Introduction

1. In this article we intend to examine the continuation of a Code agreement falling within the terms of the Electronic Communications Code ("**the Code**") and the ability of an operator to terminate it permanently, such that the agreement may be treated as at an ended at the specified break date without any ongoing continuation of the operator's contractual liability. We shall also consider the issue of renewal following termination.

2. Those reading this article will be familiar with the fact that the Code came into force on 28 December 2017. It provides, amongst many other things, a dichotomy between termination of an agreement protected by the Code and removal of an operator's electronic communications apparatus ("**ECA**"). Part 5 of the Code contains very detailed provisions as to the termination of a Code agreement and Part 6 contains equally detailed provisions for the removal of an operator's ECA.

3. Part 5 deals with three matters, (1) the continuation of Code agreements when the contractual term expires or is otherwise brought to an end[1]; (2) termination of the Code agreement under the Code[2] and (3) renewal of the Code agreement[3]. But the termination provisions apply ***only to termination by the site provider*** (as defined in paragraph 30(1)(a)). As has been well publicised the termination provisions provide for service of a notice of 18 months subject to specifying one or more of four grounds for termination[4].

4. The termination provisions of the Code were much influenced by the Law Commission's consideration of the terms of Part II of the Landlord and Tenant Act

[1] Paragraph 30 of the Code.

[2] Paragraph 31 of the Code.

[3] Paragraph 33 of the Code.

[4] Paragraph 31 generally. This is subject to transitional provision in the case of "subsisting agreements". See paragraph 7(3) of Schedule 2 to the Digital Economy Act 2017.

1954 ("**the 1954 Act**")[5]. Those familiar with the terms of the 1954 Act will recall that it makes provision for (1) the continuation of the tenancy (i.e. the contract which exists between the parties)[6] upon its expiry, (2) provision for its renewal[7] or (3) its termination[8].

Continuation

5. The three elements of the 1954 Act, continuation, renewal and termination are reflected in the terms of Part 5 to the Code. The terms of paragraph 30 of the Code provide for its continuation where a Code right conferred by a Code agreement ceases to be exercisable, or the site provider ceases to be bound by it or the site provider may bring it to an end so far as it relates to that right[9]. In those circumstances it is provided that "*the code agreement continues*"[10]. So the Code agreement continues if, for instance, (1) it expires by effluxion of time; (2) the agreement is terminated e.g. by the exercise of a contractual break clause or by forfeiture (in the case of a lease) for breach or for non-payment of rent, (3) it is determined automatically on satisfaction of a condition

[5] The Law Commission (Report No.336) said " ….we recommend a wholly new system for the revised Code in relation to the removal of apparatus, which will do away with the current overlap between the 2003 Code and Part 2 of the Landlord and Tenant Act 1954. The new system incorporates the best features of the 1954 Act security of tenure regime, in particular the continuation of Code rights despite their contractual expiry (thus regularising the position of Code Operators) while giving landowners the right to have equipment removed when they plan to redevelop or where the Code operator is in breach of its obligations." (para 1.39).

Later they said:

"6.79 We are impressed by the arguments in favour of the 1954 Act, which is well respected and whose provisions appear to operate, for the most part, smoothly. We are also impressed by the observations made by Code Operators to the effect that they would be generally supportive of a right for landowners to have the apparatus removed where they wished to redevelop the land.

6.80 Accordingly we are attracted to the idea of adapting, and incorporating with the revised Code, the regime found in the 1954 Act, while eliminating the current dual protection."

[6] Under s.24 of the 1954 Act.

[7] Under s.24(1) of the 1954 Act.

[8] Under s.29(2) of the 1954 Act.

[9] Paragraph 30(2).

[10] Paragraph 30(2).

e.g. if the term is expressed to terminate on the grant of planning permission for development or upon breach[11] or (4) if e.g. in the case of a periodic agreement[12], notice to terminate the periodic agreement has been served.

6. There are two matters of interest with respect to the continuation provisions of paragraph 30 of the Code. First, if the parties to the Code agreement agree a surrender, is the Code agreement nevertheless continued, so that all that the surrender is doing is accelerating the termination of the contractual term but without obviating the need to serve 18 months' notice? Second, what happens if the operator, being a party to the Code agreement, terminates it in accordance with its terms?

Surrender

7. By s.24(2) of the 1954 Act it is provided that "*The last foregoing subsection[13] shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture or by the forfeiture of a superior tenancy….*" The 1954 Act accordingly made express provision for its termination by surrender[14]. There is no such saving provision in paragraph 30 of the Code.

8. However, it would be odd if the Code required termination in accordance with Part 5 notwithstanding the parties' agreement to bring the agreement to an end. The authors of The Electronic Communications Code and Property Law [15] ("**the Book**") have touched upon the subject in paragraph 34.5.8(2) of the text where it is said:

"…it would seem, given the terms of paragraph 30(1)(b), that all that the surrender will do is to accelerate the determination of the contractual term. It would seem the site provider will still need to serve notice to terminate the code agreement in accordance

[11] Commonly seen in licence agreements.

[12] Whether that be a lease or licence.

[13] Being s.24(1), which provides for the continuation of the tenancy upon its termination.

[14] In the case of an agreement to surrender, the requirements of s.38A need to be complied with. Those requirements are not needed to effect an actual surrender: See eg *HL Bolton Engineering Co Ld v TJ Graham & Sons Ltd* [1957] 1 QB 159, CA and *Gibbs Mews plc v Gemmell* [1999] 1 EGLR 43, CA.

[15] 1st ed (2019) by members of Falcon Chambers of whom an author of this article is one.

with paragraph 31. On the other hand, paragraph 30 only continues the agreement, if "*under the terms of the agreement,* the right ceases to be exercisable or the site provider ceases to be bound by it, or the site provider may bring the code agreement to an end so far as it relates to the that right"(paragraph 30(1)(b)). Thus, can it be said that a surrender is not one "*under the terms of the agreement*" (assuming that the surrender is not pursuant to a contractual provision providing for such) such that upon surrender the agreement will not in fact be continued requiring its termination in accordance with Part 5, and thus enabling the site provider to proceed straight to Part 6 to effect removal?"

9. Although the last sentence of the quoted text is phrased as a rhetorical question, there seems some merit in the view that a surrender should bring the Code agreement to an end without the necessity for the 18 months' notice normally required to initiate termination of a Code agreement. A surrender is of course a bilateral arrangement with both parties agreeing to bring the agreement to an end.

10. The terms of paragraph 100 of the Code are often referred to as anti-avoidance provisions[16]. Paragraph 100(1) provides for the sanctity of the parties' contract as the starting position. However, paragraph 100(2) makes it clear that sub-paragraph (1) "*does not apply in relation to paragraph 99 or Parts 3 to 6 of this Code*." Thus, one is in effect asking whether there is anything in the contract which is inconsistent with the terms of, inter alia, Part 5. If the phrase "*the terms of the agreement*" in paragraph 30(1)(b) of the Code does not comprise, on its true interpretation, a surrender agreed outside the terms of the parties' agreement, there is no inconsistency with paragraph 100(2). The surrender is not seeking to oust Part 5, because Part 5 only seeks to deal with termination arising from "*the terms of the agreement*" of the right to exercise the Code right. Thus, an agreement arising other than pursuant to the terms of the Code agreement to bring the Code agreement to an end is not caught by the anti-avoidance provisions[17].

[16] The heading to the paragraph is in fact: "Relationship between this code and agreements with operators."

[17] In paragraph 6.93 of the Law Commission's Report (No.336), it was said that "We have not made any provision for contracting out of the recommended regime. Code operators expressed great concern

11. There seem to the authors of this article several reasons to support this conclusion. First, as the authors of the Book state, "*if the parties are unable to effect a surrender it seems difficult, logically, to see why, therefore, any compromise of court proceedings, which are commonplace, whereby the operator agrees to vacate on a specified date should not equally fall foul of the anti-avoidance provisions*."

12. Second, the parties can enter into a new agreement without first having to terminate the existing Code agreement. This much is apparent from the approach taken by Lewison LJ in *CTIL v Compton Beauchamp*[18] to paragraph 34(8)[19] of the Code. It was said that that subparagraph, "*also applied to a new agreement made between an operator and a site provider…*" Of course, a new agreement in substitution of the old will surrender by operation of law all rights that the operator had under its existing agreement[20]. If the parties can bring about a new agreement, which by necessary implication terminates

about the possibility of contracting out save (for the most part) in cases where the landowner wished to develop its land; our recommended regime mirrors the 1954 Act in allowing the landowner to regain possession where he or she intends to redevelop the land and so the issue of contracting out on that ground does not arise."

[18] [2019] EWCA Civ 1755, Civ, at [63]

[19] Which provides "This code applies to the new agreement as if it were an agreement under Part 2 of this Code."

[20] This is true not only in the obvious case of a lease but also where a new licence is entered into in place of the old. In the context of licences, the doctrine of rescission by agreement rather than surrender applies: *Bone v Bone* [1992] EGCS 81, CA. Nourse LJ said:

" [It was] submitted that the principles governing the implied abandonment of a contractual licence to occupy land were similar to those which govern the surrender of a lease by operation of law. However, the latter principles were developed in order to overcome the injustices of the rule that the surrender of a lease, being a conveyance of a legal estate in land, must be made by deed, a development which has firmly rooted them in estoppel. The abandonment of a contractual licence to occupy land requires no formalities, nor is it necessarily founded on estoppel. In particular, there is no necessity for someone who alleges an implied abandonment to have acted to his detriment on the faith of a representation made by the other party to the contract. It is enough that the parties have so conducted themselves that it ought to be inferred that they have mutually agreed to bring the contract to an end."

the old, it seems to be implicit in paragraph 34(8) that an agreement to surrender the operator's rights is valid. The premise of 34(8) is that the parties can, by reaching a new agreement, bring the old to an end. If the parties can bring the old agreement to an end by agreement, why should it be necessary that this can arise only in the case of entry into a new agreement?

13. Third, some support for the view that a surrender should be permitted, is to be derived from the fact that *an agreement* to surrender would be caught by paragraph 100(2). Under the 1954 Act, an agreement to surrender is rendered void unless certain procedural requirements are fulfilled[21]. The cases under the 1954 Act make it clear that even where the requirements for entry into an agreement to surrender have not been complied with, an actual surrender is still effective[22].

14. The Code says nothing *expressly* about *agreements to surrender*, being ineffective. But it is considered that this is because any such agreement was considered likely to fall within paragraph 100(2) of the Code. An agreement to surrender if forming part of the parties' bargain is clearly seeking to bring about a termination of the operator's Code rights otherwise than in accordance with Part 5 and is a cessation of the rights "*under the terms of the agreement*".

15. That example is a relatively straightforward one to deal with. But what of an agreement to surrender which is entered into *other than by way of an existing term o*f the Code agreement? An agreement to surrender is not an actual surrender and thus, on the face of it, trying to enforce that agreement is likely to be met with reliance on the anti-avoidance provisions of the Code. But equally it is not a provision "*under the terms of the agreement*" providing for the cessation of the right to exercise the Code right.

16. But on the face of it there does not appear to be any merit in preventing the enforcement of the terms of Code agreement which seek to side step the Code, but not agreements which for all intents and purposes have the same effect but are entered into post entry

[21] See s.38A(2) and (4) to the 1954 Act.

[22] See *Gibbs Mews plc v Gemmell* [1999] 1 EGLR 43, CA. where the tenant entered into a tenancy at will (which has no protection under the 1954 Act) in place of its existing protected 1954 Act tenancy.

into the Code agreement. However, it may be thought that upholding the latter as enforceable but not the former may be justified on the basis that an agreement entered into when the operator already has Code security is an agreement entered into from a position of strength. The operator does not have to enter into the agreement and is entering into it in full knowledge of the consequences of what it is doing, to be contrasted with the position as at the date of entry into the Code agreement, where its negotiating position may not be as strong.

Termination by an operator

17. An agreement which is a Code agreement[23] may be terminated in accordance with paragraph 31. The paragraph provides that "*a site provider who is a party to a code agreement may bring the agreement to an end by giving notice in accordance with this paragraph to the operator who is a party to the agreement*." Thus, there is no reference to the operator serving notice to terminate. This is contrast to the terms of paragraph 33 of the Code which deals with renewal of a Code agreement. A notice under paragraph 33 may be served by either *"an operator or site provider who is a party to a code agreement…*"

18. Thus, the notice provisions and the requirement to specify a ground for termination contained within paragraph 31 apply only where the site provider seeks to terminate the Code agreement. No Code provision exists providing for termination by an operator of a Code agreement, other than in the context of paragraph 33. But a paragraph 33 notice is not a notice of termination. If notice is served under paragraph 33 either the operator or the site provider may apply to the court for an order under paragraph 34[24]. But if

[23] For the purposes of the Code a "Code agreement" is an agreement to which Part 5 of the Code applies: paragraph 29(5) of the Code.

[24] There is no time specified for the making of any such application, save that it cannot be made before the expiration of 6 months from the date of service of the paragraph 33 notice: para 33(4). The Code provides in essence for a period of 6 months to enable the parties to reach agreement and only then may they go to court. But there is no necessity to do so at the end of the 6-month period in order to protect the operator's continuing use of the site; that is provided for by the continuation of the Code agreement by paragraph 30(2) of the Code.

none is made the Code agreement carries on in accordance with paragraph 30[25].

19. No guidance may be derived from the Law Commission, as there is simply no commentary in their Report No. 336 on termination by an operator by service of a notice to quit or by a break notice.

20. Thus, one reading of the Code is that there is no need to make provision for termination by an operator. Part 5 restricts termination by the site provider, but does not seek to restrict termination by the operator. Thus, if there is a contractual right to break by an operator this takes effect; that is the end of the Code agreement. The anti-avoidance provisions of paragraph 100(2) do not apply because there is nothing in Part 5 providing for any specific method of termination of a Code agreement by an operator. Accordingly, the parties' contract prevails as is provided for by paragraph 100(1) of the Code. However, it is considered that there is a potential difficulty for this analysis and thus for operators arising from the continuation provisions in paragraph 30 of the Code.

21. It is almost universally the case that operators provide for a contractual right to break the contractual term of a Code agreement. In the case of the 1954 Act, it has been seen that by s.24(2) it preserves the right for the tenancy to end by service of a notice to quit. This would include a notice by the tenant. "Notice to quit" is defined in s.69(1) of the 1954 Act to mean a notice to terminate a tenancy (whether a periodic tenancy or a tenancy for a term of years certain) given in accordance with the provisions (express or implied) of that tenancy. This includes a notice to quit properly so called as well as a notice pursuant to a tenant's right to break[26].

22. On a consideration of the terms of paragraph 30 of the Code, termination by an operator of the Code agreement by exercise a contractual right to break (or service of a notice to quit in the case of a periodic arrangement) will not, arguably, give rise to an effective

[25] In order to serve a paragraph 33 notice, the notice must specify a date which is not earlier than the date on which, apart from paragraph 30, the agreement would otherwise come to an end: para 33(3) of the Code.

[26] See *Scholl Manufacturing Co Ltd v Clifton (Slim Line) Ltd* [1967] Ch 41, CA, and *Garston v Scottish Widows Fund & Life Assurance Society* [1998] 1 WLR 1583, CA.

(or "permanent") termination of its Code rights. This appears to be clear from the express wording of paragraph 30. Unlike paragraph 31, which can only be invoked by a "site provider", the continuation provisions apply to continue the Code agreement howsoever it is brought to an end. It applies where "*under the terms of the agreement (i) the right ceases to be exercisable or the site provider ceases to be bound by it, or (ii) the site provider may bring the code agreement to and end so far as it relates to that right.*"[27] The cessation of the exercise of the Code right is contracting party neutral; it matters not how or by whom that right has ceased to be exercisable. For the terms of paragraph 31(1)(b)(i) to be triggered, one simply has to show that the "*the right ceases to be exercisable*". It has ceased, where the operator serves a break notice, because the contractual break notice takes effect to terminate the contract from the relevant break date.

23. Thus, if the operator's notice simply brings the contract term to an end, how otherwise can the agreement, as a Code agreement protected by the Code, be brought to an end? Given the attraction of the 1954 Act to the Law Commission, there is, perhaps surprisingly, nothing which resembles the terms of s.27 of the 1954 Act, the terms of which enable a 1954 Act tenant to prevent continuation, or if continuation has occurred, or of s.24(3) of the 1954 Act, the terms of which enable the continuation to be brought to an end where there has been cessation of occupation for business purposes.

24. Now it may be considered that any difficulty over the effective termination by an operator of the agreement as a Code agreement[28] is unlikely to occur in practice given that the operator will have already made its mind up to vacate the site and is likely to remove its ECA from the site. There may be some merit in this given that paragraph 30 only applies so as to continue the Code agreement to protect the Code rights conferred by it. A Code right is defined in paragraph 3 as being a right "*for the statutory purposes.*" The "*statutory purposes*" is either the purpose of "*providing the operator's*

[27] Paragraph 31(1)(b)(i) of the Code.

[28] Clearly the contractual break notice will terminate the contract but the all-important issue is whether there remains any continuation of the agreement pursuant to the Code notwithstanding the exercise of the contractual break.

network" or "*of providing an infrastructure system*.[29]" If an operator serves a break notice and removes its ECA before the break date, there will be no continuation, because as at the contractual break date there will be no Code right which is being used for the statutory purposes. It may be that the operator is still operating its network via other sites using other ECA, but if in respect of the relevant site it has removed its ECA (or simply abandoned it) it seems difficult so see how it may be said that that the rights under the Code agreement are and remain Code rights. In essence, by analogy to the 1954 Act, it is a continuing requirement of statutory Code continuation under para 30 that there is a continuation of the statutory purposes and thus a cessation of the statutory purposes brings the Code right and thus the Code agreement to an end. If this is the correct analysis, the continuation of the operator's Code agreement at the break date is dependent on whether or not it has managed to remove itself from the site in time (or has stopped using the ECA with respect to the operation of its network) so as to be able to ensure that the "statutory purposes" are no longer being fulfilled.

25. However, just as under the 1954 Act a tenant who has not served a s.27 notice to stop any continuation under s.24 arising runs the risk of a continuation tenancy arising inadvertently, so also it would seem that an operator may also inadvertently end up with a continuation of its Code agreement if it cannot point to the fact that the "statutory purposes" are no longer being fulfilled. Cessation of the statutory purposes is an issue of fact and it may be that the operator has waited too long such that the factual circumstances as at the break date are such that a Code agreement continuation arises.

26. Under the 1954 Act, a tenant whose tenancy has continued under s.24, whether by design or by inadvertence, may bring it to an end by service of a notice of 3 months: s.27(2) of the 1954 Act. But there is no equivalent to s.27(2) in Part 5 of the Code. The wording of paragraph 30 appears to indicate that once the Code agreement is continuing it continues *until terminated by the site provider* in accordance with paragraph 31 or renewed by either the site provider or the operator in accordance with paragraph 33. There is nothing in paragraph 30 which enables one to say that the continuation continues only for so long as the Code rights remain such, so that if there is a cessation of the "statutory purposes" the continuation of the Code agreement ceases.

[29] Paragraph 4 of the Code.

27. That said it may be possible to produce a purposive construction of paragraph 31(2) of the Code to provide for termination of a continuing Code agreement. Paragraph 31(2) provides that where the sub-paragraph applies "the code agreement continues so that (a) the operator may continue to exercise that right, and (b) the site provider continues to be bound by the right." "The right" is the code right referred to in paragraph 31(1).

28. It clearly was the intention of Parliament to continue that right only if and for so long as it remained a "Code right". Thus, it may be said that the sub-paragraph should be interpreted as if it read "Where this subparagraph applies the code agreement continues so that, for so long as the right remains a Code right…."

29. Reading words into a statute is permissible but there are limitations[30]. Nevertheless, it would appear to make sense[31] to provide that rights which are Code rights will only continue for so long as they remain Code rights but not otherwise. The difficulty of this approach is, however, that it is subject to the vagaries of the operator's network.

[30] In *Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586*, 592 Lord Nicholls said "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words … This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

[31] One should interpret legislation so far as possible to equate with common sense: *R v Secretary of State for the Home Department ex p Naughton* [1997] 1 WLR 118 at 130G-H.

Moreover, the absence of use for the "statutory purposes" may be unknown to the site provider.

Part 6

30. Part 6 of the Code makes provision in paragraph 37(6) of the Code for removal of ECA where "*the operator has the benefit of a code right entitling the operator to keep the apparatus on, under or over the land*" but it is no longer being used "*for the purposes of the operator's network and there is no reasonable likelihood that the apparatus will be used for that purpose*. In those circumstances the landowner[32] may serve notice requiring its removal. This provision would suggest that cessation of network use does not automatically terminate the Code right nor, by necessary implication, the Code agreement. However, one has to be slightly nuanced here with respect to the application of paragraph 37(6). The sub-paragraph could, according to its terms, apply where the contractual term *has not* been brought to an end but the ECA has simply been abandoned[33]. So perhaps not too much should be read into this paragraph in terms of undermining the argument that cessation of network use, post continuation of the Code agreement, brings about an automatic termination of the Code agreement. Given that paragraph 37(6) is dependent on a Code right existing, if the Code agreement has ceased, there is no Code right.

31. It is unclear whether the landowner would still need to utilise Part 6 to remove the ECA in a network cessation scenario. Part 6 makes it clear that removal of ECA may only be in accordance with Part 6 "*if (and only if) one or more of the following conditions are met.*" Although the termination of a Code right (in varying circumstances) is provided for as the second condition triggering the right of the landowner to seek removal (sub-paragraph 37(3)), the termination of a Code agreement either by service of notice (whether a notice to quit or by service of a break notice) by the operator or by the cessation of network use, is not mentioned as one of the circumstances in which the operator's ECA may be removed.

[32] Only a landowner may seek removal: para 37. A "Landowner" is someone who has "an interest in land": para 37(1).

[33] Paragraph 37(6) essential restates paragraph 22 of the Old Code.

32. Thus, in fact Part 6 makes no provision for the removal of ECA in circumstances where the contractual term of the agreement has been terminated by the operator. This would suggest the either (1) the operator's termination of the Code agreement has no effect on its continuation pursuant to paragraph 30, so that it continues *until terminated by the site provider*, or (2), it is terminated and the landowner is not constrained by Part 6. The latter interoperation does not sit comfortably with the terms of paragraph 37(1), which applies to removal of ECA; it does not have to be ECA which has been put on to the land pursuant to a Code agreement, e.g. it may have been installed by mistake or deliberately but without, in both cases, the benefit of a right to do so[34]. But equally the former interpretation renders the contractual termination by operators wholly ineffective and termination of its continuing Code agreement dependent on action of the site provider.

Renewal following termination by operator?

33. As stated earlier, it is surprising that nothing is said about termination of a Code agreement by an operator, either in the Code, the Law Commission's consultation paper or in its final Report[35]. It may be that there is a general assumption that termination of the contractual term by an operator brings an end to its Code rights, irrespective of the terms of the Code and that the Code is intending to deal, in Part 5, only with renewal by the site provider or operator or termination only by the site provider. Nothing needed to be said with respect to termination by the operator because it was a given that, if the operator did not wish the agreement to carry on, it would not do so if terminated by the operator in accordance with its terms.

34. This is an important issue. Under the 1954 Act it has been held that a tenant who serves a notice to quit, bringing its tenancy to an end pursuant to a contractual break notice, cannot then seek renewal: *Garston v Scottish Widows Fund & Life Assurance Society*.[36] It is unclear whether an operator may serve a notice to quit (whether a notice to quit

[34] And this is covered by the first condition for removal contained in paragraph 37(2) of the Code.

[35] The Explanatory Notes which accompany the Digital Economy Act 2017 state succinctly that "paragraphs 29 and 30 provide for code rights to continue as a matter of statute notwithstanding that they may have come to an end in accordance with their contractual terms": Note 425.

[36] [1998] 1 WLR 1583, CA.

properly so called or a break notice pursuant to an express contractual right to break) and claim renewal under paragraph 33 of the Code. This is a matter which has yet to be determined under the Code.

35. The wording of s.26(2) of the 1954 Act is very different to the wording of paragraph 33(3) of the Code. The latter, which seeks to identify the date which has to be specified in the renewal notice under paragraph 33 (whether that notice is served by the site provider or the operator) does so but not by reference to a notice served by the operator. The date specified in the renewal notice must not earlier be than the "*time when, apart from [paragraph 30] the code agreement could have been brought to an end by the site provider*." This would therefore appear to exclude the opportunity for an operator to break the Code agreement mid-term to take advantage of paragraph 33.

36. This outcome thus supports the view that termination by an operator terminates all of its rights under the Code, including a right of renewal under paragraph 30. The alternative outcome is that considered above, namely that the operator's termination of the Code agreement has no effect on its continuation pursuant to paragraph 30, so that it continues *until terminated by the site provider*. Either way the operator cannot seek to take advantage of a contractual right to break to seek to enhance its position mid-term. As was said in *Garston v Scottish Widows*, "One of the main purposes of Part II of the Act of 1954 is to enable business tenants, where there is no good reason for their eviction, to continue in occupation after the expiration of their contractual tenancies. It is not a purpose of the Act to enable a business tenant who has chosen to determine his contractual tenancy to continue in occupation on terms different from those of that tenancy."

37. That sentiment, it is considered, applies equally to an operator seeking to terminate its Code agreement mid-term. If operators assert that they can bring about an effective termination of their Code agreement by the simple expedient of the service of a contractual break notice, and that is effective irrespective of whether or not there is a cessation of use for the statutory purposes, why should they then seek to claim the benefit of paragraph 33?

Wayne Clark
Fern Schofield
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Wayne is a co-author of The Electronic Communications Code and Property Law (1st ed, 2019), has appeared in numerous cases on the Code before the Upper Tribunal and has represented landowners in both of the reported cases on the Code which have reached the Court of Appeal.

Fern has extensive experience of the Code, and frequently advises on both the new Code and the transitional provisions. She was junior counsel in the Court of Appeal decision in CTIL v Compton Beauchamp 2019 which determined against whom an application for Code rights could be made.