

Property Commentary: Telecoms

Faster, better, cheaper – pick [one? two? all three?]

COMMENTARY BY [JONATHAN SEITLER QC](#), [JULIAN GREENHILL QC](#), [ZOË BARTON QC](#) AND [HARRIET HOLMES](#)

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Renewals and *Compton Beauchamp*

Cornerstone Telecommunications Infrastructure Ltd v. Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755 (22 October 2019)

Issue:

Whether the Upper Tribunal has jurisdiction to require a freeholder who is not in occupation of land to confer rights under the (new) Code on an operator at a time when there is another operator in occupation of the land exercising the code rights.

Facts:

- In 2004, Vodafone was granted a lease of the site in question for a term of 10 years.
- The site lay on the edge of an arable field. Compton was the freehold owner of the site.
- The lease did not demise any of the land itself, but granted the right to install and use a mast and ancillary apparatus which were subsequently installed on the site, together with rights of access thereto.
- Security of tenure under the 1954 Act was excluded.
- Vodafone shared the use of the mast with Telefonica.
- Since the expiry of the lease, Vodafone's apparatus had remained on site.
- Under para 21 of the old code (Sch 2 to the Telecommunications Act 1984), Compton was not entitled to enforce the removal of Vodafone's apparatus except in accordance with a court order. The keeping of apparatus on the site was deemed lawful, pending enforcement.
- Cornerstone served notice on Compton (not Vodafone) under para 20 of the New Code seeking conferral of code rights by Compton on Cornerstone.

At first instance the Upper Tribunal ([2019] UKUT 0107 (LC)) held that:

- because Compton was not in occupation of the land (Vodafone was), Compton could not have conferred a code right by agreement under Part 2 of the Code because para 9 says that a code right can only be conferred by an agreement between the occupier of the land and an operator;

- There was nothing in Part 4 of the Code which suggested a departure from the principle that only an occupier could confer code rights;
- The occupier needed to be involved in each case, whether the right was being conferred (voluntarily / by agreement) or imposed;
- Cornerstone could have reached agreement with Vodafone, who was in occupation, to confer code rights on Cornerstone and then applied under para 20 to the UT for an order imposing that agreement on Compton;
- It followed that the UT had no jurisdiction to make the order sought against Compton, who was not in occupation of the land.

CA held (dismissing Cornerstone's appeal):

1. Para 20 applies where an operator makes a request of a 'relevant person'.
2. A 'relevant person' may be either (i) an occupier who is can confer code rights or (ii) another person with an interest in the land who can be compelled to agree to be bound by code rights conferred by another. The Code maintains a clear distinction between the two. [30] – [32]
3. The only person who can agree to confer a code right on an operator is the occupier of the land. Para 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 'relevant person' for the purposes of conferring code rights included someone other than the occupier, that person could never agree to confer a code right, making an application inevitable if rights are to be obtained, which Parliament is unlikely to have legislated for. [40]
4. The Upper Tribunal was correct to hold 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.*" [54]. Only in very special circumstance would the New Code contemplate two or more persons (not being joint occupiers) being simultaneously occupiers of the same parcel of land. [81]
5. Where the operator is new to a site there is no difficulty in applying the test. The operator must reach agreement with the occupier or apply under para 20 to the UT. If there is someone else with an interest in the land the operator must get their agreement to be bound by the code rights or, again, apply under para 20.
6. What about an operator in situ?
 - a. An operator in situ may be in 'occupation' / 'an occupier' (e.g. if he has already obtained a code right and is in fact in occupation applying the test above).

- b. It cannot be the case that he may confer a right on himself under para 9.
- c. However, Part 5 of the New Code introduces a new concept of a 'site provider' i.e. a person who conferred or is otherwise bound by a code right, whether or not they are in occupation thereafter. Under Part 5 an operator is entitled to apply to a site provider under para 33 requiring the site provider to vary existing code rights or agree to a new agreement conferring code rights. If agreement cannot be reached the operator can apply to the UT under para 34 for an order requiring the site provider to enter a new agreement. Such an agreement is to be treated as if it were an agreement under Part 2 of the New Code.

Cornerstone Telecommunications Infrastructure Ltd v. Ashloch Ltd [2019] UKUT 338 (LC) (8 November 2019)

The Upper Tribunal decided that it had no jurisdiction to impose Code rights in favour of an operator who was already in occupation of the site, holding over under a tenancy protected by Part II of the Landlord and Tenant Act 1954.

Facts:

- Vodafone took a tenancy in 2002 of part of the roof of a site for a term of 10 years for the purpose of locating telecoms equipment.
- The tenancy was one to which Part II of the 1954 Act applied and Vodafone remained in occupation after the tenancy expired in 2012 so that the tenancy continued under the 1954 Act
- Ashloch was freehold owner of the site.
- In 2018 a third company, APW, took a 99-year lease of the roof from Ashloch.
- In 2019 (in the light of the *Compton Beauchamp* decision) Cornerstone took an assignment of the tenancy from Vodafone, so that Cornerstone was APW's tenant pursuant to the tenancy.
- Cornerstone gave notice under para 20 seeking agreement to the grant of code rights from APW.
- Cornerstone asserted that it could choose either to seek a new tenancy under the 1954 Act or apply to the UT for imposition of a Code Agreement under Part 4 of the Code.

Issue: How can an operator in situ apply for a new agreement conferring Code Rights? Is an operator in situ entitled to apply under Part 4 of the Code for a new agreement? Including if the operator occupies under a subsisting agreement that is a 1954 Act protected tenancy?

At first instance the UT held:

- Although unlike Part 5, the provisions of Part 4 were not expressly excluded by the Transitional Provisions from applying to an operator in situ under a 1954 Act tenancy, the logically prior question was whether Part 4 was available to an operator in situ at all [57]
- As to that, the CA in *Compton* held that an operator in situ has no right to give notice under para 20 of Part 4 of the Code save in the very limited circumstances of obtaining interim or temporary rights under paras 26 or 27 [87]
- The existence of a right on the part of an operator to apply under Part 4 for new or modified rights at any time would be wholly inconsistent with the structure of the Code and in particular the protections and restrictions under Part 5 [100]
- UT 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 1954 Act protected tenancy make use of Part 5 to obtain a new tenancy [110]

Renewals after *Compton Beauchamp* and *Ashloch* – a Summary

1. Is the operator in occupation?
 - If not in occupation then the operator must seek a new agreement from the occupier to confer code rights and then seek agreement from any other relevant person to be bound by those rights.
 - In default of agreement with such persons the operator must apply under Part 4, para 20 of the New Code
2. If the operator is in occupation, then the next question is: is the operator in occupation under a tenancy or only a licence?
 - If the operator is in occupation only under a licence then the operator must seek a new agreement from the site provider under Part 5 of the New Code

3. If the operator is a tenant and, as is very likely for the time being, it is tenant under a *subsisting* tenancy (i.e. a tenancy in existence at that date the New Code came into force), then:
- The key lies in being clear as to the type of subsisting tenancy in question.
 - There are two critical distinctions: (i) is the tenancy for the primary purpose of granting code rights? (ii) is the tenancy protected under Part II of the 1954 Act?
 - An operator in situ under a subsisting primary purpose protected 1954 Act tenancy must in order to renew that agreement:
 - o apply to the County Court for a new tenancy under Part II of the 1954 Act
 - o the new tenancy will then be excluded from the 1954 Act by section 43(4) because it is for the primary purpose of granting Code Rights, and it will be deemed to be an agreement under Part 2 of the New Code by para 38(4);
 - o therefore that new tenancy can then at the end of its contractual term be made the subject of notice under para 33 for renewal or modification under Part 5 of the New Code
 - o if the aim of the operator is to obtain modified Code Rights as soon as possible, the operator should seek a new tenancy for a short term to accelerate the point in time at which Part 5 rights can be enjoyed
 - An operator in situ under a subsisting primary purpose *contracted out* tenancy is not excluded by the Transitional Provisions and so can renew under Part 5.
 - An operator in situ under a subsisting *non-primary purpose* tenancy can renew only under Part II of the 1954 Act. Part 5 of the New Code will not apply – see para 29(2). This is the case regardless of whether the tenancy is a protected 1954 Act tenancy or is contracted out.
 - Otherwise, more generally an operator in situ must rely on Part 5 of the Code to enter into an agreement for new or modified Code Rights
 - Part 4 is only available to an operator in situ to the limited extent of seeking interim or temporary rights.
 - In the case of a contracted out non-primary purpose lease there is no right of renewal under the 1954 Act, Part 4 of the New Code is not available and nor is Part 5 (by reason of the Transitional Provisions).

Interim and temporary rights under the Code

1. The legal effect and policy objectives of the Code:
 - 1.1. To give operators access to "faster dispute resolution, making sure that disputes do not delay construction and maintenance of communications infrastructure"¹ ;
 - 1.2. To "put the telecommunications sector on a similar footing to utilities like electricity and water and reduce the cost of providing infrastructure"² by
 - 1.2.1 Introducing favourable valuation assumptions and disregards when assessing the consideration payable (the no-network' assumption);
 - 1.2.2. Giving operators rights as to upgrading and sharing of ECC; and
 - 1.2.3. Providing operators with security of tenure by continuing code agreements and only permitting site providers to terminate code agreements on 18 months' prior notice and only on specified statutory grounds.
 - 1.3 To drive down the costs of providing electronic communications services;³ and
 - 1.4 To ensure that the jurisdiction for any claims under the Code is with a specialist Tribunal, namely the Upper Tribunal (Lands Chamber).⁴

Cornerstone Telecommunications Infrastructure Ltd v. University of London [2019] EWCA Civ 2075

Facts:

- C is a JV formed by Vodafone and Telefonica UK. It does not provide a network; it installs and maintains apparatus which it makes available to its two shareholders.
- C originally sought (through its agents) the respondent's consent to three visits to inspect and survey the roof in an unspecified four week period.
- No agreement was reached.
- C served notice under para 26 seeking interim rights for a 4-week period from the date of agreement. The draft agreement required the university to keep the building in sufficient state

¹ Paragraph 15 of the Explanatory Notes to the Digital Economy Act 2017

² Paragraph 14 of the Explanatory Notes to the Digital Economy Act 2017

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524895/ECC_Impact_Assessment.pdf

⁴ Law Comm 336 at 9.39 and 9.44

of repair and condition to enable the visits to be safely carried out and proposed a single payment of £50.

Issues:

1. Whether the tribunal has jurisdiction to impose an agreement under para 26 providing only for rights of access to undertake a survey of a building. And whether a right of access to undertake a survey is a code right at all.
2. Whether C is entitled to seek an interim code right under para 26 without seeking the same or any permanent code right under para 20.
3. If the tribunal has jurisdiction to impose an agreement as requested, whether C has shown a good arguable case that the conditions in para 21 are satisfied.

At first instance, the UT held:

1. Is the right sought by C a code right?
 - Para 3 contains a 'menu' of rights. There is no reason in principle or in the statutory language why an agreement must confer them all.
 - Rights of access conferred by regulations would not cover the ordinary situation where an operator wishes to undertake a survey or a new rooftop site. The existence of the alternative rights are not a bar to the interpretation of the code rights for which C contends, but a factor to be taken into account when construing para 3.
 - Focussing on the language, the right to install apparatus under para 3(a) must include a right to enter on the land and to carry out each step required to achieve the installation. *"The right to install is intended to permit an operation involving a series of distinct steps the single word is sufficient to connote, as a component of the right, each of those steps"* (para 73). Preparatory surveys required as a prelude to installation are part of the right "to install" under para 3(a) (para 74).
 - Alternatively, such surveys are part of the right under para 3(d). Whilst one would usually understand the word "works" to mean physical works, "works in connection with the installation" connotes a still wider range of activities than the word "install".
 - If the right is not conferred by the express provisions of paras 3(a) and (d), then the right must be implied to render the code effective.

2. Can interim rights be imposed without an operator seeking permanent rights at the same time?
 - Yes. The opportunity to seek interim rights under para 26 is conferred by the Code in terms which do not require a request for the same or permanent rights to be made concurrently.
 - The fact that interim rights may be available without the need for an operator to satisfy the normal civil standard of proof is the result of a policy decision by Parliament to give greater weight to the public interest in the provision of electronic communications networks than to private property rights. Parliament should be taken to have appreciated that before an operator's case is properly tested, substantive (albeit interim) rights might be conferred applying the "good arguable case" standard.

3. The standard to be applied:
 - The adoption of the 'good arguable case' test is consistent with the expectation that applications for interim rights will be dealt with on a summary basis, without oral evidence or full disclosure.
 - It will be for the operator to provide sufficient information, supported where appropriate by the disclosure of sufficient documents, to demonstrate it has a good arguable case that para 21 is made out.

What's the scoop from the Court of Appeal?

Here is what they (Etherton MR, Lewison and Arnold LL.J) had to say:

7. Lewison LJ described the background to the Code in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755:

"[2] Until the enactment of the Code, an operator of electronic communications equipment was entitled to acquire rights under Schedule 2 to the Telecommunications Act 1984. There was wide dissatisfaction with that code for a number of reasons. First, it was complex and extremely difficult to understand. Second, it was outdated. Third, there was evidence of concern that it was making the rollout of electronic communications equipment more difficult. These three features were noted by the Law Commission in its report (The Electronic Communications Code Law Com Report 336 paras 1.9 to 1.11). Both in its consultation paper

and in its final report the Law Commission took the view that reform could not be achieved simply by amendment. Instead, it took the view that:

"... the advantages of this review will only be felt if the revised Code is drafted from a "clean sheet of paper"; there is no point in merely amending the 2003 Code."

[3] It was part of the government's strategy to achieve widespread coverage of the country by imposing obligations on operators by way of licence conditions. The government also intended to reform the electronic communications code to help operators to extend their networks, to make mast-sharing easier and infrastructure deployment and maintenance cheaper. Following the Law Commission's report, the code now in force was introduced by the Digital Economy Act 2017, which inserted section 106 and Schedule 3A to the Communications Act 2003."

8. One of the avowed purposes of the Code was to reduce the price payable by operators for the acquisition of code rights. That was done by requiring the consideration for any such rights to be assessed in a "no network" world. Landowners stand to receive much less for the conferring of rights under the Code. They therefore prefer to operate outside the Code where they can. That is the commercial consideration underlying this appeal.
34. We do not regard this argument as a strong pointer towards the correct interpretation of the Code. As the Law Commission said, the Code was to be drafted on a "clean sheet of paper". The Code was thus designed to be, so far as possible, a self-contained Code; and the answer to the first question raised by this appeal must be found within the words of the Code itself.
47. The context in the present case is a Code designed to facilitate the provision of electronic communications apparatus in the public interest Where the legislation uses an imprecise word, a court is entitled to place strong reliance on the legislative purpose underpinning the legislation. That purpose is undoubtedly to facilitate the improvement of electronic communications throughout the country. That purpose cannot be sensibly achieved unless operators can acquire (compulsorily if need be) the right to assess the suitability of potential sites.
55. Parliament must be taken to have intended that national coverage by electronic communications equipment would be facilitated by code rights. It must also be taken to have intended that apparatus would be installed on suitable sites ... [It is all about] ... the legislative context"

Upgrading

1. What does the Code say?

3 The code rights

For the purposes of this code a "code right", in relation to an operator and any land, is a right for the statutory purposes—

- (a) to install electronic communications apparatus on, under or over the land,
- (b) to keep installed electronic communications apparatus which is on, under or over the land,
- (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,

...

(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,

(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,...

17 Power for operator to upgrade or share apparatus

(1) An operator ("the main operator") who has entered into an agreement under Part 2 of this code may, if the conditions in sub-paragraphs (2) and (3) are met—

- (a) upgrade the electronic communications apparatus to which the agreement relates, or
- (b) share the use of such electronic communications apparatus with another operator.

(2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.

(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.

(5) Any agreement under Part 2 of this code is void to the extent that—

(a) it prevents or limits the upgrading or sharing, in a case where the conditions in subparagraphs (2) and (3) are met, of the electronic communications apparatus to which the agreement relates, or

(b) it makes upgrading or sharing of such apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money).

(6) References in this paragraph to sharing electronic communications apparatus include carrying out works to the apparatus to enable such sharing to take place.

2. What might this mean?

1. Meaning of "upgrade"

- Question of statutory interpretation.
- The word 'upgrade' is generally understood to mean raising something to a higher standard or improvement, by adding to or replacing it.
- That interpretation is consistent with the Law Commission's understanding when it commented that "the upgrading of equipment – usually the substitution of equipment, sometimes the addition of more – generally involves physical change" (Law Com 336 para 3.40)
- Might be argued that upgrade only includes replacement of components and not the whole apparatus (see, suggestion in Falcon book at §§20.3.4 – 20.3.5).
- On balance, we are of the view that 'upgrade' means to improve / raise the standard of the apparatus, including by replacement or adding to the relevant apparatus.

2. Interplay between para 3(c) and para 17

- Para 3(c) confers nothing. It is a description of a right which may be acquired by agreement under Part 2 or at the imposition of the tribunal.
- Para 17 is the automatic entitlement on the part of the operator to upgrade "the apparatus to which the agreement relates".

- In our view, para 17 does not limit the extent and scope of the code right under para 3(c) or the circumstances in which a right of upgrade under para 3(c) may be acquired.
3. The first condition under para 17: no adverse impact or no more than minimal impact
- It is the impact on the appearance of the apparatus which counts, rather than the impact on the land (the word "its" refers back to the apparatus).
 - The provision is directed towards whether the change to the apparatus can be seen and, if it can, whether that visible change exceeds the de minimis threshold (i.e. so as to be adverse or having no more than minimal impact).
 - If the impact would have no visual impact or would not be noticeable to the reasonable person, then the condition would be met. That view is consistent with the wording of para 17(2) and with the Law Commission's discussions at paras 3.48 and 3.51 (Law Com 336).
 - Otherwise, whether the condition is met is likely to be fact-sensitive, but we think it can be said that:
 - o If the change is within existing ducts, cabinets or other structures, then the condition should be met.
 - o If the change is to add something to existing apparatus and that additional thing is visible – e.g. additional receiver or transmitter on an existing mast – then whether the condition is met will depend on whether it makes the site messier or appear overloaded (?).
 - o Condition is unlikely to be met if the upgrade is to make the mast materially bigger or to materially increase the size of the cabinet.
4. The second condition: What constitutes an additional burden?
- No de minimis threshold, unlike the first condition. So, if an 'additional burden' for the purposes of para 17(3) is established, then the condition is not met.
 - Para 17(4) not an exhaustive list of what might constitute an 'additional burden' although it is hard to see what additional burden is not covered by 17(3)(a) and (b).
 - Hard to say what might be an additional burden in a vacuum. Some potential examples:
 - Where the site provider can show that additional insurance is necessary as a direct result of the upgrade;

- Where the other party / SP can show that additional security (at additional cost) will fall on him;
- If the upgrade were to restrict the other party's / SP's user of the land;
- Where additional access to the site on an on-going basis will be required by reason of the upgrade and that has a cost consequence for the other party / SP.

This commentary was originally published in January for our Telecoms Breakfast Briefing held in chambers. If you would like to be added to our mailing list to receive invitations to future property events, please email events@wilberforce.co.uk

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