UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 0338 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – JURISDICTION – whether an operator occupying land under a tenancy to which Pt II, Landlord and Tenant Act 1954 applies may seek new rights under Part 4 of the Code – Parts 4, 5 of Sch.3A, Communications Act 2003 – transitional provisions - Sch.2, Digital Economy Act 2017

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

ASHLOCH LIMITED (1)
AP WIRELESS II (UK) LIMITED (2)

Respondents

Re: 11A, 13 and 15 High Street, Kings Heath, Birmingham

Martin Rodger QC, Chamber Deputy President

Royal Courts of Justice

29-30 October 2019

Jonathan Seitler QC and *James Tipler*, instructed by TLT LLP, for the claimant
Wayne Clark and *Jonathan Wills*, instructed by Eversheds for the second respondent
The first respondent did not appear and was not represented

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The following cases are referred to in this decision:

Cairnplace Ltd v CBL (Property Investment) Co Ltd [1984] 1 WLR 696, CA

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] UKUT 107 (LC))

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

Cornerstone Telecommunications Infrastructure Ltd v University of London [2018] UKUT356 (LC)

Da Costa v Jamaica [1990] 2 AC 389

EE Ltd v London Borough of Islington [2019] UKUT 53

O'May v City of London Real Property Co Ltd [1983] 2 AC 726

Wallis Fashion Group Ltd v CGU Life Assurance (2001) 81 P&CR 28

Wilson v. First County Trust (No.2) [2004] 1 AC 816

Introduction

1. Does the Upper Tribunal have jurisdiction under Part 4 of the Electronic Communications Code to impose Code rights over land in favour of an operator which is already in occupation of the same land under a tenancy which is being continued after its contractual expiry date by section 24(1) of the Landlord and Tenant Act 1954? In order to determine that important practical question the Tribunal is now required for the first time to consider the relationship between the new Code and the 1954 Act as a preliminary issue in this reference.

2. The Code is found in section 106 and Schedule 3A to the Communications Act 2003, into which it was inserted by the Digital Economy Act 2017 ("the 2017 Act") with effect from 28 December 2017. Subject to transitional provisions it replaces the original Electronic Communications Code, which was first enacted in Schedule 2 of the Telecommunications Act 1984 and subsequently amended by Schedule 3 to the Communications Act 2003 ("the old Code").

3. The Claimant, which I will refer to as "Cornerstone", is a joint venture formed by Vodafone Ltd and the Telefonica group of companies to own and manage a combined portfolio of telecommunications sites contributed by each of them. Cornerstone is an "operator" within the meaning of the Code.

4. The first respondent, Ashloch Ltd, owns the freehold of Windsor House, a building at 15 High Street, Kings Heath in Birmingham. The second respondent, which I will call APW, is a property investment company which specialises in the acquisition and management of leasehold telecommunications sites.

5. At the hearing of the preliminary issue Cornerstone was represented by Jonathan Seitler QC and James Tipler, while APW was represented by Wayne Clark and Jonathan Wills. I am grateful to them all for their submissions. The Tribunal and the parties also received written submissions prepared by Justin Kitson, counsel on behalf of Arqiva Services Ltd, which is not party to this reference but is party to another reference in which the same issue arises between it and APW.

The basic facts

6. The freehold interest in Windsor House was acquired by Ashloch in 2016, subject to an agreement dated 14 June 2002 between a previous owner, RVB Investments Ltd, and Vodafone ("the Vodafone Agreement").

7. The Vodafone Agreement was described on its face in neutral terms as an agreement for the installation of telecommunications apparatus, but it is common ground in this reference that it created a tenancy of part of the roof of the building for a term of ten years, and that the tenancy was one to which Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") applied.

8. In 2012, on the expiry of the contractual term created by the Vodafone Agreement, Vodafone remained in occupation of the roof top site for the purpose of its business of providing telecommunications services. No steps were taken by it or its landlord to terminate the tenancy in

accordance with the provisions of the 1954 Act, and the tenancy was therefore continued by section 24(1) of the Act.

9. Cornerstone has given three notices under paragraph 20 of the Code seeking agreement on the grant to it (not Vodafone) of new code rights. The first such notice was given to Ashloch on 25 July 2018. When no agreement was reached Cornerstone referred the dispute to the Tribunal on 1 October 2018.

10. On 11 October 2018 APW intervened in the relationship between Vodafone and Ashloch when it took a lease from Ashloch for a term of 99 years of the roof top of Windsor House. The lease was granted subject to the Vodafone Agreement.

11. Cornerstone then gave a second notice under paragraph 20 of the Code on 9 November 2018 before commencing a second reference seeking Code rights against both Ashloch and APW. The second reference was consolidated with the first.

12. In its response to the reference APW disputed the Tribunal's jurisdiction to impose on it any Code agreement relating to the roof of Windsor House (in particular the part of the roof comprised in the Vodafone Agreement) because it, APW, is not in occupation of that site. On 3 April 2019 the Tribunal determined in a reference concerning a different site that, under Part 4 of the Code, a Code agreement could only be imposed in favour of an operator on a person who is the occupier of the land. The Tribunal's decision has very recently been upheld by the Court of Appeal: *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755 (on appeal from [2019] UKUT 107 (LC)).

13. *Compton Beauchamp* concerned a request made by an operator to a landowner, neither of whom was in occupation of a site. The operator was Cornerstone and the site in question was occupied by one of its shareholders, Vodafone, which intended to give up the rights it enjoyed under the old Code as soon as a new Code agreement was imposed on the landowner in favour of Cornerstone. The Tribunal held that an agreement could not be imposed on the landowner because it was not in occupation and was therefore not in a position to grant rights to Cornerstone.

14. In light of the Tribunal's decision in *Compton Beauchamp* Cornerstone arranged for the Vodafone Agreement to be assigned to it and, with APW's consent, that assignment was completed on 13 August 2019. A direct relationship of landlord and tenant was thus established between Cornerstone and APW. It has not been suggested that the assignment had any effect on the statutory continuation of the tenancy under the 1954 Act.

15. The assignment was followed on the same day by a third Cornerstone notice under paragraph 20 of the Code, calling on APW to enter into a new Code agreement. Cornerstone now relies principally on this third notice as conferring jurisdiction on the Tribunal to impose an agreement on it and APW under Part 4 of the Code.

16. In response to the third notice APW has taken a new jurisdictional objection. It says that Part 4 of the Code is not available to Cornerstone because Cornerstone itself is now the occupier of the site. APW also says that because the tenancy first granted under the Vodafone Agreement

in 2002 is continuing under the 1954 Act, the only way for Cornerstone to obtain new rights over the site is by means of an application to the County Court for a new tenancy under section 24(1) of the 1954 Act. Cornerstone disagrees and asserts that it has a choice, either to seek a new tenancy under the 1954 Act or to apply to the Tribunal for the imposition of a Code agreement under Part 4 of the Code.

17. Ashloch has agreed to be bound by any Code agreement imposed on Cornerstone and APW and has played no further part in proceedings.

The structure of the Code

18. Part 2 of the Code deals with the conferral of Code rights and their exercise. It includes paragraph 9, which 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."

As Lewison LJ said in *Compton Beauchamp* at [40], paragraph 9 is clear. It gives effect to "the essential principle that code rights can only be conferred by agreement with the occupier" [69].

19. By paragraph 11, an agreement under Part 2 must be in writing.

20. Part 3 of the Code is concerned with the assignment of code rights, and with upgrading and sharing of electronic communications apparatus. The rights in paragraphs 16 and 17 for an operator to assign an agreement under Part 2 to another operator and to upgrade or share the apparatus to which such an agreement relates override any contrary term of the agreement. These are important provisions giving operators great flexibility in the use of their sites.

21. Part 4 of the Code deals with the power of the court to impose an agreement. In England and Wales that power is exercisable by the County Court, by the Upper Tribunal and by the First-tier Tribunal, but in practice all Code disputes are required to be commenced in the Upper Tribunal (see Electronic Communications Code (Jurisdiction) Regulations 2017).

22. The Tribunal's power to impose an agreement conferring Code rights on an operator is under paragraph 20, which also gives the Tribunal power to make Code rights binding on a third party. The new agreement is "imposed" on both parties although, usually at least, only the occupier of the land will be unwilling. An operator may give a "relevant person" a notice in writing requiring them to agree to confer a Code right on the operator, or to be bound by a Code right which is exercisable by the operator (which will have been conferred by someone other than the recipient of the notice). If within 28 days the relevant person does not agree to that request the operator may apply to the Tribunal for an order under paragraph 20 imposing an agreement between the operator and the relevant person.

23. In *Compton Beauchamp,* at [31], the Court of Appeal approved the explanation of the "relevant person" given by this Tribunal in the same case:

> "… a clear distinction is maintained in the Code between an agreement by which rights are conferred (which may only be entered into by an occupier of the land) and an agreement to be bound by Code rights (which will have been granted by someone else). We agree with Mr Clark that paragraph 20 is drafted to accommodate this structure. Paragraph 20 refers to a "relevant person" not because an agreement to confer Code rights can be imposed on someone who is not an occupier but because two different types of order may be made by the Tribunal. The relevant person will either be an occupier who is to be compelled to confer rights, or will be a person who is to be bound by rights conferred by another."

24. By paragraph 21 the Tribunal may only make an order under paragraph 20 if it is satisfied that any prejudice to the relevant person from the making of the order can be adequately compensated by money, and that the public benefit likely to result from the order outweighs the prejudice to the relevant person. The Tribunal may not make an order if the relevant person intends to redevelop its land and could not reasonably do so if the order were made (paragraph 21(5)).

25. Paragraph 22 makes a critical connection between agreements imposed by order under paragraph 20 and consensual agreements under Part 2 of the Code. It provides:

> "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."

26. By paragraph 23 any agreement imposed under paragraph 20 must include terms for the payment of consideration by the operator to the relevant person. This is to be assessed in accordance with paragraph 24, the most important feature of which is the "no network" assumption i.e. the principle that consideration is to be assessed on the assumption that the transaction does not relate to the provision or use of an electronic communications network (paragraph 24(3)(a)) (see the Tribunal's decision in *EE Ltd v London Borough of Islington* [2019] UKUT 53 (LC) at [61]-[71] for a discussion of paragraph 24).

27. Paragraphs 26 and 27 introduce two special forms of Code rights, interim Code rights (paragraph 26) and temporary Code rights (paragraph 27). Neither form may come into existence without an order of the Tribunal (paragraphs 26(7)-(8)), 27(1). Interim rights are available before an agreement for full Code rights is entered into or imposed, and allow early access to sites for operators without the need to demonstrate to the usual civil standard of proof that the paragraph 21 conditions are satisfied. Temporary rights are available to an operator to postpone the removal of apparatus while the operator seeks a further agreement or resists the exercise of a right of removal by a site provider. Both variants were considered in outline in *Cornerstone Telecommunications Infrastructure Ltd v University of London* [2018] UKUT 356 (LC) at [30]-[35].

28. For the purpose of the arguments in this reference, there is an important distinction between a request for Code rights under paragraph 20 and a request for the more limited interim or temporary Code rights under paragraphs 26 or 27. A notice under paragraph 20 may only be given to a "relevant person" (i.e. either an occupier of the site or a person who is to be bound

by rights conferred by another), whereas a notice under paragraphs 26 or 27 may be given simply to "a person". An operator who is already in occupation of land may therefore make an application for interim or temporary rights. As Lewison LJ explained in *Compton Beauchamp* this represents an exception to the essential principle reflected in paragraph 9 that Code rights can only be conferred on an operator by agreement with the occupier. The exception is accommodated within the scheme of the Code, without disturbing the essential principle, by means of a statutory deeming provision. By paragraphs 26(4)(b) and 27(4)(b) paragraph 22 applies to orders imposing interim and temporary rights so that they take effect for all purposes as agreements under Part 2 of the Code between the operator and the relevant person (see *Compton Beauchamp* at [73]).

29. Part 5 of the Code is concerned with the termination and modification of agreements. It is also concerned with the renewal of rights. In *Compton Beauchamp* Lewison LJ said at [60]:

> "the renewal of rights by an operator *in situ* is not primarily governed by Parts 2 and 4. Rather, it is governed (at least principally) by Part 5."

30. In England and Wales Part 5 applies generally to agreements under Part 2 of the Code with one important exception (paragraph 29(1)-(3)). That exception is a lease of land to which Part 2 of the 1954 Act applies and whose primary purpose is not to grant Code rights. Subject to that exception Part 5 is available to the parties to any agreement under Part 2 and therefore, by virtue of paragraph 22, it applies also to agreements imposed by the Tribunal under Part 4.

31. It is Cornerstone's case in this reference that an operator *in situ* may make use of the procedures under Part 4 to obtain a new agreement as an alternative to the procedures under Part 5 for renewing an agreement. In order to consider whether that is likely to have been Parliament's intention it is necessary to understand how Part 5 operates. It is a complex series of provisions which do a number of different things.

32. Paragraph 30 provides for the statutory continuation of any agreement to which Part 5 applies (referred to as a "code agreement") after the expiry or termination of the agreement. It does not apply to interim or temporary rights.

33. An agreement which would otherwise continue under paragraph 30 may be brought to an end by a site provider who is party to the agreement by giving notice of at least 18 months duration under paragraph 31(1). The notice must expire after the contractual termination date or on a date on which the agreement could have been brought to an end by the site provider. The notice must also state one of four grounds on which the site provider proposes to bring the agreement to an end. The available grounds are listed in paragraph 31(4) and are (in summary): substantial breaches of obligation by the operator, persistent delay in making payments, the site provider's intention to redevelop, and that the test in paragraph 21 for the imposition of an agreement is not met.

34. A site provider's notice of termination under paragraph 31 will terminate a Code agreement to which Part 5 applies unless the operator gives a counter-notice and applies to the Tribunal under paragraph 32(1) for an order under paragraph 34 (continuing or modifying the

Code agreement or ordering a new agreement). If, on an application made under paragraph 32(1), the Tribunal decides that the grounds stated in the site provider's notice of termination are established, it must order that the Code agreement comes to an end in accordance with the notice (paragraph 32(4)).

35. Paragraph 33 allows an operator or a site provider to give six months' notice to the other requesting a modification of an agreement to which Part 5 applies, or the addition or removal from the agreement of a Code right, or the termination of the agreement and its replacement by a new agreement. Once again, the proposed change may not be earlier than the contractual termination date of the agreement or a date on which it could be brought to an end under the agreement by the site provider.

36. If a notice given under paragraph 33 does not result in an agreement within 6 months, either party may apply to the Tribunal for an order under paragraph 34. Under sub-paragraphs (2) to (6) the Tribunal may order the continuation of the agreement for a specified period, or the modification of the agreement including by the removal or addition of a Code right, or the termination of the agreement coupled with an order that the parties enter into a new agreement. In determining what order to make the Tribunal must have regard to all the circumstances including in particular those specified in sub-paragraph (13), which include the operator's business and technical needs.

37. Where the Tribunal orders the parties to enter into a new agreement under paragraph 34(6), paragraph 34(8) provides:

> "This code applies to the new agreement as if it were an agreement under Part 2 of this code."

38. The terms of any modification or new agreement ordered under paragraph 34 are to be such as are agreed by the parties (paragraph 34(9)). If agreement is not reached the terms are to be such as are specified by the Tribunal (paragraph 34(10)). In reaching its decision the Tribunal will order such terms as it considers to be appropriate (paragraph 34(11) applying paragraph 23(2)) and must have regard to the terms of the existing Code agreement (paragraph 34(12)).

39. When specifying the consideration payable under a new agreement obtained under Part 5, the Tribunal is required to apply the paragraph 24 valuation assumptions (including the no-network assumption). That is because, by paragraph 34(11), paragraphs 23(3)-(4), which introduce the paragraph 24 valuation hypothesis, apply to an order under paragraph 34(10).

40. Paragraph 34(13)-(14) contains provision for the Tribunal, in effect, to backdate the consideration payable for a new or modified agreement to the date on which the original agreement could have been terminated had it not been subject to statutory continuation by the operation of paragraph 30. Similar provision is made in paragraph 35 expressly incorporating the paragraph 24 basis of valuation.

41. Part 6 of the Code deals with rights to remove electronic communications apparatus. A landowner is given the right to require removal in circumstances specified in paragraph 37

either where it is not bound by Code rights permitting the retention of the apparatus or where such rights have come to an end. This right is exercisable under paragraph 40, by the landowner first giving notice requiring the removal of the apparatus and restoration of the land within a reasonable period. If no agreement is reached the landowner may apply to the Tribunal for an order requiring the operator to remove the apparatus or permitting the owner to sell it. By paragraph 40(8) the Tribunal may not make an order for removal or authorising sale by the landowner "in relation to apparatus if an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined".

The transitional provisions

42. The genesis of the Code was the Law Commission's 2013 report: *The Electronic Communications Code* (Law Com No.336). One of the problems the Commission set out to overcome was the difficulty of discerning the relationship between the old Code and other elements of the law. In paragraph 1.27 of the report it identified one such difficulty as "the uncertain interaction between the protection for electronic communications apparatus under the Code and the security of tenure for business tenancies provided by Part 2 of the Landlord and Tenant Act 1954" before adding "our recommendations would resolve this uncertainty."

43. At paragraph 6.83 the Law Commission recommended that "a lease granted primarily for the purpose of conferring Code Rights upon a Code Operator should not fall within the scope of Part 2 of the Landlord and Tenant Act 1954". In paragraph 6.85 it made a separate recommendation that "where Code Rights have been conferred by a lease whose primary purpose is not the grant of Code Rights, the lease should fall within the scope of Part 2 of the Landlord and Tenant Act 1954 and the provisions of the revised Code for the continuity of Code Rights should not apply to the Code Rights within the lease."

44. The Law Commission's distinction between "primary purpose" and "non-primary purpose" leases was implemented by the introduction into the 1954 Act of a new provision, section 43(4), which has the effect that a tenancy granted after the commencement of the Code primarily for the purpose of conferring Code rights on an operator is not one to which Part 2 of the Act applies, but that Part 2 does apply to a non-primary purpose tenancy. An example of such a tenancy might be a lease of an office building or shop which, incidentally, conferred Code rights on the tenant to install electronic communications apparatus on the demised premises.

45. As it made clear at paragraph 6.82 of the report, the Commission's recommendations related only to leases granted after the commencement of the new Code. At paragraph 1.43 it had already suggested that it would not be practical or appropriate simply to apply the new Code to existing arrangements. Because the new Code was not intended to operate retrospectively, the Commission was conscious that its introduction would "need to be managed with care and considerable thought given to transitional provisions".

46. The Law Commission did not produce a draft Bill with its report, and it was not responsible for the transitional provisions which appear in Schedule 2 to the 2017 Act. Its recommendation that the new Code should not apply retrospectively to existing agreements was the subject of Government consultation. In its response to the views expressed during that

consultation, published in May 2016, the Department for Digital, Culture, Media & Sport set out the arguments it had heard in favour of the Code having immediate effect before stating that it had "not been sufficiently convinced the public benefits of retrospective application are such that they outweigh interference with carefully negotiated arrangements under the existing Code". It foresaw "a steady phasing in of new Code rights, while preserving better investment incentives on new sites from day one" and promised "a clear and robust set of transitional provisions".

47. Those transitional provisions are found in Schedule 2 to the 2017 Act. Paragraph 1(4) introduces the concept of a "subsisting agreement". In essence a subsisting agreement is an agreement under the old Code which was in force, as between an operator and any person, when the new Code commenced on 28 December 2017. By paragraph 2(1) a subsisting agreement has effect after that date as an agreement under Part 2 of the new Code, subject to the modifications made by the Schedule.

48. Two important modifications are contained in paragraphs 5 and 6 of Schedule 2. These give effect to the Law Commission's recommendation that the Code should not have retrospective effect by disapplying some of its most significant features, leaving operators under subsisting agreements with rights more closely aligned with the old Code.

49. By paragraph 5(1) the provisions of Part 3 of the Code concerning assignment, upgrading and sharing of apparatus do not apply to subsisting agreements.

50. Part 5 of the Code, dealing with termination and modification of agreements, is also substantially modified by paragraph 6 which applies to a subsisting agreement in place of paragraph 29(2) to (4) of the Code (the provisions which define who can use Part 5). By paragraph 6(2), Part 5 does not apply to a subsisting agreement to which Part 2 of the 1954 Act applies, provided there has be no agreement under section 38A of the Act excluding the security of tenure provisions of Part 2. Thus, a tenant under a 1954 Act tenancy which was not contracted out and which had either not expired or was continuing under section 24 of the Act when the new Code commenced, cannot make use of Part 5 to renew or modify their tenancy.

51. Nor does Part 5 of the Code apply to a non-primary purpose lease if there has been an agreement under section 38A of the 1954 Act (paragraph 6(3)).

52. At paragraph 6.58 of the Law Commission's report it said that it understood that it was common practice for leases to Code operators to be contracted out of the 1954 Act. Part 5 is not modified in the case of a primary-purpose lease or tenancy contracted out of security of tenure under the 1954 Act by an agreement under section 38A (because the condition for disapplication in paragraph 6(2) will not be met). Such a lease will be a subsisting agreement within the meaning of paragraph 1(4) of Schedule 2 to the 2017 Act, and will therefore take effect as an agreement under Part 2 of the Code having the benefit of Part 5 (paragraph 29(1)).

Cornerstone's case

53. On behalf of Cornerstone Mr Seitler QC submitted in summary that the Code did not exclude the Tribunal's jurisdiction to impose a new Code agreement under Part 4 conferring

rights over a site in favour of an operator which was already in occupation of all or part of the same site. Although the circumstances of this case are that the operator occupies under a subsisting agreement to which the 1954 Act applied, it became clear in the course of argument that Mr Seitler's proposition goes much further than the current facts. He postulated that an occupier *in situ* could always make use of Part 4. If, as in this case, it occupied under a subsisting agreement with 1954 Act protection, Part 4 would be available as an alternative to renewal under the 1954 Act. If the operator's rights were under an agreement made under Part 2 or imposed under Part 4, the opportunity to seek a new agreement under Part 4 would be an alternative to the right of renewal available under Part 5. There were, Mr Seitler submitted, very good reasons why this should be so, and his reading fitted best with the structure and purpose of the Code. Any procedural issues created by the availability of alternative routes to renewal could be resolved, he suggested, by sensible case management.

Cornerstone's primary argument

54. Mr Seitler advanced eight separate reasons why his interpretation of the Code should be preferred. The first of these was the simplest and, he suggested, the most powerful. That was that the application of Part 4 to a subsisting agreement continuing under the 1954 Act had not been excluded from the jurisdiction of the Tribunal. There was no ambiguity or uncertainty about it. There was simply nothing in the Code, or in the 1954 Act, or in the transitional provisions, equivalent to the express exclusion of Parts 3 and 5 of the Code by paragraphs 5 and 6 of the transitional provisions. It followed that Part 4 was not excluded.

55. Mr Seitler's second argument was that, by reason of paragraph 100(2) it was impossible to contract out of Part 4, which will always have effect.

56. The difficulty with Mr Seitler's primary argument (which was also the primary argument relied on in Arqiva's submissions), and his supportive second argument, is that they assume the correctness of a quite separate proposition, namely, that the procedures in Part 4 are accessible to an operator *in situ*.

57. Logically, the absence of an express exclusion of Part 4 from the transitional provisions can be of no significance unless Part 4 is capable in principle of being relied upon by an operator *in situ*. Parliament would have no reason to exclude by transitional provisions a right which, in its own terms, could never be enjoyed by a person in the transitional circumstances. As we have already seen, paragraph 2(1) of Schedule 2 to the 2017 Act causes a subsisting agreement to have effect after the commencement of the new Code as an agreement under Part 2, subject to the modifications specified in the Schedule. As Mr Seitler points out, nothing in Schedule 2 purports to modify the application of Part 4. It follows that Part 4 applies to a subsisting agreement in the same way as it applies to an agreement under Part 2. The real question is therefore whether Part 4 is available to an operator in situ under an agreement to which Part 2 applies.

58. The express exclusion of Parts 3 and 5 does not call this analysis into question. Paragraphs 16 and 17, which are the substance of Part 3, apply generally to agreements under Part 2. To respect the Law Commission's recommendation that the new Code should not apply retrospectively it was necessary that the transitional provision should disapply Part 3 in the case

of subsisting agreements. With the exception already referred to (non-primary purpose agreements to which the 1954 Act applies) Part 5 also applies generally to agreements under Part 2 of the Code (paragraph 28(1)). To avoid conferring new rights of renewal on subsisting agreements it was therefore necessary for the transitional provisions to exclude Part 5 from applying to such agreements. Was there any comparable reason for the transitional provisions to exclude Part 4? Only if, without an express exclusion, Part 4 would have applied to such agreements.

59. For that reason, Mr Seitler's contention that the opportunity to seek a new agreement under Part 4 was always available to an operator *in situ* rendered his primary argument irrelevant.

Compton Beauchamp

60. Cornerstone's third proposition grappled with the real issue. Mr Seitler submitted that, on a proper appreciation of the Code, Part 4 is available to an operator *in situ.* This argument was said to be supported by paragraphs 26, 27, 40(8) and 81, by the Tribunal's decision in *Compton Beauchamp*, and by the Explanatory Notes issued on the enactment of the legislation. The difficulty it faces is that it is inconsistent with the reasoning of the Court of Appeal in *Compton Beauchamp*.

61. Mr Seitler argued that the Court of Appeal had considered only the position of a landowner which was not in occupation, without considering the entitlement of an operator *in situ* to give notice under paragraph 20 seeking the imposition of a Code agreement using the Part 4 procedures. I do not accept that submission.

62. The main issue for the Court of Appeal in *Compton Beauchamp*, identified at [1], was whether the Upper Tribunal has jurisdiction to require a freeholder who is not in occupation of land to confer rights under the Code on an operator, at a time when there is another operator in occupation of the land exercising Code rights. It is therefore correct, as Mr Seitler pointed out, that the appeal was not specifically concerned with the question whether there is jurisdiction to require a freeholder to confer Code rights on an operator which is itself in occupation of the land.

63. In *Compton Beauchamp,* as in this case, Cornerstone sought an order imposing on a landowner an agreement by which it would confer Code rights. As also in this case, the freeholder was not the occupier of the site. Cornerstone argued that that did not matter because the person on whom notice could be served under paragraph 20 was "a relevant person" who need not be the occupier. It suggested three potential categories of relevant person (at [26]).

64. The first category comprised whichever of the occupier of the land, the owner of the freehold estate, or the lessee of the land who had "title" to grant the rights sought. This "rights based" approach was rejected by the Court of Appeal because it was clear, in particular from paragraph 10, that Code rights may be granted by an occupier who has no interest in the land (see [28], [36], [39]).

65. A further reason for rejecting the "rights based" interpretation of "relevant person" was given at [40]:

> "A further objection to Ms Tozer's interpretation is that it does not fit with paragraphs 9 and 20 of the Code. Paragraph 9 is clear. The only person who can agree to confer a code right on an operator is the occupier. Paragraph 20 permits an application to the UT where "the relevant person does not agree … to confer or be otherwise bound by the code right". If the "relevant person" for the purpose of *conferring* code rights is someone other than the occupier, the effect of paragraph 9 is that that person cannot agree to confer the code right. In that situation, it is inevitable that an application will have to be made to the UT. It is unlikely that Parliament would have legislated so as to compel an application to the UT with no possibility of agreement (or even of compromise of an application without an order of the UT)."

66. Mr Seitler did not explain why the same objection did not apply with equal force where the operator itself was in occupation, leaving the putative "relevant person" equally incapable of conferring Code rights by an agreement under paragraph 9.

67. Cornerstone's second category of "relevant person" was the person with the right to control access to the site and who had some physical presence on it. After considering the meaning of "occupation" in different legal contexts, at [54] the Court of Appeal approved the Tribunal's formulation that whether a person is an occupier for the purposes of the Code is "a question of fact rather than legal status; it means physical presence on and control of the land."

68. This formulation made it necessary to address the position of the operator *in situ*. At [57] Lewison LJ acknowledged that:

> "The Code clearly envisages that a sitting operator may enter into an agreement conferring new or varied Code rights. It also clearly contemplates that a sitting operator may apply to the UT for interim or temporary code rights under either paragraph 26 or 27."

How could that be so if only the occupier could confer Code rights by agreement and if interim and temporary rights required the operator to serve a notice under paragraph 20 which could only be given to an occupier? The Court of Appeal's solution to this puzzle illuminates the structure of the Code and is therefore of direct relevance to the preliminary issue in this reference.

69. The suggestion that the operator could never be an occupier, "whether it is itself seeking a fresh right or another operator is seeking the right" was rejected, at [59], as being impossible to square with the language of the Code. It is obvious that, contrary to Mr Seitler's submission, here at least the Court of Appeal had the facts of this case, an occupier *in situ* seeking new rights, well in mind. It was in that context that Lewison LJ added, at [60]:

> "In addition, it seems to me that the renewal of rights by an operator *in situ* is not primarily governed by Parts 2 and 4. Rather, it is governed (at least principally) by Part 5."

70. Lewison LJ then examined Part 5 in detail and addressed the position of an operator wishing to renew or vary code rights. Such an operator is required to give notice under paragraph 33 to the "site provider". The status of "site provider" is held by a person who conferred a code right, or is otherwise bound by it, and is not dependent on that person being in occupation (although a site provider may well be in occupation if the existing Code agreement is not a lease). For the purpose of securing new rights under Part 5 (at [61]):

> "It follows that in the case of the renewal of code rights it is not necessary for the person who confers the new (or modified) code rights to be an occupier."

71. By paragraph 34(8) the Code applies to an agreement imposed by the Tribunal under Part 5 "as if it were an agreement under Part 2 of this code". Lewison LJ explained at [63] that this statutory deeming overcomes the objection that an agreement could only be imposed on an occupier, by treating an agreement imposed under Part 5 as if it had been made under Part 2 and therefore in accordance with paragraph 9. Moreover, the deeming provision was not on its face restricted to new agreements imposed by the Tribunal; on the contrary, Lewison LJ said:

> "It would fit the scheme of the Code if paragraph 34 (8) also applied to a new agreement made between an operator and a site provider; and in my judgment it should be so interpreted."

By this route, using only Part 5, an occupier *in situ* is able to enter into an agreement for new Code rights and the basic structure of the Code is respected, because under Part 5 "whether or not the operator is also the occupier does not matter".

72. Mr Seitler emphasised that, in its treatment of Part 5, the Court of Appeal had not ruled out the use of Part 4 by an operator *in situ*. It recognised at [57] that the Code clearly envisages that a sitting operator may enter into an agreement conferring new or varied Code rights. It described Part 5 as being "primarily" the route to the renewal of such an operator's rights. At [66] Part 5 was said not to help Cornerstone on the facts because it was not *in situ*, Vodafone was, "And Vodafone has made no application either under Part 5 of the Code, or under paragraph 20". I agree with Mr Clark that that sentence is manifestly not an acknowledgement that Vodafone, or any operator *in situ*, could have given notice under paragraph 20 seeking the imposition of a "full" Code agreement.

73. Nor is it possible to read Lewison LJ's judgment as allowing Part 4 to confer on an operator *in situ* much wider and more general rights of renewal than those provided by Part 5 which was clearly the right of renewal available to a sitting operator being referred to in [57] (in the passage quoted in at [68] above). To describe the narrower right in those circumstances as the "primary" route provided by the Code would be an odd use of language. More significantly, Part 5 is aptly described as the "primary" right of renewal for such an operator because of the limited exception in which Part 4 is available to an operator *in situ*. The extent of that exception was identified and explained by Lewison LJ at [67]-[74]; it is concerned only

with interim and temporary rights under paragraphs 26 and 27. At [68] Lewison LJ recognised that it is a precondition of an application to impose interim or temporary Code rights that the operator must have given a notice under paragraph 20. But that was consistent with the "essential principle that code rights can only be conferred by agreement with the occupier" because "One would expect interim or temporary rights to be conferred on an operator new to the site, whereas the case of an operator *in situ* is principally dealt with by Part 5 of the Code" [69].

74. Cornerstone nevertheless suggested to the Court of Appeal that an operator *in situ*, with apparatus on site, must be able to make an application under paragraph 20(3) in order to counter an attempt by a landowner to require the removal of its apparatus under Part 6. That was because paragraph 40(8) specifically provides that the Tribunal cannot make an order for removal if an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined. If temporary rights are granted to an operator *in situ* to prevent the removal of its apparatus it could not be intended that the Tribunal would be unable to determine a paragraph 20 application for full Code rights. It was argued that this meant the Tribunal must have jurisdiction to entertain an application under paragraph 20 by an operator *in situ.*

75. Lewison LJ found the answer to that point in paragraphs 26(4)(b) and 27(4)(b), which apply paragraph 22 to agreements for interim or temporary rights imposed by the Tribunal, thereby deeming such agreements to be Part 2 agreements. As the learned Lord Justice explained at [74]:

> "Thus, an agreement imposed either under paragraph 26 or under paragraph 27 takes effect for all purposes as an agreement between the operator and the occupier. In other words, for this purpose only, the landowner upon whom the agreement is imposed is treated as if he were the occupier, whether or not he is in fact the occupier. So in this example the circle is squared."

76. It is apparent that the Court of Appeal regarded the exception in the case of interim and temporary rights as a limited one, saying that "for this purpose only" a landowner is treated as occupier. It is in that exceptional circumstance only that an operator *in situ* need not rely on Part 5 to obtain the renewal or modification of existing rights. The essential principle that an agreement conferring Code rights over land may only be made between an operator and a person in occupation of that land is otherwise preserved and is of general application; the apparent exceptions to that principle suggested by paragraphs 26(3), 27(1) and 40(8) do not undermine the principle or alter the basic structure of the Code because they depend on deeming provisions. In each case an agreement takes effect as if it was made between an operator and a relevant person.

77. The only provision of the Code relied on by Mr Seitler which was not considered by the Court of Appeal in *Compton Beauchamp* was paragraph 81, but as Mr Clark pointed out, that has application only to the special regime dealing with tidal waters; in any event, it simply supplies another statutory deeming provision which leaves undisturbed the essential principle that only an occupier can agree to confer Code rights or be subject to an order imposing them.

78. Mr Seitler (and Arqiva) relied on what had been said by the Tribunal in its decision in *Compton Beauchamp* at [82], agreeing with his submission that rights may be conferred by an agreement under Part 4 on an operator who is already in occupation. But it is important to read that paragraph in context. The point which Mr Seitler had then been making, and which the Tribunal accepted, was identified at [81], and concerned applications under paragraphs 26 or 27. Moreover, to the extent that paragraph [82] might appear to differ from the analysis of the Court of Appeal, it is because it overlooked the importance of paragraph 34(8) and its general application to agreements between operators and site providers.

79. The sole commentary on which Cornerstone was able to rely was in the parts of the Explanatory Notes to the 2017 Act dealing with the effect of paragraph 100 of the Code. Paragraph 100 provides as follows:

> "100 Relationship between this code and agreements with operators
>
> (1) This code does not affect any rights or liabilities arising under an agreement to which an operator is a party.
>
> (2) Sub-paragraph (1) does not apply in relation to paragraph 99 or Parts 3 to 6 of this code."

80. Explanatory Notes are prepared for each Act of Parliament by the Government Department with primary responsibility for the Act. They provide some policy background to the legislation, as well as an analysis of the purpose and effect of individual provisions. They can be used as an aid to construction: *Wilson v. First County Trust (No.2)* [2004] 1 AC 816, [64], *per* Lord Nicholls.

81. Paragraph 497 of the Explanatory Note comments on paragraph 100(1) of the Code and explains that it concerns "the binding quality of agreements made under the code" which are "final so that once agreed (see Part 2), it is not possible for either party to re-open the agreement". An operator who enters into a consensual agreement "cannot then apply to the court to get a better price or improve the accompanying terms". That explanation is contrary to Mr Seitler's submission that an operator can always apply to the Tribunal under Part 4 to modify a Code agreement.

82. Paragraph 498 of the Explanatory Note explains that paragraph 100(2) ensures that operators cannot be required to contract out of the rights they enjoy under Parts 3, 5 and 6. Paragraph 499 then says this, in relation to Part 4:

> "Similarly, an operator cannot be required to agree that it will forgo its right to make an application to the court under Part 4 for a different or additional code right (for which it would have to pay additional consideration). For example an operator may have an agreement with a site provider under which the operator is entitled to enter the land to maintain apparatus on terms that it gives at least 72 hours' notice (see paragraph 3(f) of the code). The operator might later wish to seek a different code agreement, e.g. to enter the land to maintain apparatus giving only 48 hours' notice. That would be a new right, more onerous for the landowner, which would have to be agreed on further terms, including as to payment. Failing agreement,

> the operator could apply to the court to be granted the new right. The court would be required to apply the test under paragraph 21."

83. Mr Seitler submitted that the Explanatory Note clearly contemplated an application for additional Code rights by an operator *in situ* under Part 4. I agree that the example given in paragraph 499 does suggest that. I do not agree, however, that the Note is an accurate description of the effect of Part 4 (at least if "later" is taken to mean during the term of the original Code agreement, rather than after its expiry). As the Court of Appeal has explained, the primary source of an operator's right to apply for a different or additional Code right is Part 5, not Part 4. The example given, of an operator wishing to shorten the period of notice of entry provided by an agreement, does not concern the acquisition of a new Code right, but rather the modification of an existing Code right, which is the subject of Part 5 (specifically paragraph 34(3)), not Part 4. When such an application was made, the Court or Tribunal would not be required to apply the test under paragraph 21, but the different considerations in paragraph 34(12) and (13). The reference to "a site provider" is also the language of Part 5, not of Part 4.

84. In any event, the example in paragraph 499 is of an agreement with a site provider who remains in occupation. If the operator's wish "later" to seek a different code agreement, means at a time after the expiry of the original agreement, while it was being continued by paragraph 30(2), it would obviously be open to the operator to seek a new consensual agreement under Part 2 (there being no difficulty in complying with paragraph 9). But, thereafter, if agreement was not reached, and if the substance of what the operator sought was a new or modified agreement, that would require a notice under paragraph 33(1).

85. For these reasons I do not think paragraph 499 of the Explanatory Note is of assistance.

86. Paragraph 100(2) itself does not advance Cornerstone's case. A prohibition on contracting out of Part 4 is perfectly consistent with Part 4 having no application to the position of an operator *in situ.* For example, paragraph 100(2) would render ineffective an agreement by an operator *in situ* that it would not give notice under paragraph 24 to a relevant person (for example, a superior landlord) seeking its agreement to be bound by the terms of a Code agreement entered into by the operator with a third party (for example, an intermediate tenant).

87. It follows that I do not accept Mr Seitler's submission that *Compton Beauchamp* presents him with no problem. In my judgment it represents an insurmountable obstacle. An operator *in situ* under a subsisting agreement is in the same position as an operator *in situ* under an agreement made under Part 2 or imposed under Part 4; that status does not confer the right to give notice under paragraph 20, except for the very limited purposes of obtaining interim or temporary rights.

Cornerstone's additional arguments

88. Mr Seitler presented a number of supporting arguments.

89. He referred to the position of operators who have periodic tenancies, or who are not party to a Code agreement falling within Part 5, or who need new or different Code rights during the

term of an existing Code agreement or unexpired 1954 Act lease. In all of these cases, the only route available to the operator to secure a new agreement was via Part 4 of the Code.

90. On examination, a number of these categories referred to an operator whose rights pre-dated the new Code but, for one reason or another, were not subsisting agreements for the purpose of the transitional provisions. The periodic tenancy Mr Seitler had in mind was one arising by implication from an operator's payment of rent while holding over after the expiry of a fixed term agreement; not being an agreement in writing, he submitted, paragraph 11 and its equivalent under the old Code may prevent such a tenancy being a subsisting agreement. Part 5 would not apply to an operator whose only rights were to prevent removal of its apparatus under paragraph 21 of the old Code or Part 6 of the Code, as where its rights had been conferred by a mere licence which had expired.

91. It should come as no surprise that the transitional provisions leave operators without the full benefits of the new Code and reliant instead on their pre-existing rights. That was the Law Commission's recommendation and the Government's intention when it rejected the argument that "retrospective application was needed for reforms to have full and immediate impact to address ongoing difficulties with the existing Code" (see the DCMS response, *A New Electronic Communications Code*, at paragraph 50). As Mr Clark pointed out, a tenant in occupation under an oral agreement would have enjoyed no rights under the old Code, nor was it the purpose of the Code to confer additional rights on operators pending the expiry or renewal of their old agreements.

92. Nevertheless, Mr Seitler urged that the Code would be seriously deficient if Part 4 was not available to an operator *in situ* in addition to Part 5, because even if the operator has a Code agreement to which Part 5 applies, paragraph 33 cannot be relied on during the currency of the term. The Code ought to be given the widest possible interpretation because it was introduced to make it easier for operators to deploy and maintain infrastructure in the public interest, and to assist them to meet licence obligations about coverage and encourage investment. To confine an operator to the Part 5 procedures, without access during the term to the opportunity to seek new or different rights under Part 4 would "fly in the face" of those aims. Once again, although this submission was made in the context of subsisting agreements, Mr Seitler explained in oral argument that it was Cornerstone's case that it held good for all Code agreements.

93. Part 5 of the Code provides no opportunity to an operator to seek additional Code rights, or different terms, during the currency of a Code agreement. A notice given by either party under paragraph 33 must be of at least six months duration and must expire after the time at which, apart from paragraph 30, the Code right would have ceased to be exercisable or at a time when, apart from that paragraph, the Code agreement could have been brought to an end by the site provider. Thus, when an agreement is made under Part 2 or imposed under Part 4, the parties have the certainty that the same terms will apply for the contractual duration of the agreement.

94. Cornerstone's case proposes that the settled position which Part 5 protects during the currency of the term, before the period of continuation under paragraph 30, may be upset by the operator alone giving 28 days' notice under paragraph 20 at any time of its choosing. It would be necessary for the operator to satisfy the statutory test for a new agreement imposed

by paragraph 2, so, it is said, this route would be more difficult than under Part 5. Any abuse by an operator seeking new rights prematurely could, Mr Seitler suggested, be controlled by the Tribunal which had a discretion under paragraph 20 to refuse to make an order imposing a new agreement even where the paragraph 21 conditions were satisfied.

95. There is no hint of this structure in the Law Commission's report, or in the DCMS response to consultation. Had it truly been intended to allow operators to side step the detailed provisions of Part 5 for termination and variation, with their procedural protections, it is impossible to believe that some coherent explanation would not have been provided. After all, these are said not simply to be rights enjoyed for a transitional period or by a limited class of operators, but are applicable to all operators at all times.

96. Cornerstone's suggested operation of the Code would be even more astonishing in the case of a subsisting agreement to which Part 2 of the 1954 Act applies, which the Law Commission recommended should not obtain the benefits of the new Code retrospectively. Rather than making use of the right of renewal under the 1954 Act, which requires between six and twelve months' notice to be given under section 26(2) expiring after the end of the contractual term, the operator would have an unrestricted opportunity to give 28 days' notice under paragraph 20. Having done so the operator would escape the provisions in section 34 of the 1954 Act for determining the rent under a new tenancy, which substantially replicate the open market, and would instead obtain access to the valuation assumptions in paragraph 24 of the Code, including the no-network assumption which strips out the component of value referable to the intended use of the site as part of the operator's network. The operator would also escape the restrictions of section 34 of the 1954 Act, and those of paragraph 34(12) of the Code, both of which make the terms of the existing tenancy or Code agreement the starting point when, in default of agreement, the Court or Tribunal is required to fix the terms on which new rights are to be enjoyed (see *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726). Instead the operator would have the benefit of paragraph 23(1)-(2) of the Code which requires the Tribunal to impose an agreement which gives effect to the Code right sought by the operator with such modifications and on such terms as the Tribunal thinks appropriate.

97. Mr Seitler suggested that there were additional conditions and controls under Part 4 which need not be faced by an operator under Part 5, which he relied on to explain why two regimes with such different consequences should exist side by side. On examination these were illusory or unconvincing. The first was the need for an operator applying under Part 4 to satisfy the paragraph 21 conditions. But under Part 5 a site provider may respond to a request by an operator for renewal by giving notice of its own under paragraph 31 to terminate the agreement, citing the fact that the paragraph 21 conditions are no longer satisfied as its ground of termination under paragraph 31(4). It is therefore not right to suggest that, where the parties do not agree, renewal by the Part 4 route will entail satisfaction by the operator of conditions which would not apply under Part 5.

98. Nor am I persuaded that the Tribunal could control a premature application for new or modified rights by the exercise of a discretion under paragraph 20 to refuse to impose an order even where the paragraph 21 conditions were satisfied. Although the language of paragraph 20(1) is arguably permissive ("the court *may* make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met") it is equally arguable that the use of "may" coupled with "if (but only if)" is intended to emphasise the condition rather than

confer a discretion. The existence of such a discretion would raise difficult questions about the circumstances in which it would be proper to refuse to exercise it. On Mr Seitler's case the mere fact that there was still an unexpired agreement in place would not be grounds in itself; the whole point of his argument was that the machinery of the Code would not be fit for purpose if there was no opportunity *during the term* to seek the imposition of new Code rights, or different terms, which might have been overlooked when the agreement was agreed or imposed.

99. Mr Clark referred to *Da Costa v Jamaica* [1990] 2 AC 389, 405 where the Privy Council approved and applied a principle stated in the 1984 edition of Bennion, Statutory Interpretation:

> "Where a court or tribunal is given in terms a <u>power</u> to exercise a certain jurisdiction, this may be construed as imposing a mandatory <u>duty</u> to act. This will arise where there is no justification for failing to exercise the power. In such cases as it is often put, 'may' is held to mean 'shall'".

Mr Seitler did not respond to Mr Clark's reference to authority. The proper approach to paragraph 20(1) may be of significance in other references and it would be undesirable to reach a concluded view on incomplete argument; fortunately, the point is too peripheral to this reference to make it necessary to do so. All I need say, therefore, is that it is not obvious to me that the Tribunal could refuse to impose an agreement where the paragraph 21 test was met.

100. Far from accepting Mr Seitler's argument that the Code would be deficient without the opportunity under Part 4 for an operator to seek new rights or modified terms at any time, in my judgment the existence of such an opportunity, lacking the protections and restrictions found in Part 5, would be wholly inconsistent with the structure of the Code. Nothing in the general objects of the Code, which I accept are intended to facilitate the expansion of the operators' networks in the public interest, justifies such a radical, incoherent and unheralded addition.

101. Mr Seitler's fifth argument was that Parliament had given concurrent jurisdiction to the Tribunal and to the County Court. I agree that there is now a good deal of flexibility, both in jurisdiction and in judicial deployment, but I do not think that supplies any substantive argument in support of Cornerstone's case.

102. Mr Seitler's sixth argument was based on the right given to an operator to challenge removal of its apparatus under Part 6. It was common ground that this right was available to an operator under a subsisting agreement. It was submitted that this would make no sense if the same operator was not able to make an application under paragraph 20. I do not agree. The purpose of Part 6 is to enable an operator to retrieve its apparatus, including when there is no right to keep it on land because an agreement has come to an end, or where the operator never had the benefit of an agreement at all and the apparatus was installed on land by mistake (see Law Commission, paragraph 6.122). The focus of Part 6 is on the apparatus itself, and there is nothing in its wide-ranging provisions which assists Cornerstone in this case.

103. Mr Seitler's seventh point described how the right of renewal available to an operator in respect of a subsisting agreement which was continuing under the 1954 Act could operate side by side with the right of renewal under Part 4 of the Code. He suggested that an operator whose tenancy had been brought to an end under section 29 of the 1954 Act could apply to the

Tribunal under paragraph 20 of the Code when an order for possession was sought or an application was made under Part 6 for the removal of apparatus. Unless the operator had been denied a new tenancy under the one ground which was common to both Code and 1954 Act (the landlord's intention to demolish and reconstruct, which is a ground of opposition under section 30(1)(f) and paragraph 21(5)), the operator could obtain new Code rights.

104. The parallel schemes contemplated by Mr Seitler's argument struck me as chaotic and irrational, as well as inconsistent with the Law Commission's recommendations. He suggested that any tensions could be resolved by case management and by careful use of the power to transfer proceedings between the court and the Tribunal to ensure all issues were dealt with in one forum. But he did not explain what criteria were to be used by a court or Tribunal to manage rival renewal claims between the same parties, concerning the same site, the operator seeking renewal under the Code and the site provider simultaneously seeking termination under the 1954 Act. The financial consequences of a case management decision to stay one application and proceed with the other would be very significant, but, on Cornerstone's argument, there is nothing in the legislation to suggest which statutory regime is to have precedence.

105. Nor was Mr Seitler able to answer Mr Clark's question about whether, and if so how, a tenancy continuing under the 1954 Act would come to an end if the Tribunal imposed a new Code agreement which was not a tenancy. The imposition of a licence might be compatible with the continuation of a tenancy under section 24 of the 1954 Act, yet it cannot have been intended that an operator should have both.

106. These were just some of the difficulties identified by Mr Clark which would not exist if Parts 4 and 5 of the Code are treated as separate regimes, with the operator *in situ* being confined to Part 5 except in the limited circumstances identified by the Court of Appeal in *Compton Beauchamp.* Those difficulties provide further powerful arguments against Cornerstone's case.

107. The last of Mr Seitler's eight points was based on the suggested inadequacy of the renewal provisions of the 1954 Act to meet the need of operators. I have already referred to some of the differences between renewal under the 1954 Act and renewal under Part 5 of the Code (such as the basis of assessment of rent, and the significance of the terms of the original agreement when agreement cannot be reached on the terms of the new agreement). As Mr Clark pointed out, citing *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 WLR 696, CA and *Wallis Fashion Group Ltd v CGU Life Assurance* (2001) 81 P&CR 28, the existence of the Code and the consideration settled in the open market for new and old Code agreements will all be matters capable of being taken into account by the Court when determining the terms and rent for tenancies renewed under the 1954 Act (although rents agreed in the shadow of the o-network assumption might be of limited assistance). Apart from that, the operators' continuing exposure to the less favourable regime of the 1954 Act is simply a consequence of Parliament's acceptance of the Law Commission's recommendation that the new Code should not apply retrospectively. While a site is in transition between the regimes, the deferment of the full benefits of the Code cannot be regarded, objectively, as a deficiency requiring a creative remedy.

108. The one suggested deficiency which merits mention is the possibility that a "primary purpose" tenancy renewed under the 1954 Act might fall into a "black hole" in which it would

be excluded by section 43(4) from any further protection under the 1954 Act, yet could not be recognised as a Code agreement under Part 2 because it would not have been granted by an occupier. The solution to that puzzle was supplied by Lewison LJ in *Compton Beauchamp* at [63]. Paragraph 34(8) of the Code is to be interpreted as applying to any new agreement made between an operator and a site provider and deems the Code to apply to the new agreement as if it were an agreement under Part 2. Whether a new tenancy is ordered by the Court under section 29 or agreed between the parties, a tenancy obtained under the 1954 Act is a true agreement, coming into effect by means of an exchange of lease and counterpart executed by the parties (see section 36(1)). If entered into for Code purposes such a tenancy is outside the 1954 Act (section 43(4)), but it will be deemed by paragraph 34(8) to be an agreement under Part 2. As the circle was squared, so the black hole is filled.

109. In reaching these conclusions I have taken Arqiva's submissions into account. As these were filed on the day the Court of Appeal handed down its decision in *Compton Beauchamp*, they make only limited reference to that decision. Mr Kitson's main points were: first, that Part 4 had not been excluded from applying to subsisting agreements (which was also Mr Seitler's primary submission); secondly, that the 1954 Act was inconvenient and less favourable to operators, so it cannot have been intended that they should be limited to it (in substance Mr Seitler's seventh point); and finally that the construction of the Code suggested by APW would lead to an absurd outcome. Since that construction was favoured by the Court of Appeal it is not necessary to say more about that submission.

Disposal

110. For these reasons I determine the preliminary issue in favour of the respondents. The Tribunal has no jurisdiction under Part 4 to impose a Code agreement on an operator and a landowner where the operator is in occupation of the land under a subsisting agreement. Nor may an operator in occupation under a tenancy continued by Part 2 of the 1954 Act make use of Part 5 to obtain a new tenancy. Such an occupier must first apply in the County Court for a new tenancy under the 1954 Act; when that new tenancy is close enough to its contractual termination the operator may give six months' notice under paragraph 33 and seek renewal under Part 5 of the Code.

111. As the Tribunal lacks jurisdiction to entertain the reference, I am obliged by rule 8(2), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to strike it out.

Martin Rodger QC

Deputy Chamber President

8 November 2019