FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023 – 000391**
Property	**:**	**Rooftop site – The Hive, Hive Lane, Northfleet, Kent DA11 9DE**
Claimant (Operator)	**:**	**On Tower UK Limited**
Representative	**:**	**Oliver Radley-Gardner KC Gowling WLG (UK) LLP**
Respondent (Site Provider)	**:**	**Gravesham Borough Council**
Representative	**:**	**Jonathan Wills Freeths LLP**
Application	**:**	**Electronic Communications Code**
Hearing	**:**	**2nd October 2023 Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date	**:**	**18 October 2023**

DECISION

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1. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 27th June 2023 and on 30th June 2023 an Order was made by a member of the Tribunal's staff, authorised for that purpose, transferring the reference to the First-tier Tribunal.

2. That Order was considered afresh by the Deputy Chamber President on 20th July 2023 who confirmed transfer to the First-tier Tribunal.

   In written reasons the Deputy Chamber President said:

   "The general issue whether an operator which has failed to obtain a new tenancy under the 1954 Act can claim new Code rights under Part 4 of the Code is said by the Respondent to be resolved in its favour by the Supreme Court's decision in Compton Beauchamp, such that it is appropriate for the reference to be struck out".

   Determination of application to strike out the reference is now before me.

3. The application for strike out was made under Rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2010. Following transfer the appropriate rule is Rule 9(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which provides that the Tribunal may strike out the whole or part of the proceedings or case if:

   "the Tribunal considers there is no reasonable prospect of the Applicant's proceedings or case, or part of it, succeeding."

Background

4. The Hive is an 8 storey residential building of which the Respondent is the freeholder. The present reference under Part 4 of the Code relates to occupancy of a roof top site. Electronic communications apparatus has been in place since 1997 under the terms of a lease dated 27th November 1997 for a term of 20 years from 31st March 1997. It is common ground that the lease fell within Part 2 of the 1954 Act and that there was no contracting out of that protection. The lease was ultimately assigned to the Claimant.

5. The Respondent's case is that it needs to carry out repairs to the roof. The roof has been leaking since 2019 and works are now urgently required to what is a residential building. The Respondent's position is that it cannot carry out those works without removal of the Claimant's apparatus.

6. In 2019 the parties discussed "lift and shift" of the apparatus to allow works to be carried out. It appears that those negotiations were not successful being derailed in part because of the pandemic.

7. On 17th December 2021 the Council served a section 25 Notice under the 1954 Act to terminate the lease. The Claimant applied to the County Court and a Claim Form was issued on 12th July 2022 but not served within 4 months (i.e. by 12th November 2022) in accordance with CPR 7.5

8. On 23rd February 2023 DDJ Aikman sitting at Birmingham County Court refused an extension of time for service under CPR 7.6 and the claim was dismissed. Very shortly before that hearing, on 17th February 2023, the Claimant served a Notice under Paragraph 20 of the Code.

9. Notice of Reference was received by the Upper Tribunal on 27th June 2023. By application dated 19th July 2023 the Respondent made application to strike out.

No concurrency of Regimes

10. The Respondent's case is that two important principles emerge from the decision of the Supreme Court in **Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited** [2022] UKSC 18 (referred to in this Decision as Compton Beauchamp, Ashloch and On Tower by reference to the three conjoined appeals). The first is that there is no concurrency of different regimes from which the operator may elect. There is only one applicable procedure.

11. Prior to enactment of the current version of the Code the Law Commission in its report on the Code expressed the view that dual protection under both the 1954 Act and the Code was neither necessary nor helpful.

12. As Lady Rose makes clear at paragraph 166 of **Ashloch** an operator with a 1954 Act lease which is not contracted out cannot rely on Part 5 of the Code as doing so is expressly excluded by para. 6(2) of the Transitional Provisions. At paragraph 167 Lady Rose adopts the reasoning of the Upper Tribunal and Court of Appeal that an operator with 1954 Act protection does not have the option of applying for the imposition of rights under Part 4 of the Code either.

13. However, that is not the end of the story. Whilst the regimes may not be concurrent, they are in a fact sequential. I reach this conclusion for two reasons. The first is set out at paragraph 168 of **Compton Beauchamp** when considering the position of Cornerstone:

    "Cornerstone must therefore use its rights under Part 2 of the 1954 Act to renew its lease; that lease will then be caught by section 43(4) of the 1954 Act so that when that lease expires, Part 5 will be available."

    Simply put following a 1954 Act renewal the code agreement will transition to Part 5 of the Code on any subsequent renewal.

    Secondly in the case of a failed 1954 Act renewal the site owner can only enforce its right for removal of the Claimants apparatus by way of Part 6 of the Code. It cannot use enforcement proceedings in the County Court. Again, the Code follows on sequentially from the 1954 Act. This is in contrast to a "vanilla" 1954 Act lease where by virtue of section 64 of the 1954 Act a tenancy terminates on the expiration of the period of three months beginning with the date on which the application is finally disposed of by the Court (subject to a further 21 days in which to appeal). Following the expiration of the period of 3 months a landlord may apply to the County Court for a possession order under CPR Part 55.

14. Mr Wills relies on conclusions compelled by the proper interpretation of the Code as a whole. This requires identification of the underlying legislative purpose. The starting point is set out at paragraph 106 of **Compton Beauchamp**: "*The correct approach is to work out how the regime is intended to work*". In my judgement on expiry of the operator's rights the parties end up at Part 6 of the Code. Put inelegantly the operator finds itself in "the last chance saloon."

15. The importance the Code attaches to the maintenance of apparatus that is still functioning and providing service is illustrated at Paragraph 27(3) of the Code which provides for Temporary Code Rights:

    "The objective is that, until proceedings under paragraph 20 and any proceedings under paragraph 40 are determined, the service provided by the operator's network is maintained and the apparatus properly adjusted and kept in repair."

16. Parliament's intention is that an operator can challenge the removal of functioning apparatus under Part 6 by making an application under Part 4 of the Code subject always to considerations of abuse of process and in particular robust intervention by the Tribunal to prevent relitigating issues already determined e.g. redevelopment.

No second bite at the cherry

17. The second principle upon which the Respondent seeks to rely is identified by Lady Rose at paragraph 135 of **Compton Beauchamp**:

    "…The tribunal will also be astute to ensure that an operator whose application under Part 5 for new rights or for its right to continue an agreement has already been rejected by the tribunal cannot have a second bite at the cherry by making an application under Part 4. The Upper Tribunal has powers under its rules to deal promptly with applications such as those; no doubt the landowner will draw the failed application under Part 5 to the attention of the tribunal."

18. The Respondent's case is that **Compton Beauchamp** is authority for the following four propositions:

    i. An operator in occupation cannot access Part 5 before expiry of an agreement.
    ii. An operator with a 1954 Act lease, which is not contracted out, cannot rely on Part 5 of the Code
    iii. An operator with 1954 Act protection does not have the option of renewing rights under Part 4 of the Code
    iv. An operator whose application under Part 5 has been rejected by the tribunal cannot make an application under Part 4

19. The Respondent submits that in light of those four principles it must follow that a Part 4 application is impermissible following an unsuccessful 1954 Act claim. The Claimant has no choice: the only route for renewal is under the 1954 Act. An operator cannot

elect to use Part 4. That route is not available because the Code and the 1954 Act are not concurrent regimes. The operator who has failed under the 1954 Act cannot have a second bite of the cherry under Part 4.

20. Proposition (i) is clear from Part 5 of the Code which makes provision for bringing an agreement to an end and change to terms of an agreement which has expired. Propositions (ii) and (iii) that an operator with 1954 Act protection cannot access Parts 4 or 5 are set out at paragraphs 166 and 167 of **Compton Beauchamp**:

"166. …It was common ground that the lease initially granted to Vodafone fell within Part 2 of the 1954 Act and there was no contracting out of that protection: see para 7 of the Upper Tribunal's judgment. It seems clear, therefore, that whether or not Cornerstone's rights had been embodied in a written agreement at the point when the new Code replaced the old, Cornerstone would not have been able to rely on Part 5 of the new Code. It would have been expressly excluded from that by para 6(2) of the transitional provisions.

167. I find the reasoning of the Upper Tribunal and the Court of Appeal in Ashloch as to why an operator with a subsisting agreement protected under the 1954 Act should not have the option of renewing the rights under Part 4 of the new Code to be persuasive. The intention of the Government, following the recommendation of the Law Commission, was that such an operator should not get the retrospective benefit of the new Code, in particular the substantial benefit of the no-scheme valuation of the rights."

It is important to note for the purposes of the present reference that the Court of Appeal was considering a "subsisting agreement" under the 1954 Act. The tenancy of the Claimant before me has terminated in accordance with section 64 of the 1954 Act and is not therefore a "subsisting agreement".

21. In support of proposition (iv) Mr Wills relies on paragraph 135 of **Compton Beauchamp**. However, paragraph 135 cannot be understood without first looking at paragraph 134 in which Lady Rose considered the following situation:

"If the landowner is faced with an unwelcome application under para 20 by an operator who is party to an existing agreement under Part 2 in respect of the same land, he may submit to the tribunal that the operator is illegitimately dressing up a modification of the existing agreement as a request for new rights. That would be an illegitimate attempt to bypass the fact that the existing agreement has not yet reached the end of its contractual term and Part 5 is not available."

Accordingly, paragraph 135 must be considered in the context of "the landowner faced with an unwelcome application" by an operator "who is a party to an **existing agreement**" (my emphasis) that "has not yet reached the end of its contractual term".

22. I now turn to consider paragraph 135:

135. In most circumstances the tribunal will be able without much difficulty to determine whether the application is really for new code rights or whether it is a

disguised attempt to improve on the bargain struck as to the price or duration of the existing rights…. The tribunal will also be astute to ensure that an operator whose application under Part 5 for new rights or for its right to continue an agreement has already been rejected by the tribunal cannot have a second bite at the cherry by making an application under Part 4. The Upper Tribunal has powers under its rules to deal promptly with applications such as those; no doubt the landowner will draw the failed application under Part 5 to the attention of the tribunal."

23. I find that paragraph 135 of **Compton Beauchamp** must be read as referring to an operator "*with an **existing agreement**"* (my emphasis). Accordingly, paragraph 135 has limited application to the present reference because I am concerned here with an agreement that has expired and where renewal under the 1954 Act has failed.

    It is also important to note here that Lady Rose does not say that there is a want of jurisdiction, or that the claim cannot be made under Part 4 following a failed or rejected Part 5 application. Rather Lady Rose is saying that the Tribunal should be deal robustly with applications that are no more than "disguised attempts to improve on the bargain", seek to rerun arguments that have already failed or amount to an abuse of process.

24. My interpretation is further confirmed by what Lady Rose went on to say at paragraph 169 when considering the position of the operator, Cornerstone:

    "But [Cornerstone] cannot bypass the fact that it has ongoing rights under a tenancy which it is entitled to renew - or bypass the terms of the renewed tenancy once it is granted - by applying in effect for modifications of those rights under Part 4."

    Again, Lady Rose is referring to an ongoing tenancy rather than the situation that arises before me.

25. Not only does the "second bite of the cherry argument" fail because I am considering neither an ongoing tenancy nor an existing agreement, but it also fails for reasons I will turn to when considering whether there has, on the facts, been a failed or rejected argument.

Claimant's Reply

26. The first point made by the Claimant is that **Compton Beauchamp** was primarily about the operator test in Paragraph 9 of the Code. The "Conclusion" at paragraph 171 is unambiguous:

    "In conclusion, I would hold that the Court of Appeal erred in holding that the proper construction of the new Code results in the tribunal having no jurisdiction to consider an application under Part 4 of the new Code from an operator on the grounds that operator is in occupation of the site because of the presence there of its ECA."

As set out a paragraph 160 only having determined that point did the Supreme Court turn to determine the outcome of the appeals:

"In the light of my conclusions set out above, I turn to consider whether, having largely won the battle as to the meaning of the word "occupier" in para 9, the appellants have won the war of establishing that the Upper Tribunal has jurisdiction to consider their applications under Part 4 of the new Code."

27. The Claimant submits that the answer to the question: *whether an operator which has failed to obtain a new tenancy under the 1954 Act can claim new Code rights under Part 4 of the Code?* is to be found in Paragraph 40(8) of the Code.

28. Paragraph 40 is headed *"How does a landowner or occupier enforce removal of apparatus?"*. Paragraph 40(8) provides:

"On an application under sub-paragraph (6) or (7) the court may not make an order in relation to apparatus if an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined."

Mr Radley-Gardner submits with some force that if an operator in the Claimant's position could not make a Part 4 application having exhausted all other routes the provisions of Paragraph 40(8) would be rendered entirely redundant.

29. Both counsel before me also appeared before the Upper Tribunal in **Crawley Borough Council v EE Limited and Hutchinson 3G Limited** [2022] UKUT 158(LC). In that case the operator failed to commence 1954 Act proceedings despite having received a section 25 Notice to terminate. It was common ground that the condition in paragraph 37(3)(d) was met so that the Council could apply under Part 6 to enforce its right to require the removal of the operator's apparatus from the site under paragraph 44.

30. At paragraph 7 Upper Tribunal Judge Cooke said:

*"The respondents' lease has now come to an end and it is common ground that they have no Code rights in relation to the site, and that while they remain in occupation of the site they cannot acquire new Code rights by serving paragraph 20 notices because of the effect of the Court of Appeal's decisions in [**Compton Beauchamp**]"*

31. It was not argued in that case by the site owner that a paragraph 20 notice was impermissible as a second bite at the cherry. The sole reason for the Upper Tribunal's want of jurisdiction was the uncertainty over the "occupier test" which was not resolved until the decision of the Supreme Court.

32. The Upper Tribunal found itself in a similar position when considering the position of On Tower in Compton Beauchamp. As explained by the Supreme Court (at paragraph 165) On Tower was, before the Upper Tribunal, prevented from accessing Paragraph 20 solely because it was not an operator in accordance with the interpretation given by the Court of Appeal:

"On Tower could not rely on the transitional provisions because they only applied Part 5 to subsisting agreements. The Upper Tribunal's conclusion that On Tower was

also prevented from using para 20 of the new Code was based solely on the judgments in Compton Beauchamp and Ashloch which had ruled that an operator with ECA on site such as On Tower was the occupier of the site for the purposes of para 9 and therefore unable to apply under para 20. As explained above, I consider that no such bar is created by the new Code and that the Upper Tribunal has jurisdiction to determine On Tower's application. I reiterate the point I made in para 93 above, that this conclusion does not improve the position of On Tower over the position it was in under the old code as the Upper Tribunal and the Court of Appeal have suggested. There was nothing in the old code which precluded an operator vulnerable to an application to remove his apparatus from applying for fresh rights to be imposed by order of the court under para 5 of the old code."

33. Consideration of the Old Code is important. An operator vulnerable to removal had the right to apply for fresh rights under Paragraph 5 of the Old Code as is confirmed at paragraph 93 of **Compton Beauchamp**:

"The operator who was on site holding over under an unwritten continuation of an agreement did have rights under the old code in the sense that, at least if it was vulnerable to a request for removal of its equipment, it could apply for fresh rights under para 5 of the old code"

34. The Supreme Court was not concerned with the question that arises before me, namely, can an operator whose inadvertence has led to the loss of renewal rights seek to make good its position under Part 4 via a regularising application, as paragraph 40(8) envisages? However, nothing said by the Supreme Court in **Compton Beauchamp** indicates that there is a want of jurisdiction in those circumstances, nor that an application under Part 4 cannot be made.

35. The difficulty with Mr Wills' submissions is that operators with no renewal rights at all, such as those with mere tenancies at will, or no rights at all, can access Part 6. Why should an operator in the Claimant's position be excluded when it too no longer has any subsisting rights?

The County Court – a failed or rejected application?

36. I do not read anything in the paragraph 135 of **Compton Beauchamp** to suggest that the test to be applied is res judicata. Lady Rose is proposing a much more practical solution. Rather than use legal terminology such as res judicata she talks about not having a "second bite at the cherry". She sees the kind of situation that the Claimant operator faces as one a Tribunal "will be able without much difficulty [to] determine". The word rejected is used interchangeably with "failed application".

37. The Order of DDJ Aikman sitting at the County Court at Birmingham on 23rd February 2023 dismissing the 1954 Act renewal claim was made solely under CPR. The claim from has not been served within the time period specified by CPR. An extension of time was refused. The merits of renewal under the 1954 Act we not engaged. This is not the kind of rejected or failed application referred to by Lady Rose at paragraph 135. Where for example a site owner defeats a renewal application on the grounds of redevelopment an operator cannot hope to make a successful Paragraph 20

application in response to a removal application. In those circumstances the fresh application would have no reasonable prospects of success because the operator had already lost on redevelopment. I take the same view in relation to applications where an operator has lost on section 30(1)(f) 1954 Act grounds – even though the redevelopment test therein stated is slightly different to the wording used in Paragraph 21(5) of the Code. An application in such circumstances would undoubtedly be struck out. In the present reference the merits have never been engaged and it cannot be said that the operator is seeking to rerun arguments it has previously lost.

Abuse of Process

38. I note in particular the Respondent's concerns that an unscrupulous operator might seek to "game" the process by deliberately losing under the 1954 Act so that it could then apply under Part 4 in response to a removal application and thus obtain more favourable Code terms than would have been available on renewal under the 1954 Act. Mr Wills in his Skeleton Argument rightly stigmatises such behaviour as "Absurdities and Unfairnesses". I have no hesitation that any such conduct would be met by striking out an operator's Part 4 application on the grounds that *"the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of process of the Tribunal"* (see FTT Rule 9(3)(d)).

39. Mr Wills helpfully conceded that the Claimant was not under any obligation in 2019 to remove its apparatus to allow roof repairs to take place. It is common ground that there were no provisions in the lease to compel the Claimant to do so. Mr Wills also concedes that the Claimant was exercising its right to delay in serving claim form within the 4 month period. The conduct of the Claimant was neither improper nor an abuse of process. The Respondent's case is that a Part 4 claim is impermissible but not abusive. Nor can it be said that there is delay here attributable to the Claimant which can be characterised as oppressive. It is common ground that the delay between 2019 and 2002 in progressing a resolution were in part, at least due to the pandemic.

40. Despite Mr Wills' concession I have nevertheless scrutinised the conduct of the Claimant. I have been referred to 16 separate emails sent by the Respondent's solicitors to the Claimant's solicitors chasing service of the claim form. Those emails reveal that the Claimant's solicitors made the Respondent's solicitors aware that the fee earner who initially had conduct of the case had left and that the solicitor who had taken over had unfortunately suffered a horse riding accident. There were clearly genuine problems at the Claimant's solicitors' office which explain the delay in service. Those problems were not sufficient to persuade the Deputy District Judge to extend time under CPR 7.6, but they are sufficient to satisfy me that there is no abuse of process here.

    See **Aktas v Adepta** [2011] QB 894 per Rix LJ at [90]:

    "A mere negligent failure to serve a claim form in time for the purposes of CPR 7.5/7.6 is not an abuse of process. It has never been held to be in any of the many cases cited to this court, nor in my judgment should it be described as such, nor as being tantamount to such. I say a "mere" negligent failure to serve in time in order to distinguish the typical case of such failure to be found in these appeals and many

other cases in the reports from any more serious disregard of the rules; but not in order to be in any way dismissive of the proper strictness with which a failure to serve in time, without good reason for doing so, is and has been rigorously dealt with by the courts, whether under the CPR or under the previous regime of the RSC. However, all the cases make clear that for a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules."

Paragraph 20 Notice

41. The Paragraph 20 Notice was served on 17th February 2023. However, the 1954 Act claim was not dismissed until 23rd February 2023. Mr Radley-Gardner submits that the tenancy was terminated under section 64 of the 1954 Act 3 months after that latest date for service of the claim form (12th November 2022) and therefore the Paragraph 20 Notice was served at a time when the Claimant no longer had a subsisting agreement. However, the analysis of the Court of Appeal in **Aktas v Adepta** [2011] QB 894 suggests that in circumstances where there is a failure to serve the claim does not automatically lapse but is required to be given a formal discharge.

42. The Respondent served Notice under Paragraph 40 to enforce removal of apparatus on 30th May 2023. Under those circumstances I am satisfied that the reference received by the Upper Tribunal on 27th June 2023 was made at a time when the Claimant operator was vulnerable to an application for removal of its apparatus. By that date the 1954 Act tenancy had been determined by operation of section 64 (3 months from 23rd February 2023). The Claimant thus found itself in "the last chance saloon" and, absent abuse of process or relitigating issues already determined, could access Part 4 of the Code.

Decision

43. The Claimant, having failed to obtain a new tenancy under the 1954 Act, can claim new rights under Part 4 of the Code, in response to an application to enforce removal of apparatus under Part 6, for the purposes of ensuring that the service provided by the Claimant's network is maintained.

44. The application to strike out the reference under Rule 9(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is refused.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.