ISSUE NO. 4 | JULY 2022

Falcon Chambers Telecoms Newsletter

Welcome to the fourth Falcon Chambers telecoms newsletter. The intention of this newsletter – with each edition co-edited by two members of chambers, one who has acted primarily for site providers and one who has acted primarily for operators – is to provide insights three or four times a year into developments in the telecoms world of interest to solicitors, agents and surveyors.

In addition to writing the first dedicated textbook on the Code, members of Falcon Chambers have appeared in many of the recent leading cases, including the three appeals recently before the Supreme Court and other decisions that have settled fundamental principles during the Code's early life.

Since the last edition, there have been significant developments not only as a result of the Supreme Court's decision, but also arising from other cases providing guidance on valuation, terms and removal of equipment.

This edition covers:

- *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd; Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and AP Wireless II (UK) Ltd; On Tower UK Ltd v AP Wireless II (UK) Ltd* [2022] UKSC 18
- Product Security and Telecommunications Infrastructure Bill
- *On Tower UK Ltd v J.H. & F.W. Green Ltd* [2021] EWCA Civ 1858
- *EE Limited and Hutchinson 3G Limited v Morriss* [2022] EW Misc 1 (CC)
- *On Tower UK Limited v AP Wireless II (UK) Limited* [2022] UKUT 152 (LC)
- *EE Ltd and H3G UK Ltd v Affinity Water Ltd* [2022] UKUT 08 (LC)
- *EE Ltd and H3G UK Ltd v 100 Nox S.A.R.L.* [2022] UKUT 0130 (LC)
- *Crawley Borough Council v EE Ltd and Hutchinson 3G Ltd* [2022] UKUT 158 (LC)
- Government Briefing Note: Building broadband and mobile infrastructure
- Regulations to implement the Telecommunications Infrastructure (Leasehold Property) Act

Case Note: Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd; Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and AP Wireless II (UK) Ltd; On Tower UK Ltd v AP Wireless II (UK) Ltd [2022] UKSC 18

On 22 June 2022, the Supreme Court handed down its long-awaited judgment in these three appeals. While the key point could perhaps be characterised as a narrow one – the meaning of the word 'occupier' in paragraph 9 of the Code – the three appeals raised wider questions about who can and cannot confer Code rights, what renewal options are available to operators with 1954 Act-protected tenancies, and the availability of additional Code rights during the term of an existing agreement.

For a summary of the previous decisions and how they led to the Supreme Court's decision, please refer to the previous edition of this newsletter.

All three appeals (the *On Tower* decision being a 'leapfrog' appeal straight to the Supreme Court) were heard in the first week of February. Lady Rose has now delivered the only judgment, with which Lords Hodge, Sales, Leggatt and Burrows agreed.

The starting point was that the word "occupier" has no fixed legal meaning in different statutory provisions, but must take its meaning from the context in which it appears and the purpose of the provisions in which it is used. The correct approach was accordingly to work out how the Code regime was intended to work and then consider what meaning should be given to the word "occupier" in paragraph 9 so as best to achieve that goal.

Given the centrality of code rights to the operation of the regime and the creation of this sui generis form of statutory rights which use contractual agreement as their foundation, i*t seemed to Lady Rose that "the fundamental premiss of para 9 is that the "operator" and the "occupier of the land" are different persons …I would conclude therefore that where an operator requests or applies for code rights under para 20 of the new Code, it is not to be regarded as the occupier of the site for the purposes of para 9 merely because it has ECA installed on that site because of code rights that have previously been conferred on it for that equipment on that site."*

The decision draws a clear distinction between agreements being continued by paragraph 30 (with the result that the parties are able to make use of Part 5) and agreements which are still within the contractual term (such that Part 5 is not yet available). Once Part 5 has become available, following the paragraph 33 procedure is the only means by which the parties can alter the code rights already conferred, confer additional rights, or make a reference to the Tribunal if they cannot agree. Looking at the structure of the Code as a whole, it was sufficiently clear that Part 4 no longer applies to agreements once Part 5 has become available.

As parties are for the most part to be held to their bargains, it is not permissible for Part 4 to be used during the contractual term to obtain modification of existing Code rights. However, given the conclusion reached about the meaning of 'occupier', there is no impediment to the operator making use of Part 4 during the contractual term for the purpose of seeking *additional* Code rights.

Applying those conclusions to the facts of the cases in question, the Compton Beauchamp appeal failed. The Court had declined to accept Cornerstone's submission that all occupation by operators should be disregarded; the fact that the entity in occupation of the site happened to be an operator was not of relevance where it was not the operator which was seeking code rights. Accordingly, the landower remained the incorrect recipient of a paragraph 20 notice. The *On Tower* appeal succeeded,

as *On Tower* was itself the operator in occupation seeking new Code rights. The outcome of the *Ashloch* appeal remains to be determined following further submissions.

The Court was surprised by the Upper Tribunal's conclusion in the *On Tower* appeal that On Tower's tenancy at will was not a 'subsisting agreement' for the purpose of the transitional provisions, as subsisting agreements are defined in the transitional provisions as being agreements 'for the purposes of' paragraph 2 of the old code, not agreements 'falling within' that provision. This may be the target of a further appeal in a future case.

In many ways this decision provides welcome clarity as to the circumstances in which operators are able to seek Code rights; it is now apparent not only that operators in the position of On Tower can proceed to obtain new agreements, but also that there is no bar to parties agreeing consensually for new rights to be granted to operators who are already on site. As a result, it is no longer necessary to consider what the Upper Tribunal in the *On Tower* decision considered to be 'contrived' and 'artificial' workarounds. However, there remains the potential for disputes regarding whether rights sought are new rights or a modification of existing rights; the Court recognised that its determination that the former is permissible during the contractual term but the latter is not may create the need for 'nice distinctions' to be drawn. The extent to which that remains the case following the further review of the Code by Parliament (as to which see elsewhere in this newsletter) remains to be seen.

James Tipler acted for the operator in *Compton Beauchamp*, led by John McGhee Q.C.

Oliver Radley-Gardner Q.C., **Tricia Hemans** and **James Tipler** acted for the operator in *Ashloch*, led by John McGhee Q.C.

Kester Lees acted for the operator in *On Tower* with Justin Kitson, led by Jonathan Seitler Q.C.

Wayne Clark and **Fern Schofield** acted for *AP Wireless II (UK) Ltd* in all three appeals, led by Christopher Pymont Q.C.

Product Security and Telecommunications Infrastructure Bill

The Product Security and Telecommunications Infrastructure Bill is currently passing through Parliament.

In its present form, the Bill makes amendments to paragraph 9 of the Code (persons who may confer code rights) so as to make provision for scenarios where land is occupied exclusively by an operator. It remains to be seen whether Parliament will revisit this section of the Bill in light of the Supreme Court's decision in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18 (covered elsewhere in this newsletter), which also deals with the issue of the grant of code rights to operators in occupation.

Other points to note in respect of the Bill as currently drafted include:

1. The Bill will also insert an express Code right to share apparatus.
2. A modified version of the automatic paragraph 17 sharing and upgrading rights will apply to subsisting agreements.
3. Modifications will be made to the assessment of rent under s.34 of the Landlord and Tenant Act 1954 so as to introduce the no-network assumption.
4. Landlords of renewed 1954 Act telecommunications leases will have the right to claim compensation, in a manner similar to paragraph 25 of the Code.
5. The Secretary of State will have power to make regulations providing for 1954 Act renewals of telecommunications agreements to be dealt with by the Tribunal rather than the County Court.
6. A new part 4ZA will be inserted into the Code, which will provide for a procedure to enable operators to obtain Code rights to install equipment in multi-dwelling buildings (such as blocks of flats) despite a nonresponsive landowner. The government's response to a recent consultation on the nuts and bolts of how these rights will work in practice is covered elsewhere in this newsletter.

Case note: On Tower UK Ltd v J.H. & F.W. Green Ltd [2021] EWCA Civ 1858

In this case (commonly referred to as 'Dale Park', after the name of the subject land), the Court of Appeal was asked to consider Part 5 of the Code for the first time and gave guidance on the approach to be taken to the determination of disputed terms.

The operator, On Tower (a wholesale infrastructure provider, or WIP) sought renewal of its lease (which dated from 1999) under Part 5 of the code. The Upper Tribunal had determined that the new agreement would grant On Tower unlimited rights to share and upgrade its equipment, and also determined the consideration that would be paid.

The Court of Appeal dismissed the site provider's appeal. While the Upper Tribunal had been wrong to apply the paragraph 21 test instead of considering the matters stated in paragraph 34(12), that had in fact been to the appellant's advantage, as a higher threshold had been imposed, and it was clear from the Tribunal's judgment that it had nevertheless had the relevant considerations in mind.

As regards upgrading and sharing rights, the Court of Appeal accepted the operator's contention that weighty justification was not necessary for rights beyond those conferred by paragraph 17 to be imposed, and that paragraph 17 was not a 'floor'. Particularly in light of On Tower's business model as a WIP, the uncertainty of future technological change was a reason weighing in favour of more extensive rights.

Newey LJ (with whom Dingemans and Whipple LJJ agreed) endorsed the statement in *EE Ltd v Stephenson* [2021] UKUT 167 (LC) that the principle derived from *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 (that the burden is on the party seeking a change from the terms of the existing agreement to justify that change) does not apply under the Code in the same way as it does to renewals under the Landlord and Tenant Act 1954. Rather, where the terms of the existing agreement are not consistent with the aims of the Code, they will carry little weight.

Wayne Clark (led by Christopher Pymont Q.C.) appeared for the appellant.

Oliver Radley-Gardner QC (leading Justin Kitson) appeared for the respondent.

Case note:
EE Ltd and Hutchison 3G UK Ltd v Stephenson and AP Wireless II (UK) Ltd [2021] UKUT 167 (LC)

This case (commonly referred to as 'Pippingford', after the name of the estate where the site is located) concerned the renewal of a telecoms lease under the Landlord and Tenant Act 1954. The court determined disputed terms of the tenancy and the rent payable.

The court determined what various terms of the lease would be, including unlimited equipment rights, a break clause, indemnity, a non-interference clause, the basis of rent review, and that there would be no contractual entitlement to the equivalent of paragraph 25 compensation.

The court determined that the annual rent in accordance with s.34 as £3,500. In so doing, it gave valuable guidance as to the approach to be taken when carrying out the s.34 valuation exercise in a telecoms context:

Times have moved on since *Vodafone Limited v Hanover Capital Limited* [2020] EWMisc 13(CC), when the court adopted a staged valuation approach. That was necessary because of the lack of transactional evidence. That evidence is now available, and so a staged approach is no longer appropriate in a 1954 Act context.

The Tribunal stated that the best comparable evidence comes from new lettings rather than 1954 Act renewals. While new lettings are generally better evidence than renewals, that is particularly the case in the telecoms context because of the transition between statutory regimes. New lettings will reflect the 'code shadow' (the allowance willing parties would make for the possibility that a reference might be made to the Tribunal).

While payments which are truly a payment for willingness should be disregarded, the evidence showed that capital payments were widely made in the market and were not in practice linked to conditions such as early completion. There was no reason that a willing site provider would not receive something to reflect a payment others in the market would receive, be that by way of a capital payment or a payment to reflect professional fees.

Stephanie Tozer Q.C. appeared for the claimants.

Jonathan Wills appeared for the defendants.

Case note: On Tower UK Limited v AP Wireless II (UK) Limited [2022] UKUT 152 (LC)

This judgment – known as 'Audley House', after one of the sites in the references - addresses the determination of three references to the Upper Tribunal under Part 5 of the Code, for renewal of Code agreements concerning sites in industrial areas. At all three sites, the tenant was On Tower, a wholesale infrastructure provider, and the landlord was an aggregator of telecoms sites which had taken overriding leases after the sites had become established.

The Tribunal determined numerous disputed terms of the renewed agreements. Of wider application is likely to be the Tribunal's consideration of the implications for site providers of health and safety legislation and potential criminal liability under the Health and Safety at Work Act 1974. The Tribunal was clear that where – as in these cases - a site provider has no physical presence at the site and (given the terms the Tribunal imposed) little to no ability to control the day-to-day activities carried on at that site, there should be no fear of liability.

The Tribunal also determined the consideration payable for the sites. In so doing, it confirmed that the Hanover stages are cumulative and so allowance may need to be made for benefits and burdens at stages 2 and 3 even where the site has a valuable alternative use. Further, the Tribunal stated that it will only be in a case with special features (such as a valuable alternative use) that the Tribunal will determine consideration at a level which does not align with the table provided in *Affinity Water* (digested elsewhere in this newsletter), and that comparable transactions are unlikely to be of assistance unless they relate to the value of an alternative use. As the valuers were eventually able to agree the consideration payable for each of the sites in these references, they will not be added to the table.

The Tribunal also considered the impact of a restriction in the site provider's headlease, restricting use of the site to telecoms use. Despite the 'no network assumption', this did not mean the site provider would receive no value at all for its land; rather, it was an inevitable consequence of the statutory hypothesis that the prohibition had to be ignored, such that alternative uses which would otherwise have been viable could be considered.

Wayne Clark and **Fern Schofield** appeared for the site provider.

Jonathan Seitler Q.C. and Emer Murphy appeared for the operator.

Case Note: EE Ltd and H3G UK Ltd v Affinity Water Ltd [2022] UKUT 08 (LC)

This was a decision about the consideration and compensation payable for a new code agreement under paragraph 34 of the Code.

The operators occupied pursuant to a lease of the site (a reservoir and the top of its adjoining water tower) the term of which had expired. The Tribunal determined the consideration and compensation to be payable under a new lease. Consideration was determined at £3,300pa (which included a 10% uplift for the one year break). The Tribunal also awarded compensation totalling £7,500 in respect of professional fees.

The reader should refer to the judgment for the approach to the valuation on the facts. However, the following points may be of more general interest:

1.The Tribunal stressed that the tone and patterns of available transactional evidence are now sufficiently clear that the staged valuation approach from *Hanover Capital* is unlikely to necessary in future cases.

2. The Tribunal doubted that parties negotiating a rent of this modest size would descend to the level of 'granularity' that the experts had applied in this case.

3. The Tribunal provided a table of decisions on other types of sites, and considered that a water tower would likely fall between the value of a greenfield site and an office building.

4. The Tribunal expressed an obiter view (differing from the view expressed in *On Tower UK Ltd v JH & FW Green Ltd*) that the subject site must be assumed to be vacant.

5. Paragraph 25(1) compensation applied not only to loss or damage sustained as a result of the exercise of code rights, but also included costs incurred before any code rights had been acquired.

6. The Tribunal warned that "a claim for compensation does not prove itself and where there is no evidence of why an expense has been incurred a claim is likely to be limited to the sum admitted by the paying party".

Stephanie Tozer Q.C. appeared for the operators.

Tim Calland appeared for the site provider.

Case Note: EE Ltd and H3G UK Ltd v 100 Nox S.A.R.L. [2022] UKUT 0130 (LC)

This was an application for interim rights under paragraph 26 of the Code to undertake an intrusive survey of the rooftop of the respondent's premises. The respondent freeholder is a Luxembourg company with a registered office in Luxembourg.

As is its practice, the Tribunal heard and determined the reference at the case management hearing. The application for interim rights was refused as an exercise of the Tribunal's discretion for four main reasons.

Reason 1: There was "no evidence that the respondent is aware even of the claimant's wish to visit its rooftop, let alone of these proceedings". This was despite the respondent having been correctly served with both the notice (by the claimant) and the proceedings (by the Tribunal) at its registered office (being the proper address for service pursuant to s.394 Communications Act 2003 and para 91 of the Code).

It was not sufficient to check the register of title at HM Land Registry and the Luxembourg register of companies and to rely upon the registered address. The Tribunal considered that "as a matter of common sense", once the respondent failed to respond to correspondence, the operators should have made further enquiries, of which it gave various possible examples.

Reason 2: The paragraph 26 notice was mis-addressed. The Tribunal considered that notwithstanding an explanation in the covering letter and the fact that the respondent was a party to the attached draft code agreement, an overseas respondent could have been misled by a notice clearly not addressed to it. The *Mannai* principle accordingly had no application and the notice was bad.

Operators should take care to ensure that all notices under the Code are addressed to their intended recipient(s).

Reason 3: There was insufficient evidence that the respondent was the (or a) occupier of the roof. Operators should give consideration to the identity of all potentially relevant occupiers prior to giving notice and be in a position to adduce evidence of the same.

Reason 4: There was no evidence as to what the operators intended to do by way of "intrusive survey". Nor did the Tribunal know anything about the respondent or any possible prejudice to it. Accordingly, the Tribunal felt it could not perform the balancing exercise in paragraph 21 of the Code.

Operators should adduce sufficient evidence as to their plans for the site and any potential prejudice which may be caused by those plans, so as to be able to satisfy the Tribunal on a "good arguable case" standard that the prejudice caused to the relevant person is capable of being adequately compensated by money and outweighed by the public benefit likely to result from the order.

Camilla Chorfi appeared for the operators.

Case Note: Crawley Borough Council v EE Ltd and Hutchinson 3G Ltd [2022] UKUT 158 (LC)

This was the first order made by the Tribunal under paragraph 44 for the removal of the operators' telecommunications equipment, here from Crawley Town FC's Broadfield Stadium.

The operators were tenants under a 1954 Act lease. The lease was determined by section 25 notice, the operators inadvertently having failed to commence proceedings for a new tenancy. The operators accordingly had no code rights in relation to the site, Part 5 of the Code not applying to leases protected by the 1954 Act granted prior to the coming into force of the Code.

At the time of the case management hearing, the operators could not apply for new code rights under paragraph 20 of the Code as the Supreme Court decision in *Compton Beauchamp* had not yet been handed down.

It was common ground that the condition in paragraph 37(3)(d) of the Code was met, so the landowner had the right to require the removal of the equipment. The issue was whether the reference should be stayed pending either the operators reaching agreement in respect of a neighbouring site or the Supreme Court's decision in *Compton Beauchamp* (as the operators requested), or whether an order should be made requiring removal of the equipment within six months (which the Council said gave the operators an opportunity to make a reference in relation to a nearby site and have it determined).

Judge Cooke held that there was no discretion whether to order removal; paragraph 37 gave a *right* to

have the equipment removed and to stay the reference would be "going beyond what the Code provides" since there were no conditions precedent to making the order in paragraph 44 beyond the accrual of the right in paragraph 37. An order was accordingly made at the case management hearing on that the operators remove their equipment.

The case might be considered to be an unusual one in that the site provider was not wholly unwilling to maintain the equipment on its land; rather, it wanted to have the position regularised, and had resorted to the removal application on the basis that it was the only way to force progress in the matter. That being so, the particular difficulties for the operator at sites of this nature may now be ameliorated by the Supreme Court's decision in *Compton Beauchamp*, which means the operator would have been able to seek a new Code agreement under Part 4.

Oliver Radley-Gardner Q.C. appeared for the operators.

Jonathan Wills appeared for the Council.

Government Briefing Note: Building broadband and mobile infrastructure

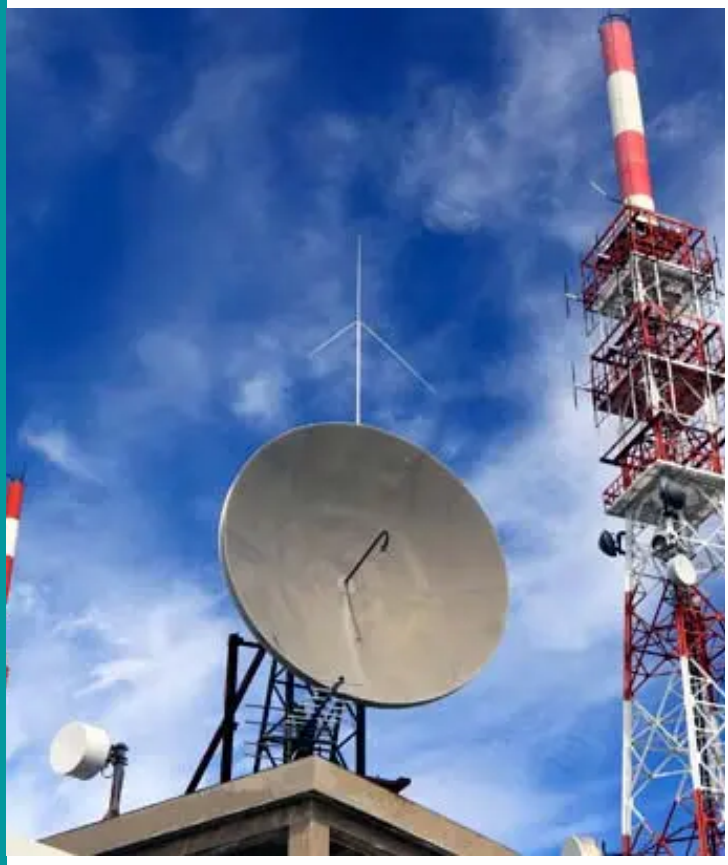
HOUSE OF COMMONS

The House of Commons Library published this briefing note on 17 March 2022: https://commonslibrary.parliament.uk/research-briefings/cbp-9156/.

It explains the rules for building telecommunications infrastructure such as mobile masts, including planning rules, the Electronic Communications Code, street works and access to existing infrastructure, as well as canvasing potential legal reforms and discussing health concerns in respect of masts.

The briefing note provides a useful overview of the various legal frameworks which impact on the rollout of telecommunications infrastructure.

Regulations to implement the Telecommunications Infrastructure (Leasehold Property) Act



The government has published its response to the consultation regarding regulations to be made to implement the Telecommunications Infrastructure (Leasehold Property) Act 2021 ('the Act').

The aim of the Act is to facilitate access to broadband connections for tenants of multi-occupied buildings (such as blocks of flats) in situations where the landowner is unresponsive. The regulations which were the subject of the consultation will set out the detailed procedures for how operators will be able to exercise those rights, which are provided for in Part 4A of the Code, including the precise forms of notices which will need to be given and the searches required.

At present, there are no plans to extend Part 4A to business parks and office blocks, although the position is being kept under review.

Editors

Toby Boncey

Fern Schofield

Falcon Chambers
Falcon Court
London
EC4Y 1AA
Tel: 020 7353 2484
DX 408 Chancery Lane

www.falcon-chambers.com
FalconChambers1
EFalconChambers
Falcon Chambers