to serve notice on a site provider under paragraph 33 requiring the site provider to agree that the code rights be varied or to agree to a new agreement between the parties which confers a code right on the operator. It follows that in the case of the renewal of code rights it is not necessary for the person who confers the new (or modified) code rights to be an occupier. In the event of failure to agree or disagreement the operator may apply to the UT under paragraph 34 of the Code. Accordingly, in many cases an application by an operator *in situ* need not be made under paragraph 20; but may be made under paragraph 34. On such an application the UT has power under paragraph 34 (6):

> "… [to] order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—

(a) confers a code right on the operator, or

(b) provides for a code right to bind the site provider."

62. Paragraph 34 (8) provides:

> "This code applies to the new agreement as if it were an agreement under Part 2 of this code"

63. This is clearly a deeming provision. If (as stated in paragraph 34 (8)) the Code applies to the new agreement "as if" it were an agreement under Part 2, it must follow that the Code applies "as if" it were made between the operator and the occupier in accordance with paragraph 9; that being the only way in which such an agreement may be made. Although paragraph 34 (8) is part of the paragraph dealing with orders that the UT may make, it is not on its face restricted to a new agreement ordered by the UT. It would fit the scheme of the Code if paragraph 34 (8) also applied to a new agreement made between an operator and a site provider; and in my judgment it should be so interpreted.

64. Part 5 of the Code also contains provision for the interim continuation of code rights.

65. Under Part 5 of the Code, therefore, which applies where an operator is already *in situ*, whether or not the operator is also the occupier does not matter.

66. That does not help Cornerstone on the facts of this case. Cornerstone is not the operator *in situ*. Vodafone is. And Vodafone has made no application either under Part 5 of the Code, or under paragraph 20.

Interim and temporary code rights

67. Ms Tozer drew our attention to paragraph 26 of the Code, which deals with interim code rights; and to paragraph 27 which deals with temporary code rights.

68. It is a precondition to the application of either of these paragraphs that the operator has already given notice under paragraph 20: paragraph 26 (3) and paragraph 27 (1) (a). These paragraphs therefore apply where either:

i) The operator seeks the conferral of a code right having failed to reach agreement with the occupier under paragraph 9 or

ii) The operator has secured the conferral of code rights by the occupier but has failed to reach agreement under paragraph 10 (4) with another person that that other person is to be bound by those rights.

69. I do not see in these paragraphs anything that undermines the essential principle that code rights can only be conferred by agreement with the occupier. The general scheme of the Code seems to me to be such that one would expect interim or temporary rights to be conferred on an operator new to the site, whereas the case of an operator *in situ* is principally dealt with by Part 5 of the Code.

70. Nevertheless, Ms Tozer postulated an example which, she said, ran counter to this analysis. Paragraph 37 of the Code entitles a person with an interest in the land (a

"landowner") to require the removal of electronic communications apparatus if certain conditions are met. That person may or may not be the occupier. But an occupier without an interest in land cannot be a landowner. The right of removal is only exercisable in accordance with paragraph 40. That paragraph enables the UT to make an order for the operator to remove his apparatus or for the landowner to sell it. However, under paragraph 40 (8) the UT cannot make such an order if an application under paragraph 20 (3) has been made in relation to the apparatus and has not been determined. It therefore, follows, so the argument goes, that an operator *in situ*, with apparatus on site, must be able to make an application under paragraph 20 (3).

71. It is in this situation that the UT may impose temporary code rights under paragraph 27 on the person requiring the removal of the apparatus. That person must be a landowner (whether or not he is also the occupier). If those temporary code rights amounted to occupation by the operator, it could not be plausibly suggested that the grant of those temporary rights deprived the UT of substantive jurisdiction under paragraph 20 to impose on the relevant person an agreement conferring code rights. It therefore follows, Ms Tozer says, that an application under paragraph 20 for the conferring of code rights can be made against a person other than the occupier (or, alternatively, that the operator's occupation does not count as occupation for the purposes of the Code).

72. If the application is made by an operator *in situ*, I am inclined to agree with Mr Clark that the factual scenario underpinning the example is highly unlikely. The operator would have failed to seek renewal of its code rights under paragraph 33 of the Code. The original agreement would have been terminated under the limited rights given by paragraph 31; and the operator would have failed to give counter-notice or to have applied to the UT under paragraphs 32 and 34.

73. But in my judgment the answer to the point lies in another deeming provision. If the UT imposes an agreement for interim rights under paragraph 26, paragraph 26 (4) (b) applies to the agreement. If the UT imposes an agreement for temporary rights under paragraph 27, paragraph 27 (4) (b) applies to it. Both these paragraphs state that paragraph 22 of the Code applies as it applies in relation to an order under paragraph 20. Paragraph 22, as we have seen, provides:

> "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."

74. Thus, an agreement imposed either under paragraph 26 or under paragraph 27 takes effect for all purposes as an agreement between the operator and the occupier. In other words, for this purpose only, the landowner upon whom the agreement is imposed is treated as if he were the occupier, whether or not he is in fact the occupier. So in this example the circle is squared.

Are other points open to Cornerstone on this appeal?

75. Ms Tozer wished to argue that on the facts found by the UT, and in the light of the evidence, Vodafone was not in fact in occupation; and that Compton was.

76. The notice that Cornerstone served under paragraph 20 of the Code asserted that Vodafone's "continued occupation is by way of periodic tenancy". The evidence in support of Cornerstone's application to the UT included a witness statement made by its solicitor, Ms Wilkinson, who stated that Vodafone's existing agreement expired in March 2014 "and Vodafone remains in occupation". Mr Elhabiby, one of Vodafone's senior network managers, said in his witness statement that it was Vodafone's intention to renew its "occupational agreements" in the name of Cornerstone. In addition, in the Agreed Statement of Facts prepared for the hearing before the UT, one of the agreed facts was that Vodafone was "currently in occupation of part of the Site sought in this application".

77. It is quite clear, then, that the reference to the UT proceeded on the agreed basis that Vodafone was in occupation. Had that been in issue one would have expected Vodafone's witnesses to have been questioned about the frequency with which Vodafone personnel visited the site for the purpose of monitoring, maintenance and repair. Depending on the facts found, the combination of the physical presence of the apparatus and visits as occasion demanded could have amounted to occupation; in the same way as the council's occupation of the open space in the *Wandsworth* case.

78. In support of this argument Ms Tozer sought also to argue that Compton was in fact exercising rights of control over the land. As she acknowledged, however, this was not an argument deployed in front of the UT. It would require factual findings to be made. Not least, in the light of Ms Tozer's proposed test for occupation the UT would have had to have made findings about Compton's physical presence on the land. But since the point was not argued, the UT gave it no consideration at all.

79. I do not consider that these arguments are open to her on an appeal restricted to a point of law arising out of a decision of the UT.

Is Compton also the occupier?

80. The third argument is that whether or not Vodafone was the occupier, Compton was also the occupier, because it had the right to require Vodafone to remove its apparatus under the procedure in paragraph 40 of the Code. That procedure enables a landowner, in certain circumstances, to give notice to an operator requiring the removal of apparatus. If the operator does not agree, then the landowner may apply to the UT for an order requiring removal. But paragraph 40 (8) prevents the making of an order if an application under paragraph 20 has been made and has not been determined. In my judgment paragraph 40 (8) presents a barrier to the contention that Compton is currently entitled to require Vodafone to remove its apparatus. Moreover, even if Compton had that immediate right, it is not in fact the occupier of the land upon which Vodafone's apparatus stands. In that connection it is pertinent to note that on the UT's findings of fact, Vodafone's apparatus was not merely on the land. It was enclosed by a fenced compound. On the basis of that finding the inevitable inference is that Vodafone had possession of the land within the fence; and was in fact exercising powers of control over it.

81. In addition, as in the rating cases, I do not consider that, except in very special circumstances, the Code contemplates two or more persons (not being joint occupiers) being simultaneously the occupiers of the same parcel of land. If that were to be the case: with whom should the operator negotiate for an agreement? Even if the operator

did reach an agreement with one of two (or more) occupiers, there is nothing in the Code that would make that agreement immediately binding on any other occupier. Ms Tozer submitted that paragraph 105 (6) of the Code contemplated more than one person qualifying as the "occupier" without being joint occupiers. That submission is based on the wording of sub-paragraph (b) which refers to:

> "… *every* person whose interest would be prejudicially affected by the exercise of a code right…"

82. If there is more than one such person, sub-paragraph (b) does not require a choice to be made between them. That is no doubt true; but paragraph (b) is a deeming provision which applies only where (a) there is no person who is in fact in occupation of the land and (b) there is no person who is in fact exercising powers of management and control over the land. To allow sub-paragraph (6) (b) to override paragraph (1) would be to allow the tail to wag the dog.

83. Allied to this argument, was the argument that even if Compton was not the occupier of the land now, it would be the occupier once Vodafone had given up its rights or had removed its apparatus. On this basis Ms Tozer proposed the following interpretation:

> "The occupier is the person with the right (for the time being) to physical control of the site at the date when the rights granted will take effect."

84. Ms Tozer argued that paragraph 10 (1) of the Code makes it clear that an occupier need not be in occupation of the land when the code right is conferred. Paragraph 10 (1) provides:

> "This paragraph applies if, in accordance with this Part, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred."

85. The argument is that the word "if" shows that the paragraph contemplates cases in which the occupier is not in occupation at the time when the code right is conferred. My initial impression is that this argument places far too much weight on the word "if" which merely describes the case to which the paragraph applies. It could have been replaced by the word "where". The "occupier" is the occupier "for the time being." Since an agreement can only be made with the occupier, the person who enters the agreement must be the occupier at the time when the agreement is made. But there is another answer to the point. This argument (or a closely analogous argument) was raised before the UT. The UT dealt with it as follows:

> "[94] Secondly, if we are wrong on the extent of our jurisdiction, at best in this case the Tribunal could impose an agreement which was contingent on Vodafone voluntarily giving up its right not to be removed from the site except by order of the court, and withdrawing its claim to be entitled to a periodic tenancy. Code rights could not be imposed until those steps had been taken. We are told that Vodafone is prepared to

> do those things and we accept that it would, but neither in its notice, nor in its statement of case, nor in the latest travelling draft of the agreement which the claimant relies on has the claimant sought a right contingent on Vodafone's concurrence or coming into effect at some time in the future when Vodafone's claims are abandoned.
>
> [95] The Tribunal asked Mr Seitler [counsel then appearing for Cornerstone] specifically about this matter during his submissions and was told that the claimant wanted the proposed rights to commence immediately on the making of the Tribunal's order and did not seek to involve Vodafone other than by the giving of an undertaking. For the first reason we have already given (even if we had jurisdiction) we do not consider that is possible. The respondent has not been asked to agree to a contingent right. We have heard no argument about whether it is necessary that such a right should have been sought in the paragraph 20 notice, nor whether it would be consistent with paragraph 20(4) which arguably contemplates that the effect of an order is to confer rights immediately. The Code is a complex piece of legislation affecting many land owners; it is in its infancy and its effects are being worked out through a series of decisions of the Tribunal which, invariably, are vigorously contested. In those circumstances we do not consider that it is open to the claimant to ask the Tribunal to proceed on a different basis from that which it has claimed and for which it has argued. We do not reach that conclusion because of a lack of jurisdiction, but rather as a matter of case management."

86. The argument thus failed as a matter of case management. There is no challenge in the grounds of appeal against the UT's case management decision. In addition, it is quite unclear what the factual basis is for the argument. As Mr Elhabiby was at pains to point out in his witness statement, it was a key objective of both Cornerstone and Vodafone to maintain the integrity of the network. What Cornerstone wants is a seamless transition from Vodafone to Cornerstone. In what circumstances Compton would take up occupation of the site in the interim is wholly obscure; and has not been the subject of any findings of fact by the UT.

87. This argument therefore fails.

Occupation of part?

88. Finally, Ms Tozer wished to argue that the UT was wrong to decide that Compton was not the occupier of *any* part of the land. Even if Vodafone occupied part of the land over which code rights were sought, there were other parts (e.g. land over which rights of access would run) of which Compton was, indeed, the occupier. Once again, this was not a point advanced before the UT. As Ms Tozer accepted, if this point were open to Cornerstone the reference would have to be remitted to the UT to decide which of the claimed code rights were to be conferred over land of which Compton was the occupier; and what the terms of any such conferral would be. I do not

consider that this argument is open to her either, given the limited nature of the right of appeal.

Result

89. There does not appear to be any impediment to Cornerstone and Vodafone entering into an agreement; and then seeking Compton's agreement to be bound by it. If that agreement does not include rights over land which Compton is said to occupy, then as regards that land, Cornerstone and Compton may enter into an agreement. If Compton refuses, then Cornerstone may serve a fresh notice under paragraph 20, seeking to bind Compton to the terms of any agreement between it and Vodafone; and seeking the conferral of code rights by Compton limited to those code rights which affect the land of which it is said that Compton is the occupier. That seems to me to be the practical way forward.

90. I would dismiss the appeal.

Lord Justice Simon:

91. I agree.

Lord Justice David Richards:

92. I also agree.