

Operators and occupiers—rights under the Electronic Communications Code (Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd)

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Property Disputes analysis: The Court of Appeal endorsed the test proposed by the Upper Tribunal that an occupier for code purposes is ‘a question of fact rather than legal status; it means physical presence on and control of the land.’ Fern Horsfield-Schonhut, a barrister at Falcon Chambers, explains why the decision is of practical importance for operators seeking new code rights.

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [\[2019\] EWCA Civ 1755](#), [\[2019\] All ER \(D\) 138 \(Oct\)](#)

What are the practical implications of this case?

This decision is of practical importance for operators seeking new code rights under the Electronic Communications Code (the Code) for two reasons:

- it is now clear that in the case of an operator coming to a new site, the appropriate person to serve with a paragraph 20 notice is the occupier of the land, whether or not that person has an interest in the land
- in the case of an operator already in occupation of land but seeking additional code rights, the appropriate channel is part 5 of the Code, not paragraph 20

What was the background?

Vodafone (which was not a party to the claim) had a mast and some other electronic communications apparatus installed on land belonging to Compton Beauchamp Estates Ltd (Compton), the respondent. Vodafone’s apparatus was protected from removal, but otherwise it occupied the site as a tenant at will.

Cornerstone Telecommunications Infrastructure Ltd (CTIL) made an application against Compton under paragraph 20 of the new Code for the conferral of Code rights. Compton argued that the ‘relevant person’ for an application under paragraph 20 is the occupier of the site; that Vodafone was the occupier of the site; and that accordingly, Compton could not confer on CTIL the rights it sought.

Compton was successful in the Upper Tribunal, and CTIL appealed.

What did the court decide?

The Court of Appeal dismissed the appeal.

The court held that the ‘relevant person’, for the purpose of conferral of Code rights under paragraph 20, is the occupier of the land, as referred to in paragraph 9 and defined in paragraph 105 as being ‘the occupier of the land for the time being’. Paragraph 20 is drafted in terms of ‘relevant person’, not ‘occupier’, because the paragraph does double duty: it provides both for Code rights to be conferred and for Code rights to be made binding on a person. The only person who can confer rights is the occupier. If that person was Vodafone, then Compton was not the correct respondent to a paragraph 20 application.

The court endorsed the test proposed by the Upper Tribunal that an occupier for Code purposes is ‘a question of fact rather than legal status; it means physical presence on and control of the land’. It is only if there is no such person that

It becomes relevant to consider people who exercise powers of management or control over the land. Only in very special circumstances can two or more people be occupiers of the same parcel of land at the same time for Code purposes.

It is not necessary for an occupier to have title in order to be able to grant Code rights. Although the Court of Appeal did not have to determine any issues involving squatters in order to resolve the matters in this case, they declined to rule out the possibility that a squatter could be the occupier for Code purposes.

An operator seeking rights should apply under paragraph 20 against the occupier of the land, or enter into an agreement with them. If it is necessary for others to be bound, they should then make the necessary applications or solicit agreement. In the present case, the practical way forward would be for CTIL and Vodafone to enter into an agreement, and for CTIL then to apply for Compton to be bound.

It was argued that in such a situation, where the operator in occupation is friendly to the operator seeking rights, they could enter a sweetheart deal and then seek to have the owner of the land bound. The court rejected this on the basis that the Upper Tribunal has jurisdiction, under paragraph 23 of the new code, to modify the terms of an agreement imposed.

It was recognised that although some Code rights may not lead to the operator being in occupation—for example the right to lop trees—others may result in the operator themselves being in occupation of the site. If such an operator wants to vary or renew their Code rights, the appropriate avenue is part 5, not paragraph 20. Part 5 of the Code introduces the concept of ‘site provider’, which is distinct from ‘occupier’—there is therefore no problem presented by the grant of new rights by a landowner to an operator in occupation who applies under part 5 for variation or renewal of those rights.

It might be suggested that paragraphs 26 and 27, which provide for the grant of interim and temporary rights, present a problem because an operator might enter into occupation of a site under those paragraphs before a paragraph 20 application was determined, meaning that the operator would be the appropriate person to confer rights on themselves. However, this is solved by the deeming provision in paragraph 23, which provides that agreements imposed under those paragraphs take effect as agreements ‘between the operator and the relevant person’. Although they may not be agreements between the operator and the occupier, therefore, they take effect as if they were.

It was sought by CTIL to argue that on the facts, Vodafone was not in occupation and Cornerstone was; or that Compton was in occupation of part; and also that Compton was exercising rights of control over the land. The court found that these points had not been argued before the Upper Tribunal and so were not open to be argued on appeal.

Case details

- Court: Court of Appeal (Civil Division)
- Judges: Lord Justice Lewison, Lord Justice Simon and Lord Justice David Richards
- Date of Judgment: 22 October 2019

Fern Horsfield-Schonhut specialises in property litigation, accepting instructions in all areas of property law. In *Cornerstone Telecommunications*, she and Wayne Clark were counsel for the successful respondent.

Interviewed by Kate Beaumont.

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