Neutral Citation Number: [2023] EWCA Civ 825

Case No: CA-2022-002094

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger QC, Deputy Chamber President
[2022] UKUT 223 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

- -

Between :

VODAFONE LTD	**Claimant / Respondent to Appeal**
- and -	
(1) POTTING SHED BAR AND GARDENS LTD (formerly known as GENCOMP (NO.7) LTD)	**Respondent to Claim**
(2) AP WIRELESS II (UK) LTD	**Respondent to Claim / Appellant in Appeal**

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Wayne Clark and Fern Schofield (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**

Graham Read KC and James Tipler (instructed by **Osborne Clarke LLP**) for the **Respondent**

Hearing dates: 10 and 11 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the Upper Tribunal (Lands Chamber) (**"the UT"**) concerns the Electronic Communications Code (**"the Code"**). The Code is found in sch 3A to the Communications Act 2003 and was introduced in 2017 as a replacement for an earlier code. It enables operators of electronic communications networks to acquire what are called "code rights", including rights to install and keep electronic communications apparatus on someone else's land.

2. The Claimant (and Respondent to the appeal), Vodafone Ltd, (**"Vodafone"**) is an operator for the purposes of the Code. It had a lease of a site in Bingley, Yorkshire, which had originally been granted in 2003 by the then freehold owner. In 2018 a subsequent freehold owner granted a concurrent lease (or lease of the reversion) to the Appellant, AP Wireless II (UK) Ltd, (**"APW"**). The effect of that was that APW became entitled to the reversion on Vodafone's lease. Vodafone's lease was granted for a term expressed to expire in 2018, and it wished to obtain new code rights. It applied to the UT for this purpose. But the application gave rise to a question, which was summarised by the UT as follows: where a concurrent lease is entered into by a site provider after it has entered into a code agreement, what procedure must the operator follow under Parts 4 and 5 of the Code to obtain a new code agreement?

3. Unfortunately the Code does not give any clear answer to the question. The result is that preliminary issues were heard in the UT by Martin Rodger QC (now KC), the Deputy Chamber President (**"the Deputy President"**). He gave his decision on 17 August 2022 at [2022] UKUT 223 (LC) (**"the Decision"**). I do not attempt to summarise it here but in essence he rejected APW's contentions. He did however give APW permission to appeal, and APW contends on this appeal that he was wrong. Vodafone seeks to uphold his decision.

4. The other party joined to the proceedings is the current freeholder. It is a company now called Potting Shed Bar and Gardens Ltd but formerly (and at the time of the Decision) called Gencomp (No 7) Ltd, and it is convenient to refer to it as **"Gencomp"** as the Deputy President did, and as counsel before us did. It has taken no part in the proceedings, either in the UT or on appeal.

The facts

5. The facts were agreed before the UT, and I can take them from the Decision which contains a convenient summary at [30] to [39].

6. The Old Fire Station in Market Street, Bingley has in modern times been used as a bar. It is a building of generally two storeys but it incorporates a noticeably higher tower. In 2003 the then owner of the freehold, Publico Ltd, (**"Publico"**) agreed with Vodafone that Vodafone could use the tower for installation of antennas and other telecommunications equipment. The agreement took the form of a deed dated 14 November 2003 under which Publico agreed that Vodafone should have the right to install, keep and operate not more than 9 antennas on a specified part of the building (including in particular the tower), together with various ancillary rights, for a period of 15 years from the date of the deed in return for an annual fee. The parties are agreed

that this deed took effect as a lease. It was expressly excluded from Part II of the Landlord and Tenant Act 1954. I will refer to it as **"the Lease"**.

7. At the time the relevant code was the predecessor to the Code, conveniently referred to as **"the old code"**. A code called the Telecommunications Code had originally been enacted as sch 2 to the Telecommunications Act 1984. This code was substantially amended by the Communications Act 2003. As so amended, it was referred to in s. 106 of the 2003 Act as the "electronic communications code", and this was the old code in force at the date of the grant of the Lease.

8. The Digital Economy Act 2017 repealed the old code and replaced it with the Code, which was inserted as sch 3A into the Communications Act 2003. The Code came into force on 28 December 2017. There were transitional provisions in sch 2 to the Digital Economy Act 2017, the effect of which is that a subsisting agreement made under the old code has effect, after the coming into force of the Code, as an agreement made under Part 2 of the Code, subject to certain modifications: see sch 2 para 2(1). One of the preliminary issues decided by the UT was whether the Lease was a subsisting agreement when the Code commenced: see the Decision at [41] to [52]. The Deputy President's answer to that issue was that it was, and that has not been appealed, with the effect that it is not now disputed that the Lease has effect as an agreement made under Part 2 of the Code. It is not suggested that any of the modifications to the Code in the transitional provisions are relevant in the present case.

9. Publico had been dissolved in 2010, and by 2018 the freehold owner of the Old Fire Station was a company called Potting Shed Trading Ltd. On 22 June 2018 Potting Shed Trading Ltd granted APW a concurrent lease of part of the building, namely the tower from the 2nd floor up, with its roof and airspace above. (There may be issues as to precisely what is included in the demise as on the one hand the property demised is said to comprise the Tower, defined as the entire tower/chimney stack from 2nd floor level up including the elevations, but on the other hand it is said not to include any structural parts of the Tower. We have not however been concerned with any such issues). This lease (**"the Concurrent Lease"**) was for a term of 40 years ending on 21 June 2058. It was granted for a substantial premium and at a peppercorn rent.

10. In November 2018 the term expressed to be granted to Vodafone by the Lease came to an end. But, as appears below, the Lease was in effect continued under the Code.

11. In December 2019 Gencomp purchased the Old Fire Station, and it was registered as the freehold owner on 19 March 2020.

The effect of the grant of the Concurrent Lease

12. There is no dispute as to the effect of the grant of a concurrent lease as a matter of the ordinary law of landlord and tenant. The Deputy President gave an impeccable summary of the position in the Decision at [57] to [58], and since there is no suggestion that this contains any errors, it is simplest to reproduce it as follows:

> "57. A concurrent or overriding lease is one granted subject to and with the benefit of a lease which is already in existence. The term of the concurrent lease begins before the expiration or other determination of the existing lease. Although the concurrent lease does not carry

> with it the right to immediate physical possession of the land comprised in the lease, it does confer on the lessee the immediate right to the rents and profits of the land and the benefit of the covenants in the original lease as from the beginning of the concurrent term. (See Woodfall, Law of Landlord and Tenant, vol 1, 6.018).
>
> 58. At common law the grant of a concurrent lease operated as an assignment of the reversion on the original lease for the duration of the concurrent term but following the commencement of the Landlord and Tenant (Covenants) Act 1995 that is no longer the case. Where the original lease is granted after 1995 the second lease now operates as a genuine lease of the reversion; pursuant to section 15(1)(a) of the 1995 Act the concurrent lessee is entitled to enforce the original tenant's covenants including by forfeiture. Theoretically, the concurrent lessor (which remains lessor under the original lease) may also be entitled to enforce the covenants in the original lease but as between it and the concurrent lessee, it is the concurrent lessee which is now entitled to receive the rents and enforce the covenants in the original lease (Megarry and Wade, Law of Real Property, 10th ed para 19.114)."

13. In the present case that means that the effect of the grant of the Concurrent Lease was that APW became entitled to the reversion on the Lease and entitled to payment of the rent due under the Lease. There is therefore a chain of interests under which Gencomp as freeholder is APW's landlord and APW as holder of the Concurrent Lease is effectively Vodafone's landlord. This chain where the freeholder is the landlord of a concurrent lessee, who in turn is landlord of an occupying lessee, seems at first sight analogous to the case where the freeholder grants a lease to a head lessee, who in turn grants a sub-lease to an occupying sub-lessee. As will appear, however, the two situations are not the same and the differences may be significant.

The Code

14. It is convenient next to refer to the provisions of the Code. The background to the introduction of the Code is set out in the judgment of Lady Rose JSC (with whom Lord Hodge DPSC and Lords Sales, Leggatt and Burrows JJSC agreed) in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18 (***"Compton Beauchamp"***) at [1] to [5]. This judgment covered three conjoined appeals which were the first (and I believe so far only) cases to reach the Supreme Court on the Code, and concerned the meaning of "occupier" as I explain further below. It is not necessary for me to repeat the whole of the background given by Lady Rose, but I will just note that in 2011 the relevant Minister asked the Law Commission to conduct a review of the old code, and that this led to the Law Commission publishing a consultation paper in June 2012 (*The Electronic Communications Code* (Consultation Paper No 205)), followed by a report in February 2013 (*The Electronic Communications Code* (Law Com No 336) (**"the Law Commission Report"**)). The recommendations in the Law Commission Report were largely, although not wholly, accepted by the Government, and, as already referred to, the Code was introduced by the Digital Economy Act 2017, which inserted it as sch 3A to the Communications Act 2003, and came into force on 28 December 2017.

15. The Code is a lengthy and highly complex set of provisions and it is unnecessary to attempt to summarise it all. It is divided into Parts. Part 1 (paras 1 to 7) is headed *"Key Concepts"* and defines some key concepts used in the Code (para 1). It includes the following:

    (1) Paragraph 2 defines "operator". It includes a person to whom the Code has been applied by a direction under s. 106 of the Communications Act 2003. Under s. 106 OFCOM can give a direction applying the code to a person for various specified purposes, including (by s. 106(4)(a)) the provision of an electronic communications network. Vodafone is such an operator.

    (2) Paragraph 3 defines a "code right". This contains a list of various rights over or in relation to land which an operator might need for the statutory purposes. It is not necessary to set them all out; they include the right to install (sub-para (a)), keep (sub-para (b)), and inspect, maintain, adjust, alter, repair, upgrade or operate (sub-para (c)) electronic communications apparatus, on, under or over land.

    (3) Paragraph 4 defines "the statutory purposes". It includes the purposes of providing the operator's network.

    (4) Paragraphs 5 and 6 define "electronic communications apparatus" and "network" respectively. Nothing in the present case turns on the precise definitions, which are in line with what one would expect.

16. Part 2 of the Code (paras 8 to 14) is headed *"Conferral of code rights and their exercise"*. It makes provision about the conferral of code rights, the persons who are bound by them and their exercise (para 8). Paragraph 9(1) provides:

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

In *Compton Beauchamp* the Supreme Court held that in order for the regime created by the Code to work, the occupier of the land had to be a different person from the operator, and that the operator was not therefore to be regarded as the occupier of the land even if it would otherwise be regarded as in occupation of the site through having installed and kept its apparatus there: see per Lady Rose at [117] and [137].

17. Paragraph 10 is of central importance to the present case. It provides as follows.

> "*Who else is bound by code rights?*
>
> 10 (1) This paragraph applies if, pursuant to an agreement under this Part or Part 4A, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred.
>
> (2) If O has an interest in the land when the code right is conferred, the code right also binds—
>
> (a) the successors in title to that interest,

(b) a person with an interest in the land that is created after the right is conferred and is derived (directly or indirectly) out of—

(i) O's interest, or

(ii) the interest of a successor in title to O's interest, and

(c) any other person at any time in occupation of the land whose right to occupation was granted by—

(i) O, at a time when O was bound by the code right, or

(ii) a person within paragraph (a) or (b).

(3) A successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement by which O conferred the right.

(4) The code right also binds any other person with an interest in the land who has, pursuant to an agreement under this Part or Part 4A, agreed to be bound by it.

(5) If such a person ("P") agrees to be bound by the code right, the code right also binds—

(a) the successors in title to P's interest,

(b) a person with an interest in the land that is created after P agrees to be bound and is derived (directly or indirectly) out of—

(i) P's interest, or

(ii) the interest of a successor in title to P's interest, and

(c) any other person at any time in occupation of the land whose right to occupation was granted by—

(i) P, at a time when P was bound by the code right, or

(ii) a person within paragraph (a) or (b).

(6) A successor in title who is bound by a code right by virtue of sub-paragraph (5)(a) is to be treated as a party to the agreement by which P agreed to be bound by the right."

18. Paragraph 11(1) provides:

"*Requirements for agreements*

11 (1) An agreement under this Part—

(a) must be in writing,

(b) must be signed by or on behalf of the parties to it,

(c) must state for how long the code right is exercisable, and

(d) must state the period of notice (if any) required to terminate the agreement."

19. Part 3 (paras 15 to 18) is headed *"Assignment of code rights, and upgrading and sharing of apparatus"*. Paragraph 16, which concerns assignment of code rights, provides that an agreement under Part 2 cannot prevent or limit assignment of the agreement to another operator (para 16(1)). Paragraph 16(4) provides that from the time when the assignment takes effect the assignee is bound by the terms of the agreement. Paragraph 16(5) provides:

"(5) The assignor is not liable for any breach of a term of the agreement that occurs after the assignment if (and only if), before the breach took place, the assignor or the assignee gave a notice in writing to the other party to the agreement which—

(a) identified the assignee, and

(b) provided an address for service (for the purposes of paragraph 91(2)(a)) for the assignee."

20. Paragraph 17 is concerned with the operator's right to upgrade or share the use of its apparatus. Paragraph 17(1) provides that it may do so if the conditions in sub-paragraphs (2) and (3) are met. Paragraphs 17(3) and (4) provide as follows:

"(3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.

(4) For the purposes of sub-paragraph (3) an additional burden includes anything that—

(a) has an additional adverse effect on the other party's enjoyment of the land, or

(b) causes additional loss, damage or expense to that party."

21. Part 4 (paras 19 to 27) is headed *"Power of court to impose agreement"*. It makes provision about the circumstances in which "the court" can impose an agreement on a person by which the person confers, or is otherwise bound by, a code right, the test to be applied by the court, and the effect of such an agreement (para 19(a)-(c)). Although "the court" is defined in paragraph 94 of the Code to mean (in England and Wales) the County Court, regulations have in fact been made which confer jurisdiction on the UT and the First-tier Tribunal (**"FTT"**). The regulations also require relevant proceedings (which includes proceedings under Part 4 or Part 5 of the Code) to be commenced in the UT, although the UT can transfer them to the FTT or the County Court; and provide that references in the Code to "the court" are to be read as if they included reference to the relevant tribunal: see the Electronic Communications Code (Jurisdiction)

Regulations 2017 SI 2017/1284, regs 3(1)(aa), 3(2)(a), 3(3) , 4(1)(a) and 5(1)(a). I will continue to refer to "the court" when setting out the provisions of the Code, but in practice this is to be understood in the present case as meaning the UT.

22. Paragraph 20 deals with the power of the court to impose an agreement. By paragraph 20(1) it applies:

> "where the operator requires a person … to agree–
>
> (a) to confer a code right on the operator, or
>
> (b) to be otherwise bound by a code right which is exercisable by the operator."

By paragraph 20(3) the operator can apply to the court for an order if agreement is not reached within 28 days. By paragraph 20(4) such an order is one:

> "which imposes on the operator and the relevant person an agreement between them which–
>
> (a) confers the code right on the operator, or
>
> (b) provides for the code right to bind the relevant person."

23. Paragraph 21 provides for the test to be applied by the court, which is in essence that the prejudice to the relevant person can be adequately compensated in money and is outweighed by the public benefit in making the order. Paragraph 22 provides that an agreement imposed by an order under paragraph 20 takes effect for all purposes as an agreement under Part 2 of the Code between the operator and the relevant person. Paragraph 23 sets out the terms which are to be included in an agreement imposed by order under paragraph 20, and by paragraph 23(3) these must include terms as to the payment of consideration by the operator to the relevant person:

> "for the relevant person's agreement to confer or be bound by the code right (as the case may be)."

Paragraph 24 sets out how such consideration is to be assessed (effectively the market value of the agreement, but on the assumption that the right does not relate to the provision or use of an electronic communications network).

24. A Part 4A has recently been added but is not relevant to the present case. The next relevant Part is Part 5 (paras 28 to 35), headed *"Termination and modification of agreements"*. It makes provision for the continuation of code rights after the time at which they cease to be exercisable under an agreement, and for procedures for bringing an agreement to an end or changing an agreement relating to code rights (para 28(a)-(c)).

25. Paragraph 29 identifies which agreements Part 5 applies to, called "code agreements". These are agreements under Part 2 of the Code (para 29(1)), but there is an exception for business leases whose primary purpose is not to grant code rights (para 29(2) and (3)). Since the primary purpose of the Lease was indeed to grant code rights, it is a code agreement for the purposes of Part 5.

26. Paragraph 30 provides for code rights and code agreements to continue even if they are expressed to be for a limited period. So far as relevant it provides as follows:

> "*Continuation of code rights*
>
> 30 (1) Sub-paragraph (2) applies if—
>
> (a) a code right is conferred by, or is otherwise binding on, a person (the "site provider") as the result of a code agreement, and
>
> (b) 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 an end so far as it relates to that right.
>
> (2) Where this 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.
>
> …
>
> (4) Sub-paragraph (2) is subject to the following provisions of this Part of this code."

The effect of this is broadly that a code agreement continues (even if expressed to be for a limited period as the Lease was here) until steps are taken either by the site provider or the operator to have it terminated, modified or replaced. It should be noted that paragraph 30(1)(a) contains the definition of "site provider".

27. Paragraph 31 entitles the site provider to initiate a termination of a code agreement by notice. Paragraph 31(1) provides:

> "A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement."

Such a notice can only be given on a limited number of grounds, specified in paragraph 31(4) as follows:

> "(4) The ground stated under sub-paragraph (2)(c) must be one of the following—
>
> (a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;

(b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;

(c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;

(d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met."

28. Paragraph 32 enables the operator to give a counter-notice and apply to the court, in which case the court must order the agreement to come to an end if the relevant ground is made out, but otherwise must make one of the orders in paragraph 34.

29. Paragraph 33 enables either party to initiate a change once the contractual term of an agreement has expired. Paragraph 33(1) provides as follows:

"*How may a party to a code agreement require a change to the terms of an agreement which has expired?*

33 (1) An operator or site provider who is a party to a code agreement by which a code right is conferred by or otherwise binds the site provider may, by notice in accordance with this paragraph, require the other party to the agreement to agree that—

(a) the code agreement should have effect with modified terms,

(b) where under the code agreement more than one code right is conferred by or otherwise binds the site provider, that the agreement should no longer provide for an existing code right to be conferred by or otherwise bind the site provider,

(c) the code agreement should—

(i) confer an additional code right on the operator, or

(ii) provide that the site provider is otherwise bound by an additional code right, or

(d) the existing code agreement should be terminated and a new agreement should have effect between the parties which—

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

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

Paragraph 33(2) specifies what the notice must contain, including the day on which the proposed change is to take effect. By paragraph 33(3) this must be both more than 6 months after the notice is given, and:

> "after the time at which, apart from paragraph 30, the code right to which the existing code agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider."

If the operator and site provider do not reach agreement within 6 months, either may apply to the court for an order under paragraph 34 (para 33(5) and (6)).

30. Paragraph 34 specifies what orders the court may make on an application under paragraphs 32 or 33. This includes continuing the existing code agreement, modifying the existing agreement, and replacing it with a new agreement. The latter is provided for by paragraph 34(6) as follows:

> "(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—
>
> (a) confers a code right on the operator, or
>
> (b) provides for a code right to bind the site provider."

Paragraph 34(7) provides that the existing code agreement continues until the new code agreement takes effect. Paragraphs 34(9) and (10) provide that the terms of the new agreement are such as are agreed between the operator and the site provider, or if they are unable to agree such as are specified by the court.

The issue

31. It is now possible to explain what the issue is. The Lease was expressed to be granted for a term of 15 years expiring in 2018 (see paragraph 6 above). The effect of paragraph 30(2) of the Code is that notwithstanding the expiry of the contractual term Vodafone's rights continued. But the expiry of the contractual term meant that Vodafone could *prima facie* give a notice under paragraph 33 of the Code requiring the existing code agreement to be terminated and replaced with a new one. Vodafone wished to renew its rights for a further term of 10 years.

32. Before the UT, however, Vodafone took the view that only Gencomp could grant it new rights under the Code, such rights being made binding on APW by an order of the UT; whereas APW's position was that it was the only party capable of conferring new rights, and that they should then be made binding on Gencomp. Gencomp (which as I have said did not participate in the proceedings) was understood to be happy to do whatever was required of it.

33. Vodafone served a suite of alternative notices on each of APW and Gencomp, in each case either under Part 5 of the Code (paragraph 33) or Part 4 of the Code (paragraph 20).

34. The question turns on paragraph 33(1) of the Code and specifically whether APW is "a site provider who is a party to a code agreement by which a code right is conferred by or otherwise binds the site provider" (see paragraph 29 above). It is not disputed that APW is a "site provider" as defined in paragraph 30(1)(a) of the Code. As set out at paragraph 26 above, this refers to the case where:

> "a code right is conferred by, or is otherwise binding on, a person (the "site provider") as the result of a code agreement…"

The Lease is a code agreement which grants Vodafone code rights, and it is common ground that it is binding on APW. APW is therefore a site provider as defined.

35. But it is not enough for APW to be a site provider for paragraph 33(1) of the Code to apply to it; it must also be a "party to the agreement". The effect of paragraph 10(3) of the Code (set out at paragraph 17 above) is that a "successor in title" to the original grantor who is within paragraph 10(2)(a) is to be treated as a party to the agreement, but it is noticeable that paragraph 10 does not contain any similar provision for a person who is within paragraph 10(2)(b) as a person with an interest in land derived from the interest of the original grantor or his successor.

36. Vodafone's contention before the UT was therefore that although the Lease was binding on APW, APW was not a "party to the agreement", being neither the grantor (which was Publico) nor its successor in title (which was now Gencomp); and that meant that the correct parties to any application under paragraph 33 of the Code, or to an order under paragraph 34 of the Code, would be Vodafone (the operator) and Gencomp (the successor in title to the original grantor).

37. This is where there may be a difference between the case where there is a chain of interests resulting from the grant of a headlease by the freeholder and then the grant of a sublease by the headlessee; and the case where such a chain results from the freeholder granting a lease to a lessee and then granting a concurrent lease. In the former case there is no difficulty. If the sub-lease is an agreement conferring code rights and hence a code agreement, the headlessee is not only a site provider but also party to the code agreement such that if the sublessee wishes to exercise rights under paragraph 33 of the Code, or to apply to the court under paragraph 34, the other party to receive the notice, or to be the respondent to the application, is undoubtedly the headlessee. But where the chain results from the grant of a concurrent lease, the drafting of the Code leaves the position very unclear.

38. APW's contention before the UT was that it was the obvious person to be the recipient of a notice under paragraph 33 of the Code, or the respondent to an application under paragraph 34 of the Code. It should therefore be regarded as a party to the relevant code agreement (the Lease) either (i) because it was to be so regarded under the general law or (ii) because it should be treated as a successor in title to the original grantor (and hence a party to the agreement by virtue of paragraph 10(3) of the Code).

The Decision of the UT

39. In the UT, the Deputy President dealt with this question in the Decision at [93] to [122]. In a conspicuously clear and thoughtful discussion of the problem, he rejected both parties' contentions. His reasoning was as follows:

(1) He agreed with Mr Graham Read QC (now KC), who appeared for Vodafone, that paragraph 10(3) of the Code was intended to define comprehensively all those who were to be treated as parties to a code agreement [99]. He therefore rejected the submission of Mr Wayne Clark, who appeared for APW, that APW could be treated as a party to the Lease [104].

(2) Nor could APW be described as the successor in title to the interest of the lessor [104].

(3) That meant that APW was not within paragraph 33 of the Code as it was not a site provider that was a party to a code agreement, nor "the other party to the agreement" [105]-[106].

(4) But Gencomp was not in a position to enter into an agreement conferring code rights on Vodafone; it did not have the right to possession or occupation of the site and it could not confer them on Vodafone. This was nothing to do with Gencomp's status under the Code, but was "simply because it cannot grant to Vodafone what it no longer has, having already granted it to APW" [108].

(5) Nor could the UT assist. Paragraphs 20 and 34 of the Code operate by ordering or imposing agreements, and their reach is limited by what could otherwise be achieved by agreement. Hence the UT could not order Gencomp to grant rights to Vodafone over land in the possession of APW [109].

(6) That meant that the code rights which Vodafone had sought by notices served on Gencomp requiring it to enter into a conferring agreement were not available either under Part 4 or Part 5 of the Code, whether by agreement or by order of the UT. Nor for reasons already given were they available in an application under Part 5 against APW [113].

(7) But the solution to the problem was available in Part 4, and there was no obstacle to an operator making use of Part 4 [117]-[118].

(8) Admittedly that left a gap in the legislation which was that a site provider such as APW that was not a party to the existing agreement was prevented from taking steps to bring it to an end. The Deputy President did not see a solution to this "small but potentially important structural defect", but did not think it provided a reason for refusing to extend the use of Part 4 to operators in situ wishing to obtain a renewal or modification by an agreement imposed between it and a concurrent lessee [120].

40. He summarised his conclusion as being that the UT had jurisdiction under paragraph 20 of the Code to impose an agreement on Vodafone and APW conferring code rights; but had no jurisdiction to order any of the parties to enter into a conferring agreement under paragraph 34 [122].

41. The Deputy President himself granted APW permission to appeal.

Grounds of Appeal

42. APW's grounds of appeal in effect raise two questions:

(1) Is APW "a party to a code agreement" for the purposes of paragraph 33 of the Code? Two alternative arguments are advanced, namely:

(a) that paragraph 10(3) is not exhaustive of who is to be treated as a party to an agreement; or

(b) that APW is a "successor in title" within the meaning of paragraph 10(2)(a) and (3) of the Code.

(2) Was the UT right to hold that if neither Vodafone nor APW could invoke paragraph 33 of the Code, then Vodafone could make a claim for renewal of the Lease under Part 4 of the Code?

43. Vodafone does not seek to cross-appeal on the issues on which the Deputy President rejected its contentions. It seeks to uphold the Decision.

Is APW a successor in title?

44. I will consider first the argument that APW is a successor in title within the meaning of paragraph 10(2)(a) of the Code (and hence by paragraph 10(3) is to be treated as a party to the Lease). This was advanced by Mr Clark, who appeared with Ms Fern Schofield for APW, as very much a subsidiary argument, but there is some logic in considering it first because if APW were a successor in title within paragraph 10(2)(a), there would be no need to consider the rather more difficult questions raised by APW's main argument.

45. However I consider that the contention that APW is a successor in title is one that must be rejected.

46. Mr Clark, in his written submissions, referred to *Pelosi v Newcastle Arms (Brewery) Nottingham Ltd* (1982) 43 P&CR 18 for the proposition that even well-known expressions, or terms of art, may be construed in a way that departs from their ordinary meaning. In that case this Court held that "predecessors in title" in the Landlord and Tenant Act 1927 (which gives the tenant a right on quitting a holding to compensation for improvements carried out by him or his predecessors in title) was widely enough defined to include a previous sub-lessee who had carried out improvements, in circumstances where the tenant claiming compensation had acquired both the sublease and the headlease in reversion on it, and the sublease had merged in the headlease.

47. In the present case however the wording and structure of paragraph 10 of the Code (set out at paragraph 17 above) seems to me to make the argument one that is impossible to maintain. Paragraph 10(1) refers to the case where, pursuant to an agreement under Part 2 of the Code, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred. In the present case, pursuant to the Lease (which under the transitional provisions has effect as an agreement under Part 2 of the Code), Vodafone's code rights in respect of the tower were conferred by Publico, which was the occupier of the tower when the code rights were conferred. Publico is therefore O in this terminology. Paragraph 10(2) applies where O had an interest in land when the code right was conferred. Publico did have such an interest, namely the freehold, and paragraph 10(2) therefore applies. Paragraph 10(2) lists three categories of persons who are bound by the code right: (a) successors

in title; (b) those with an interest in land created after the code right was conferred and derived, directly or indirectly, from (i) O's interest or (ii) the interest of a successor in title to O's interest; and (c) any other person in occupation whose right to occupation was granted by O (at a time when O was bound by the code right), or by a person within (a) or (b).

48. In this taxonomy of interests, (a) applies to Gencomp which is a successor in title to Publico, and (b)(ii) applies to APW, which has an interest in land (the Concurrent Lease) which was both created after the Lease and derived (directly) from Gencomp's interest. I think it impossible to regard APW, which falls squarely within paragraph 10(2)(b), as also falling within paragraph 10(2)(a). First paragraph 10(2) on its natural reading refers to three mutually exclusive categories, and there is nothing to suggest that the drafter contemplated that a person could fall into more than one by virtue of the same interest. And second, and to my mind conclusively, paragraph 10(2)(a) refers to the "successors in title to *that interest*". That is a reference to the interest in land that O had at the time when the code rights were conferred. In the present case the interest in land that Publico had when the Lease was granted was the freehold. If one asks if APW is a successor in title to the freehold, there can be only one answer which is that it is not: it has not succeeded to the freehold, and has never had any title to the freehold interest at all. This has nothing to do with "successors in title" being given a technical meaning or being a term of art; it is simply the ordinary meaning of the words used.

49. This is what the Deputy President held. He put it succinctly in the Decision at [104] as follows:

> "Nor, applying the ordinary meaning of "successor in title", can the lessee under the concurrent lease be described as the successor in title to the interest of the lessor. The grant of a concurrent lease does not transfer the lessor's title to the lessee, it creates a new interest while the lessor's original interest remains with the lessor. As far as paragraph 10 is concerned, APW's interest does not fall under sub-paragraph (2)(a), but under sub-paragraph 2(b) as having been created after the Original Agreement [ie the Lease] and being derived out of the interest of a successor in title to Publico."

I agree.

50. Those were the reasons why I have concluded that the contention that APW is a successor in title within paragraph 10(2)(a) of the Code (and hence is to be treated as a party to the Lease by paragraph 10(3) of the Code) should be rejected.

Is APW otherwise a party to a code agreement for the purposes of paragraph 33?

51. But that was not the main argument advanced by Mr Clark. This was that, quite outside paragraph 10, APW was to be regarded for the purposes of paragraph 33 of the Code as a party to the Lease, and hence Part 5 of the Code could apply.

52. The Deputy President neatly encapsulated Mr Clark's submission in the Decision at [88] as follows:

> "Mr Clark's first solution to the suggested paradox was to proceed on the

> basis that paragraph 10 was not intended to be exhaustive of those who were bound by a code agreement or were to be treated as parties to the agreement. Because the lessee of the reversion had the right to the rent under the lease and the benefit of the tenant's covenants, it was, in effect, a party to the agreement whether paragraph 10 treated it in that way or not; the Original Agreement was binding on it as a matter of property law, irrespective of the operation of paragraph 10. The Code was intended to work by affording the operator a simple route to obtain a renewal by giving notice to the site provider. Limiting "the site provider who is a party to a code agreement" to a person who was the original contracting party, or a party treated as such only by reason of paragraph 10(3), causes difficulty in what was clearly intended to be an uncomplicated process. The better approach was to construe the words "site provider who is a party to a code agreement" as comprising not only those persons who fall within paragraph 10(3) but also a person who is entitled to the reversion immediately expectant upon the determination of the operator's contractual term and who is the only person who can confer on the operator the right to immediate possession."

53. I have come to the conclusion that this submission should be accepted, and I will now try and explain why.

54. The Code consistently draws a distinction between those who are parties, or treated as parties, to code agreements and those that are merely bound by code rights. I think it is worth spelling out what the effect is under the Code of being a party to an agreement. The paradigm case of such a person is of course one of the original parties. A code right can only be conferred on an operator by an agreement between the occupier of the land and the operator (para 9). This agreement must be in writing and signed by or on behalf of the parties to it (para 11(1)(a) and (b)). So if A grants a code right to B, there will be a signed written agreement between them and the parties to the agreement will (at any rate initially) obviously be A and B. If one assumes that there are no relevant dealings with the land or with the operator's rights under the agreement, they will equally obviously continue to be the parties to the agreement. If the agreement is a code agreement, that means that Part 5 applies to it (para 29). (The effect of paragraph 29 is to draw a distinction between business leases whose primary purpose is *not* to grant code rights, which are left to be governed by Part II of the Landlord and Tenant Act 1954, and all other agreements under Part 2, which take effect as code agreements to which Part 5 applies). The effect of Part 5 applying is that the agreement will continue despite the expiry of the contractual term but that both A and B will have rights against the other to invoke the provisions of Part 5.

55. In particular A, being a "site provider who is a party to a code agreement" will have the right to bring the agreement to an end by notice in any of the circumstances specified by paragraph 31(4) (substantial breaches by B of its obligations, persistent delays by B in making payments, A's intention to redevelop, or the test in paragraph 21 not being met): see the text of paragraph 31(4) set out at paragraph 27 above. It may be noted that the first two of these are worded as follows:

> "(a) that the code agreement ought to come to an end as a result of substantial breaches…

> (b) that the code agreement ought to come to an end because of persistent delays…"

The effect of this no doubt is that if the operator gives a counter-notice and the matter goes to the tribunal, the site provider will not only have to establish the fact of substantial breaches, or persistent delays, as the case may be, but also persuade the tribunal that it is an appropriate case for the agreement to come to an end. By contrast the redevelopment ground is worded as follows:

> "(c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end".

That would require the site provider to do no more than establish the facts, in which case the tribunal would be obliged to order the code agreement to come to an end. This ability for the site provider to force the termination of an agreement for the purposes of redevelopment is self-evidently a significant right for the site provider.

56. In addition to A's rights to terminate under paragraph 31, both A and B have rights to initiate a change to the terms of an agreement that has expired under paragraph 33, and to apply to the tribunal if agreement has not been reached within 6 months (para 33(4) and (5)).

57. These are the main consequences of being a party to an agreement. There are however some others. Thus under paragraph 16(5) an operator who wants to assign an agreement can avoid liability for breach of its terms after assignment by giving notice to "the other party to the agreement" (see paragraph 19 above). And under paragraph 17, the question whether the operator can upgrade, or share the use of, its apparatus depends among other things on whether the upgrading or sharing imposes no additional burden on "the other party to the agreement" (para 17(3)), and that in turn depends in part on whether there is anything that has an additional adverse effect on "the other party's enjoyment of the land" (para 17(4)) (see paragraph 20 above).

58. This all makes sense so long as A and B remain the occupier (or site provider) and operator respectively. But code agreements are intended to be long-term agreements, continuing despite the expiry of their contractual terms, and capable of surviving both a change of site provider and a change of operator. One would expect that the provisions of the Code which depend for their application on a person being a party to the agreement would also be capable of continuing to apply despite a change in the identity of the site provider or operator.

59. Take first the case where there is a change of operator. Under paragraph 16 an agreement entered into after the Code comes into effect cannot prevent or limit assignment of the agreement to another operator. So the Code envisages that agreements conferring code rights will be freely assignable to new operators. This was a recommendation of the Law Commission: see the Law Commission Report, Chapter 3 (Ancillary Rights and Obligations) at §3.4-§3.28. At §3.17 they say that by assignment "we mean simply the case where one Code Operator comes to stand in the shoes of another Code Operator"; and at §3.20 they say that assignment should not be a means for landowners to extract profit from the system: "A change of Code Operator

in itself should in most cases be immaterial to the Site Provider." They therefore recommended at §3.24 and §3.25 that operators should be entitled to assign the benefit of their agreements, and that any term in an agreement preventing, restricting, or requiring payment for the assignment to another operator of the code rights conferred by the agreement should be void.

60. Suppose therefore that B duly assigns its code agreement to C. In order to ensure that C "comes to stand in the shoes of" B, one would expect C to enjoy the same position under the Code that B did. So far as the contractual position is concerned this is indeed the case. It is to be noted that code agreements may take the form of the grant of property rights (either in the form of a lease or an easement), but may take the form of merely contractual arrangements. The Law Commission Report refers to the latter as "wayleaves": see eg §1.27 fn 30 ("A wayleave is an agreement which does not amount to a property right (that is, it is a licence or permission), in contrast with an easement or a lease") and §2.16 ("in legal terms a right to keep equipment on land might be conferred by a lease or an easement (both of which are property rights) or a licence (a personal permission, often known in this context as a wayleave, and generally arising as a matter of contract…)"). Under the general law the assignment of a contract is effective to confer the benefit of the contract on an assignee but not normally the burden of the contract. But paragraph 16(4) provides that from the time when the assignment of an agreement under Part 2 takes effect, the assignee is bound by the terms of the agreement. In this way the assignee takes both the benefit and the burden of the agreement.

61. What however is conspicuously missing from the Code (either in paragraph 16 or anywhere else) is any provision equivalent to that in paragraph 10(3) that such an assignee is to be treated as a party to the agreement. But it cannot seriously be supposed that, after an assignment by B to C, C is not a "party to the agreement" for the purposes of the Code. Take for example, the case where C commits substantial breaches of its obligations under the agreement, or persistently delays in making payments to A, or A wishes to redevelop. If C is to "stand in the shoes of" B and if the assignment to C is to be something that is generally "immaterial to" A, one would expect A to be able to serve a notice on C seeking to terminate the agreement just as A could have served such a notice on B had B still been the operator. But A's right to do this is conferred by paragraph 31(1) of the Code. This is set out at paragraph 27 above and I repeat it here for convenience:

> "A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement."

As this makes clear, A can only serve a notice under paragraph 31 on C if C is a party to the agreement.

62. The same applies to the paragraph 33 rights which are conferred on both parties. Under paragraph 33(1) A can initiate a change to the agreement by serving a notice as follows:

> "An operator or site provider who is a party to a code agreement by which a code right is conferred by or otherwise binds the site provider may, by notice in accordance with this paragraph, require the other party to the agreement to agree that …"

So unless C is "the other party to the agreement", A cannot operate this paragraph.

63. Now it was in fact common ground before us that in such a case C is to be regarded as a party to the agreement, and that A does have the right to invoke both paragraph 31 and paragraph 33 against C. I agree that this is the only sensible interpretation. But it should be noted what this means. It means that the Code requires C to be regarded as a "party to the agreement" despite the fact that there is no provision stating that an assignee of the agreement is to be treated as a party to it. Two things to my mind follow. First the drafter of the Code cannot have intended "party to the agreement" to mean (only) an original party to the agreement. And second, the drafter cannot have intended "party to the agreement" to be confined to (i) an original party to the agreement and (ii) a person expressly stated by the Code to be a person treated as a party to the agreement.

64. Against this background, we can now consider the case where there is a change of site provider rather than operator. What one would expect to find is that just as A can exercise code rights against both B and (if the agreement is assigned) C, conversely the operator (B, or as the case may be, C) can exercise code rights against both the original site provider A, and someone who steps into A's shoes.

65. But here the position is slightly more nuanced than with assignment of the agreement to a new operator. Code rights are by definition rights in relation to land (para 3), and may only be conferred by an occupier of the land (para 9). But as we have seen the agreement itself may take the form of a grant of property rights (in the form or a lease or easement) or a mere contractual arrangement (a wayleave). Moreover the occupier of land may not be the only person with an interest in, or right to occupation of, the land and provision needs to be made for others with such an interest or right. This of course is where paragraph 10 comes in.

66. To understand what paragraph 10 is doing, it is helpful to ask why it is needed. If the occupier has an interest in the land (as freeholder or lessee), and confers code rights on the operator by way of a grant of property rights, no express provision is required to make those rights binding on his successors in title. The essence of a property right is that it is exercisable against a successor in title. Take the case where A is a freeholder and confers code rights on B by a lease. If A then transfers the freehold to D, B's lease will be binding on D as a matter of the general law, and D will also acquire the right to the rent payable by B and the benefit of B's covenants. (I leave out of account here any question of registration). That makes one think that paragraph 10(2)(a) and (3) are not really designed to deal with this situation as they would seem to be quite unnecessary for this purpose. Paragraph 10(2)(a) is unnecessary as D will be bound by the lease in any event. And just as the assignee of the agreement who acquires the benefit and the burden of the agreement (ie C) is to be regarded as a party to the agreement for the purposes of paragraph 31 and 33 of the Code, so one would expect that a transferee of the freehold who takes subject to and with the benefit of a lease (ie D) would equally be regarded as a party to the agreement for the purposes of paragraph 31 and 33 of the Code without the need for express provision to that effect.

67. The explanation for paragraph 10(2)(a) is therefore likely to be something else. The obvious answer is that it is intended to deal with the case where A confers rights on B by way of wayleave. Such an agreement, not being the grant of a property right, would not under the general law be binding on D. D could take the benefit of the wayleave,

but would not be bound to honour it. That would make the operator's rights precarious, which would be contrary to the purpose of the Code. The Code was intended, in the words of the relevant Minister, to "provide a robust platform to enable long-term investment and development of digital communications infrastructure in the 21st century": see *Compton Beauchamp* per Lady Rose at [1]. So it is unsurprising that paragraph 10(2)(a) provides that someone who steps into A's shoes by taking an assignment of A's interest will be bound by the agreement conferring code rights.

68. What then of paragraph 10(3)? I think it was largely for the avoidance of doubt. We know that someone such as D who takes the same interest as A will be bound by the agreement conferring code rights even if this is in the form of a wayleave (by virtue of paragraph 10(2)(a)); and I think it must have been assumed that D would also have the benefit of such an agreement as successor to A. In such a case therefore D steps into A's shoes and I think that even without paragraph 10(3) the Code would only make sense if D were regarded as becoming a party to the agreement in A's place. After the transfer to D, it is D and not A who is interested in the question whether it can terminate the agreement by notice under paragraph 31, or seek a modification under paragraph 33. And if B wants to initiate the termination of the agreement and its replacement by a new one under paragraph 33, the obvious person for B to serve a notice on, or to bring an application against, would be D, as it is D who is now in a position to grant a new agreement. Equally if B wishes to assign to C, it is D on whom one would expect B to have to serve any notice under paragraph 16(5). And if B wishes to upgrade or share its apparatus, one would expect that the issues under paragraph 17(3) and (4) (namely, whether this would impose an additional burden on the other party to the agreement, or have an adverse effect on their enjoyment of the land) would be assessed by reference to the burden on D, or adverse effect on D's enjoyment. Seen in this light, in my view paragraph 10(3) simply spells out what would have been implicit anyway.

69. It is now possible to consider the position where A, instead of transferring its freehold to D, grants a concurrent lease to E. If, as in the present case, the original agreement took effect as a lease, then under the general law E becomes entitled both to the benefit and the burden of the lease, as explained by the Deputy President (paragraph 12 above). One would expect E to be regarded for the term of the concurrent lease as the other party to the agreement, as during that period, E steps into the shoes of A just as much as D does. It is E, not A, who has an interest in bringing the agreement to an end if the operator commits substantial breaches of its obligations under the agreement, or persistently delays in paying rent, or if E wishes to redevelop; it is E who has an interest in initiating a modification of the agreement, and it is E who is in a position to grant a replacement agreement in place of the existing agreement and so is the person on whom the operator would be expected to serve notice under paragraph 33. It is also E whom one would expect to be served with notice of a proposed assignment under paragraph 16(5), and E who might have an additional burden imposed on it, or whose enjoyment of the land might be adversely affected, by a proposal to upgrade or share the use of the operator's apparatus under paragraph 17. None of these provisions can apply to E unless it is regarded as a party to the agreement, but all of them are provisions which one would expect to be applicable to E.

70. In those circumstances the question to my mind resolves itself to this. E (for the reasons I have given above) is not a "successor in title" to A, and so cannot take advantage of the provision in paragraph 10(3) which provides that such a successor is to be treated

as a party to the agreement. Does this mean that it cannot otherwise be regarded as a party to the agreement? That depends on whether paragraph 10(3) is intended to be an exhaustive statement of who, apart from the original grantor, is to be regarded as a party to the agreement, or not.

71. The Deputy President considered that paragraph 10(3) was intended to be exhaustive. He said (at [102]):

> "By specifying that "a successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement", sub-paragraph (3) does two things. First, it makes it clear that the Code uses the expression "a party to the agreement" to refer only to the original parties to the agreement and not to their successors or other third parties; and secondly it distinguishes between those who are bound by code rights who are to be treated as parties to the agreement and those who are not. It follows that, for the purposes of the Code, someone in sub-paragraphs (2)(b) or (c) who is bound by code rights because they hold derivative property or contractual rights is not a party to the agreement, nor are they to be treated as a party to the agreement."

72. I have already said that the Decision is a thoughtful one, and the Deputy President's views, being that of a specialist tribunal, are entitled to respect. But I do not agree with him in this passage. As I have pointed out above, the provisions in paragraph 16 of the Code relating to an assignment of the agreement by the operator do not contain any provision to the effect that the assignee is to be treated as a party to the agreement, although it is common ground that the assignee must be such a party. That means that the Code does not use "party to the agreement" to refer only to the original parties, at any rate in the case of the operator. But if an operator who is an assignee of the agreement can be a party to the agreement without express provision, it would seem odd if the same was not also true of the site provider.

73. I recognise that purely as a matter of language there is force in the Deputy President's point that paragraph 10(3) singles out those who are bound by code rights and are to be treated as parties to the agreement (namely successors in title), whereas it makes no such provision for others who are bound by code rights, including those like APW whose interest is a derivative one. By itself the Deputy's President's reading of this provision is a perfectly tenable one. But on the other hand paragraph 10(3) does not expressly say that it is an exhaustive definition of who is to be treated as a party to the agreement.

74. The question whether paragraph 10(3) is exhaustive or not therefore seems to me unclear as a matter of language. But interpretation of a legal text is never simply a matter of language. It is always relevant to seek to understand how the instrument is intended to work and why. And in the particular context of the Code, we have the benefit of guidance on this from the Supreme Court in *Compton Beauchamp*. There the question was who was "the occupier" in circumstances where the operator would normally be regarded as in occupation of the site (see paragraph 16 above). The guidance given by Lady Rose (at [106]) is as follows:

> "The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word "occupier"

so as best to achieve that goal."

75. Applying that approach, it seems to me that the regime is intended to work in such a way that the person currently entitled to the benefit and burden of the agreement as operator, and the person currently entitled to the benefit and burden of the agreement as site provider, are parties to the agreement and can exercise the rights conferred by Part 5 of the Code. That can in my judgement be achieved by construing paragraph 10(3) as not intended to define exhaustively who is to be treated as a party to the agreement. On that basis APW, being currently entitled to both the benefit and the burden of the Lease by virtue of the Concurrent Lease, is to be regarded as a "party to the agreement" with the result that it can invoke paragraph 31 by serving notice on Vodafone, and both it and Vodafone can invoke paragraph 33 by serving notice on each other as "the other party to the agreement."

76. If that is right, APW succeeds in its appeal.

77. Mr Read, who appeared with Mr James Tipler for Vodafone, advanced a number of reasons why the Decision of the Deputy President should be upheld. Insofar as I have not already dealt with them, I will explain briefly why I am not persuaded by the main points that he made.

78. Mr Read said that the Code created "a *sui generis* form of statutory rights" (*Compton Beauchamp* at [117] per Lady Rose), and was "designed to be, so far as possible, a self-contained Code" (*Cornerstone Telecommunications Infrastructure Ltd v University of London* [2019] EWCA 2075 at [34] per Sir Terence Etherton MR, Lewison and Arnold LJJ). It was intended to be a unified set of rules that covered all situations from a one-off licence in relation to tree lopping to a long-term full-blown lease. That I accept. The Code has to be applied both to contractual arrangements such as licences or wayleaves and to the grants of property rights such as leases. But I do not accept that this means that one jettisons the ordinary law of landlord and tenant, or, as Lewison LJ put it in argument, that the Code exists in a legal vacuum.

79. On the contrary, the Law Commission in their Report very much took the view that leases that confer code rights should, as they put it, "look after themselves" and that the general law should apply (§2.123). Thus they said that the primary purpose of the old code provisions which are the equivalent of paragraph 10 in the Code "is to ensure that the sort of priority rules that work automatically (subject to registration) for leases will also apply to personal rights" (§2.87); and again that where code rights are contained in a lease "we take the view that the lease itself must govern priority" (§2.107).

80. It is true that the Government did not entirely accept the Law Commission's recommendations, but the point on which they differed was whether any special provision should be made in respect of registration of code rights when they were contained in leases. The Law Commission had recommended that the Code make no special provision in this respect, with the result that leases conferring code rights, but not mere contractual arrangements, would need to be registered at HM Land Registry. The Government however disagreed, considering that code rights should be binding on successors without any requirement to register: see the Government's consultation response, *A New Electronic Communications Code* (May 2016), at [40]-[47]. The Government's view was duly given effect to in paragraph 14 of the Code. Subject to that point, however, there is no suggestion in the Government response that they

disagreed with the Law Commission's recommendation that leases should look after themselves in accordance with the general law.

81. Mr Read said that Part 2 of the Code was a "comprehensive package" as to who was bound by agreements conferring code rights, and how they were bound, and its effect was clear. That seems to me to beg the question. I agree that if paragraph 10 is indeed comprehensive (in that it sets out exhaustively who is to be regarded as a party to a code agreement), then its effect is clear. But the whole question is whether it does do this or not.

82. Mr Read said the purpose of the Code was to promote the roll-out of networks, and that an operator should not have to spend a lot of time grappling with esoteric points of the law of landlord and tenant. I have sympathy with the suggestion that the Code should be interpreted in such a way as to work as simply and straightforwardly as possible. But I do not think that the interpretation of the Code advanced by Mr Read does provide a simple and straightforward solution. As the Deputy President noted, it contains its own difficulties, notably the inability of someone in the position of APW to terminate the agreement under paragraph 31. I think it is simpler to read the Code in such a way that the persons who are currently entitled to the benefit and burden of an agreement are the parties to the agreement for the purposes of the Code.

83. Mr Read said that the argument that APW was a party to an agreement by virtue of having a concurrent lease would not work in the same way if the code rights conferred on Vodafone had been conferred by contractual licence rather than by way of lease, and if APW's solution only worked in the latter case that suggested that it was not an ideal solution. I do not think it is necessary to consider what the position would have been had Vodafone had a contractual licence rather than a lease. I accept that the answer to this question is not obvious. But what we have to deal with is the case before us where Vodafone does have a lease. In such a case APW's solution works well, and certainly seems to me more of an "ideal solution" than that favoured by Vodafone.

84. Not only does Vodafone's preferred solution contain the "small but important structural defect" that the Deputy President identified, namely that Part 4 cannot fill the gap which prevents a site provider that is not a party to the agreement from taking steps to bring the agreement to an end (see the Decision at [120]); it also involves the use of Part 4 of the Code on the basis that Part 5 is unavailable despite the fact that the Lease is continuing under Part 5. That cuts across the view expressed by Lady Rose in *Compton Beauchamp* at [128] that "it is sufficiently clear from the Code read as a whole that Part 4 does not apply to code agreements to which paragraph 30(2) applies." The Deputy President said that Lady Rose was not considering the anomalous situation where, despite the agreement being continued under paragraph 30(2), Part 5 was not available (see the Decision at [117]), and that in these circumstances there was no obstacle to an operator making use of Part 4 (ibid at [118]). But as his own description of the position shows, this does seem anomalous, and contrary to how the Code appears on its face to be meant to work.

85. Mr Read had a number of subsidiary submissions, mainly directed at answering specific points of practical difficulty relied on by Mr Clark. I do not think it is necessary to deal with them individually: they do not cause me to alter the view I have expressed that Mr Clark's interpretation of the Code is more in accordance with the guidance from the Supreme Court that one should construe the Code in such a way as best to achieve the

goal of making the regime work as intended.

86. I would therefore allow APW's appeal on this ground and hold that APW is a "party to the agreement" constituted by Vodafone's Lease for the purposes of the Code.

The second issue

87. The second issue raised by APW is whether the UT was right to hold that, if neither Vodafone nor APW could invoke paragraph 33 of the Code, then Vodafone could make a claim for renewal of the Lease under Part 4 of the Code (see paragraph 42(2) above).

88. In the light of my answer to the first issue, this issue does not arise and I do not think any useful purpose would be served by considering it.

Lord Justice Phillips:

89. I agree.

Lord Justice Lewison:

90. I also agree.