Trinity Term
[2022] UKSC 18
On appeals from: [2019] EWCA Civ 1755;
[2021] EWCA Civ 90 and
[2020] UKUT 0195 (Lands Chamber)

JUDGMENT

Cornerstone Telecommunications Infrastructure Ltd (Appellant) *v* Compton Beauchamp Estates Ltd (Respondent)
Cornerstone Telecommunications Infrastructure Ltd (Appellant) *v* Ashloch Ltd and AP Wireless II (UK) Ltd (Respondents)
On Tower UK Ltd (formerly known as Arqiva Services Ltd) (Appellant) *v* AP Wireless II (UK) Ltd (Respondent)

before

Lord Hodge, Deputy President
Lord Sales
Lord Leggatt
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
22 June 2022

Heard on 1, 2 and 3 February 2022

Appellant (Cornerstone Telecommunications Infrastructure Ltd)
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Oliver Radley-Gardner QC (in Ashloch only)
Tricia Hemans (in Ashloch only)
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Respondent [Compton Beauchamp Ltd]

Respondent (Ashloch Ltd)

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LADY ROSE: (with whom Lord Hodge, Lord Sales, Lord Leggatt and Lord Burrows agree)

1. INTRODUCTION

1. When the revised Electronic Communications Code with which these appeals are concerned was published in May 2016, the Minister of State for Culture and the Digital Economy described the roll out of digital communications infrastructure as vitally important to citizens across the UK, as digital communications become an ever more essential part of the economic and social fabric of this country. The new Code was, the Minister said, intended to "provide a robust platform to enable long-term investment and development of digital communications infrastructure in the 21st Century": see the Foreword to the Government's consultation response "*A New Electronic Communications Code*".

2. Under early legislation dealing with the installation of telegraph infrastructure, the necessary apparatus could generally only be placed on land with consent of the landowner. It was recognised, however, that it was not desirable to leave the selection of sites and the negotiation between site owners and telecoms operators to market forces. Legislation was needed to enable the providers of telecoms services to compel landowners either to sell land to them or to grant them rights over land on which they could install the equipment needed to build a telecoms network.

3. A code was introduced as Schedule 2 to the Telecommunications Act 1984 empowering the courts to intervene to require an unwilling landowner to provide the site and setting the terms and conditions on which the operator would install and maintain the relevant electronic communications apparatus ("ECA") there. That code had been introduced as part of the privatisation programme to open up the telecoms sector to competition by enabling competing operators to develop networks that would compete with and supplement the network that had been developed over many years by the monopoly provider. Schedule 2 to the Telecommunications Act 1984 was substantially amended by the Communications Act 2003 ("the 2003 Act"). I shall refer to that code as amended as "the old code". It became clear that the drafting and operation of the old code was unsatisfactory and that it was generating problems that risked jeopardising the swift, economic roll out of new technologies as they arose in this fast moving sector.

4. In September 2011 the Minister asked the Law Commission to conduct an independent review of the old code. The Law Commission carried out an extensive consultation exercise. The consultation paper published in June 2012 described how

electronic communication depends on a complex array of hardware including networks of masts, cables, wires, servers, routers and exchanges. The hardware sometimes has to be located on land that does not belong to those who own the equipment: "fibre optic cables pass under streets and cross fields; mobile phone transmitters cling to church steeples and shop-fronts; and telephone cabinets are familiar on our roadsides and pavements".

5. The Law Commission published its Report *The Electronic Communications Code* (Law Com No 336) on 27 February 2013 ("the Law Commission Report"). The recommendations made in that Report were largely, though not wholly, accepted by the Government in replacing the old code. The current regime for sorting out when, where and on what terms, telecoms operators can acquire the right to install their ECA on a particular piece of land is that set out in the Electronic Communications Code which came into force on 28 December 2017 and which forms Schedule 3A to the 2003 Act ("the Code" or "the new Code"). It was inserted into the 2003 Act by the Digital Economy Act 2017 ("the 2017 Act") and has effect by virtue of section 106 of the 2003 Act (also amended by the 2017 Act).

6. As well as inserting the new Code into the 2003 Act, the 2017 Act made provision for the transition of the existing arrangements which had been made under the old code and which needed to be carried forward under the new Code. These are set out in Schedule 2 to the 2017 Act (the "transitional provisions").

7. The three appeals that are before the court concern how the Code works, particularly in combination with the transitional provisions. The main issue is whether and how an operator who has already installed ECA on a site can acquire new or better code rights from the site owner. At the heart of the three appeals is para 9 of the Code. This provides that:

> "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."

8. The Court of Appeal has decided in two of the judgments under appeal that when the operator installs its equipment on the land, in many cases it will thereafter be the "occupier of the land" for the purpose of para 9. Since an operator who is an occupier cannot enter into an agreement with itself, this means that it is thereafter precluded from applying under the Code for new code rights. That makes sense, the Court of Appeal held, having regard to the overall structure of the Code because the aim of the Code is to ensure that parties to an agreement conferring code rights stick

to the bargain they have made. There are other Parts of the Code they can use once their initial agreement has expired if they want to change that bargain, subject to meeting the conditions of those other Parts.

9. The appellants are all operators within the meaning of para 2 of the new Code, pursuant to directions made by Ofcom under the 2003 Act. They have installed ECA on land but their entitlement to keep it there is precarious. They want in effect to improve the nature of their rights by applying for rights under the Code. In this judgment where I refer to the counterparty to the agreement with the operator as "the site owner" or "landowner" that is not intended to indicate that that counterparty has any particular legal interest in the land. I refer to the operator who has ECA already installed on the site as the "operator on site".

2. THE NEW CODE, THE OLD CODE AND THE TRANSITIONAL PROVISIONS

(a) The new Code

10. The new Code is a highly complex instrument of 108 paragraphs. I describe here only those provisions which are relevant to these appeals. There are many other paragraphs of the Code dealing with rights to install ECA over railways, canals and tramways, the right to fly lines over land and conferring rights to carry out street work. I have set out the main provisions with which we are concerned in an Annex to this judgment.

11. Part 1 of the Code introduces the key concepts. The term "operator" used in the Code means a person to whom the Code is applied by a direction of Ofcom under section 106 of the 2003 Act. Such a direction can only be made in respect of that person if the purpose of making it is so the person can either provide an electronic communications network (section 106(4)(a)) or provide a system of infrastructure which it makes available to network providers so that they can provide their networks (section 106(4)(b)). The major mobile phone companies include Vodafone Ltd and the Telefonica group who were formerly joint co-owners of Cornerstone Telecommunications Infrastructure Ltd ("Cornerstone"), one of the appellants in these appeals. Vodafone and Telefonica are operators pursuant to subsection (4)(a) of section 106 of the 2003 Act and Cornerstone is an operator pursuant to subsection (4)(b).

12. A "code right" is defined in para 3 of the new Code as a right to do certain things for the statutory purposes. Those purposes are set out in para 4 and are the purposes of providing the operator's network or providing an infrastructure system. Para 3

specifies nine groups of activities from (a) to (i) which can be the subject of a code right. Some of these sub-paragraphs themselves include many different activities, for example sub-paragraph (c) is "to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land", encompassing therein 21 different activities. Some of the activities are likely to be intrusive from the site owner's point of view, for example the right to obstruct a means of access to or from land (sub-paragraph (h)), and some less so, for example the right to connect to a power supply (sub-paragraph (g)) or to cut back a tree that interferes with ECA (sub-paragraph (i)).

13. "Electronic communications apparatus" is defined broadly in para 5 as any apparatus used in connection with the provision of the network, lines such as wires and cables, and structures, including buildings if their sole purpose is to enclose other ECA.

14. Part 2 of the Code deals with the conferral of code rights and their exercise. After the introductory para 8, it starts with the key paragraph, para 9, which as I have said, provides that 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. The term "occupier" is defined in para 105 of the Code:

> "(1) References in this code to an occupier of land are to the occupier of the land for the time being.
>
> …
>
> (5) Sub-paragraph (6) applies in relation to land which -
>
> (a) is unoccupied, and
>
> (b) is not a street in England and Wales or Northern Ireland or a road in Scotland.
>
> (6) References in this code to an occupier of land, in relation to land within sub-paragraph (5), are to -

(a) the person (if any) who for the time being exercises powers of management or control over the land, or

(b) if there is no person within paragraph (a), to every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land …"

15. Para 10 introduces the concept that a code right can bind someone other than the site owner who confers the right if that person agrees to be bound. This can be a successor in title to the interest that the site owner had when the code right was conferred or someone whose right to the land was carved out of the site owner's right or granted by the site owner: para 10(2). According to para 10(4), the code right also binds "any other person with an interest in the land who has … agreed to be bound by it". The Code thereafter deals separately with occupiers who confer code rights and people who are otherwise bound by a code right conferred by someone else.

16. Para 11 sets out the requirements for an agreement under Part 2 which confers code rights or by which someone is bound by code rights. The agreement must be in writing and signed by the parties, it must state for how long the right is exercisable and the period of notice, if any, required to terminate the agreement. Para 11 provides further that any variation of the agreement must also be signed and in writing and must also state the duration of the right and the notice period.

17. The term "agreement under Part 2" is then used extensively in Parts 3 and 4 of the Code to mean primarily an agreement reached between the operator and another person under which either the site owner confers code rights or another person agrees to be bound by code rights. However, as I describe later, there are other situations in which site owners or others have code rights imposed upon them which are not consensual but which are treated as if they were and so are included in the term "agreement under Part 2".

18. Part 3 of the Code provides for the assignment of code rights and for the upgrading and sharing of ECA. The agreement under Part 2 must not prevent or limit or charge money for the assignment of the agreement to another operator: para 16(1). Para 17 provides for the operator to be able to upgrade and share the ECA if two conditions are met. The first condition is that any changes to the ECA do not have more than a minimal adverse impact on its appearance. The second condition is that the upgrading or sharing imposes no additional burden on the other party to the

agreement; including for example having an additional adverse effect on the other party's enjoyment of the land. According to para 17(5), an agreement is void to the extent that it prevents or limits upgrading or sharing.

19. Part 4 of the Code deals with the power of the court to impose an agreement on a person by which the person confers or is otherwise bound by a code right. Following the making of the Electronic Communications Code (Jurisdiction) Regulations 2017 (SI 2017/1284), the powers conferred on the court by the new Code are in practice exercised by the Upper Tribunal (Lands Chamber).

20. Para 20 provides for the operator to apply to the tribunal for the imposition of an agreement, provided it has first given the occupier an opportunity to agree to grant or be bound by the right:

(i) The operator must first give the relevant person a notice in writing setting out the code right, the land to which it relates and the other terms of the agreement that the operator seeks and asking the relevant person to agree to those terms.

(ii) The recipient of the notice then has 28 days in which to agree to confer the code rights or to be bound by them.

(iii) If the recipient does not agree, the operator may apply to the tribunal for an order which imposes an agreement between the operator and the recipient.

21. Para 21 sets out the two conditions that must be satisfied before the tribunal may make an order imposing an agreement under para 20. The first condition is that the prejudice caused by the order can be compensated for by money and the second is that "the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person". In deciding whether that public interest test is met, the tribunal must have regard to the public interest "in access to a choice of high quality electronic communications services" (para 21(4)). Conversely the tribunal may not make the order if it would frustrate the relevant person's intentions to develop the land (para 21(5)).

22. If an agreement is imposed by an order under para 20, then according to para 22 it takes effect for all purposes of the Code as an agreement under Part 2 between the operator and the relevant person.

23. Para 23 then sets out the terms of the agreement that the tribunal should or may include in the order made under para 20 when imposing an agreement giving effect to a code right. An order under para 20 must require the agreement to include a term as to payment from the operator to the relevant person, it must include a term specifying for how long the code right conferred by the agreement is exercisable and the tribunal must consider whether the agreement should include a term as to the circumstances in which the agreement can be terminated.

24. The consideration payable by the operator must be determined in accordance with para 24. This is an important provision because although it provides that the fee must represent the market value of the relevant person's agreement to confer the right or be bound by the right, that market value must be assessed on the assumption that "the right that the transaction relates to does not relate to the provision or use of an electronic communications network" and that there is more than one site which the buyer could use. These assumptions - sometimes referred to as the "no scheme" basis for valuation - effectively remove from the equation the enhanced value that the rights to the land have to the operator (rather than to anyone else) arising from the use of the land as part of the network. They are thus intended to prevent the relevant person demanding a premium price either because the operator has no choice but to use this particular site or because the site has an enhanced value as a site for ECA comprising part of the operator's network.

25. Paras 26 and 27 are significant for our purposes because the appellants rely on them as indicators that para 9 cannot bear the meaning given to it by the Court of Appeal:

> (i) Para 26 is headed "Interim code rights" and allows an operator to apply to the court for an order which imposes an agreement conferring a code right or providing for a code right to bind a person on an interim basis, that is to say for a period specified in the order or until the occurrence of a specified event. Where such an interim order is made, various of the paragraphs of Part 4 apply, including para 22 so that an interim agreement takes effect as an agreement under Part 2.
>
> (ii) Para 27 is headed "Temporary code rights" and enables an operator which has given a notice under para 20(2) (that is a notice seeking the other person's agreement to confer or be bound by a code right) also to seek a temporary code right. The conditions which must be satisfied in order for a temporary code right to be granted under para 27 are important because the appellants say they show clearly that the drafter of the Code assumed that an operator could make an application for a code right under para 20 even though

it already had ECA installed. This is because the temporary right can be applied for only if the operator has given a notice under para 20(2) to a person and has also sought a temporary right in relation to ECA "which is already installed on, under or over the land".

26. An agreement under Part 2 between the operator and the occupier who confers the rights has to state for how long the code rights are exercisable. What happens when that initial period comes to an end? That is dealt with in Part 5 of the Code and is significant in these appeals because the Respondents argue that this provides the exclusive route by which operators who are occupiers because they have their ECA installed on land can apply for rights, provided that they can bring themselves within its terms. The answer provided by para 30(2) is, broadly, that if the agreement is a "code agreement" to which Part 5 applies, the operator may continue to exercise that right and the site provider continues to be bound by the right.

27. An agreement is a "code agreement" for the purposes of Part 5 if it is an agreement under Part 2 and does not fall within para 29(2) to (4). Para 29(2) in conjunction with para 29(3) excludes an agreement if its primary purpose is a purpose other than to grant code rights and it is a lease which has security of tenure under Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act") or would have such security if the parties had not contracted out of that security pursuant to section 38A of that Act. Para 29(4) provides an equivalent exception under the corresponding Northern Irish provisions. I discuss the interrelation between the Code and the 1954 Act further below.

28. Para 31 then sets out how a site provider can bring the agreement to an end, given that it cannot do so under the terms of the original agreement. The site provider must give notice to the operator under para 31, giving one of the permitted reasons for bringing the agreement to an end. Permitted reasons include substantial breaches of the agreement by the operator or an intention to redevelop the land or where the conditions under para 21 are not met. Once the site provider gives notice of termination, the code agreement will come to an end, unless within three months the operator in receipt of such a notice serves a counter-notice. If a counter-notice is served, the tribunal will then determine whether the agreement should continue and if so on what terms.

29. Para 33 makes provision for the operator or the site provider to require the other party to vary the terms of the code agreement or to confer an additional code right or to replace the existing code agreement with a new one. The tribunal is given extensive powers to set the terms of the code agreement on the making by either party of an application under Part 5.

30. Part 6 deals with the removal of ECA from land. It distinguishes between a landowner who has a right to require the removal of the ECA and a landowner who has a right to enforce the removal of the ECA. The circumstances in which the landowner has a right to require the removal of the ECA are set out in para 37. Para 37 provides that a person with an interest in land has the right to require the removal of ECA on its land if and only if one of four conditions is met. The second condition includes where the code right entitling the operator to keep the ECA on the land has ceased to bind the landowner because he has given a notice under para 32(1) and either the operator has not served a counter-notice or the tribunal has ordered that the code agreement comes to an end.

31. Even if the landowner has a right to require the removal of the ECA under para 37, it cannot actually enforce that right without following the procedure set out in para 40. The site provider must first give notice to the operator requiring the removal of the equipment. If the parties cannot reach agreement, the site provider must apply to the tribunal for an order requiring the operator to remove the ECA or authorising the site owner to sell it. The tribunal can then make one of the orders set out in para 44, and if the operator does not comply, the tribunal can make an order entitling the landowner to remove or sell the ECA.

(b) The old code

32. The old code formed Schedule 2 to the Telecommunications Act 1984 and was amended by the 2003 Act. The structure of the old code is different in some important respects from that of the new Code. The old code is the same as the new in that it envisages that the conferring of rights will be by agreement of the occupier but then provides for the court to intervene on the operator's behalf if that agreement is not forthcoming. Thus para 2 of the old code provides that the agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right to execute any works on that land for the installation or maintenance of ECA.

33. Para 5 provides that where an operator requires any person to agree that any right should be conferred on it, the operator may give notice to that person of the right and of the agreement he requires. The person to whom the notice is given then has 28 days in which to agree, failing which the operator may apply to the court for an order conferring the proposed right and dispensing with the need for the agreement of the person to whom the notice was given: para 5(2). The court must make the order if two conditions are met, similar to the conditions in para 21 of the new Code. The court then sets the conditions on which the right is exercisable including the compensation payable calculated in accordance with para 7.

34. Under the old code, however, the outcome of such an application was an order of the court dispensing with the site owner's agreement and setting the terms on which the code rights were imposed on the site owner. Under the new Code, the outcome of the application to the court is also an order but the order imposes an agreement which sets out the terms on which the code rights can be exercised rather than the order itself setting out the terms and conditions for the grant of the right.

35. The different approach under the old code is reflected by para 5(7) of the old code which provides that, where an order is made dispensing with the need for agreement, the order shall have the same effect and incidents as the agreement of the person whose agreement was dispensed with. Accordingly, the court order can be varied or released by subsequent agreement; in other words, even though the terms are set out in and therefore imposed by an order of the court, the parties may vary or release them by agreement without needing to return to the court for an order varying or releasing the court's order: see the Law Commission Report para 4.52.

36. What happens when the agreement (whether voluntary or imposed) comes to an end is dealt with by para 21. The old code, like the new Code, also draws a distinction between being entitled to require the removal of equipment (which arises once the operator's right to keep the apparatus installed ceases) and a right to enforce the removal of the equipment which arises once the operator fails to object to a request to remove the apparatus or where the person entitled to require removal has obtained a court order overriding the operator's objection.

37. Para 21(1) provides for what happens when a person is entitled to require the removal of the operator's ECA from any land because the apparatus is kept on the land "otherwise than in pursuance of a right binding that person". It provides that the person so entitled cannot enforce the removal of the apparatus except in accordance with the provisions of that paragraph. First, the person must give notice to the operator requiring the removal of the apparatus. If after 28 days, no counter-notice is received, then the person is entitled to enforce the removal of the apparatus. The operator can serve a counter-notice either disputing the entitlement of the person to require the removal of the apparatus or specifying the steps that the operator "proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land".

38. The person to whom the counter-notice is given may then only enforce the removal of the apparatus pursuant to an order of the court. Where the counter-notice specifies steps that the operator proposes to take to secure its rights, the court can only make an order if the operator is not seriously intending to take those steps or if those steps would not secure the right to keep or reinstall the apparatus on the land. If

the person obtains a court order entitling him to enforce the removal of the apparatus, he may apply to the court for authority to remove it himself.

39. Para 21(9) of the old code provides:

> "Any telecommunication apparatus kept installed on, under or over any land shall (…) be deemed, as against any person who was at any time entitled to require the removal of the apparatus, but by virtue of this paragraph not entitled to enforce its removal, to have been lawfully so kept at that time."

40. This prevents a landowner from bypassing para 21 by bringing an action for trespass or nuisance.

41. The old code therefore did not contain the equivalent of Part 5 of the new Code. Rather it envisaged that rights under a voluntary agreement or the court's order dispensing with agreement would run on (with the installation of the apparatus being deemed to be lawful) unless and until a person entitled to require the removal of the apparatus on the expiry of the right took action under para 21 of the old code to require that removal.

42. I note here that if a counter-notice was served by the operator under para 21(4) challenging the right to require the removal of the apparatus, the court was not then empowered by para 21(6) to confer new rights. The court could only either make or decline to make the order entitling the person to enforce the right of removal. The paragraph envisages that the counter-notice will set out what steps the operator will need to take to secure a right to keep the apparatus on the land. Given that one must assume that the landowner in this situation wants the ECA removed, those steps will include making a request under para 5(1) and bringing the issue before the court under para 5(2). That accords with the Law Commission's understanding of how the old code worked. They note in their description of the procedure under para 21 of the old code, that "steps" may include applying to the court under para 5 to dispense with that person's agreement for the grant of rights pursuant to the old Code: see para 6.17 of the Law Commission's Report.

43. What is not clear and what was not addressed directly by the parties is whether under the old code an operator with ECA on the land could only make use of para 5 when the operator was resisting an application for the removal of the ECA under para 21 or whether the operator could use the para 5 avenue at any time during the term of

the voluntary agreement or during the currency of the court order imposed under para 5. As regards, the latter situation, there is no provision in para 5 suggesting that the court is somehow deprived of the power that a court inherently has to vary or revoke its own orders on the application of one of the parties. If that power remains, then it is, perhaps, likely that para 5 is available during the term of a voluntary agreement to avoid giving those operators with a court order an advantage over those with an agreement. Such an advantage would cut across the clear preference of the old code for matters being dealt with consensually where possible.

44. Para 6 of the old code (which is broadly equivalent to paras 26 and 27 of the new Code) enables the court to confer temporary rights on an operator who is vulnerable to an application to enforce the removal of his apparatus.

45. What does appear from the old code is that the fact that the operator has the benefit of the security of tenure provided by Part 2 of the 1954 Act does not make any difference to its rights under the old code. It could still apply under para 5 for new rights or para 6 for temporary rights to be embodied in an order of the court (rather than in a new lease) at least in circumstances where the operator was vulnerable to an application by the landowner under para 21 of the old code.

(c) The transitional provisions in outline

46. When the new Code came into force, there were already many thousands of sites with ECA installed by operators on site. The nature of the agreements between the operator on site and the site provider were very varied. Some were parties to a formal lease, some were on site holding over under an expired lease and therefore had either a periodic tenancy or a tenancy at will. Some were on site under a contractual licence which did not amount to a lease. It was therefore important for Parliament to provide when and how the new Code would apply.

47. The Law Commission's Report which contained recommendations for the reform of the old code discussed how the transition to any new regime should be managed. The Report recognised that reform was needed because the old code was making the roll out of electronic communications more difficult. But they also noted at para 1.25 of the Report that existing practices had already become established and that "any radical change to the basis of the Code and of dealings between Code Operators and Site Providers is likely to cause considerable economic loss, and may also generate practical and economic problems for the operation of the electronic communications network." The Report advised, therefore, that it would not be practicable or appropriate simply to apply the revised Code to existing arrangements,

affecting rights which had already arisen. In some cases, there would be disruption to carefully negotiated agreements by which the parties had sought to strike a balance within the context of the old code.

48. The Government accepted the Law Commission's recommendation of a radical overhaul of the old code and that the revised code should not be applied retrospectively. At para (xii) of the Executive Summary of the Government's consultation response in May 2016, the Government said:

> "The Government has also decided that the new Code rights will only apply to contracts signed after the law has come into effect, and will not apply to existing contracts retrospectively. Government intends to make transitional arrangements that will make clear how and when existing agreements transition to the provisions of the new Code. This will enable a steady move to the new legal framework over the next 10 to 15 years as existing contracts come up for renewal, while simultaneously creating an incentive for new investment. The Government will keep the whole sector under close review as communications companies and landlords work together to implement the reforms."

49. It is important in my judgment to note, however, that in the section of the response setting out more detail on this point, the issues that had been raised in the consultation for and against retrospectivity focused more on the retrospective application of the proposed "no scheme" basis of valuation and the application of the right to upgrade and share the ECA rather than on the issues that are raised in this appeal: see para 51 of the response.

50. Turning to the transitional provisions that were adopted, a key term for their operation is the definition of a "subsisting agreement". This means an agreement for the purposes of para 2 or 3 of the old code or an order in force under para 5 of the old code. It is important for the purposes of these appeals to note here that it was common ground between the parties that in order for an agreement to be a "subsisting agreement" for the purposes of the transitional provisions, it had to be an agreement in writing because para 2 of the old code required such agreements to be in writing. This was the conclusion reached by the Upper Tribunal in the *On Tower* case. But it is also important to note that there is nothing in Schedule 2 to the 2017 Act which limits all the transitional provisions set out there to subsisting agreements. The term "subsisting agreement" is used in some of the paragraphs in the transitional provisions but not in others.

51. Broadly, the effect of the transitional provisions is that a subsisting agreement takes effect once the new Code comes into force as if it were an agreement under Part 2 of the new Code, subject to some modifications made in the remaining paragraphs of Schedule 2.

52. The primary provision which is limited to subsisting agreements is para 2 of the transitional provisions. Para 2 provides that a subsisting agreement carries on as an agreement under Part 2 of the new Code and a person bound by it is to be treated as bound pursuant to Part 2 of the new Code. This is subject to some modifications, in particular (as presaged by the Government response to the consultation) Part 3 of the new Code prohibiting a ban on assignments and allowing the upgrade and sharing of ECA is disapplied to subsisting agreements (para 5(1)).

53. Paras 11 and 20 of the transitional provisions deal with pending applications made by an operator or landowner under the old code but not yet disposed of as at the date when that code is replaced by the new Code (which was 28 December 2017). These paragraphs are not limited in their application to subsisting agreements but apply in any case where the request or notice they deal with has been served under the old code.

54. Para 11 of the transitional provisions deals with where there is a pending request by an operator for the conferring of old code rights under para 5(1) of the old code. Where such a request has been made by an operator but no application has been made to the court by the time the new Code comes into force, the notice is treated as if it had been made under para 20(2) of the new Code. If an application to the court had already been made at that time, the application goes forward and is dealt with under the provisions of the old code but any order made by the court has effect as an order made under para 20 of the new Code: see para 12 of the transitional provisions.

55. Para 20 of the transitional provisions deals with a pending process for the removal of apparatus under para 21 of the old code. Where before the old code was repealed, a person had given notice under para 21(2) of the old code requiring the removal of apparatus, para 21 of the old code continues to apply to the processing of that notice. But the references to steps that the operator specifies in its counter-notice that it intends to take to secure a right to keep the apparatus on the land “are to be read as including any corresponding steps that the operator could take under the new code or by virtue of this Schedule”.

(d) The relationship between the codes and the Landlord and Tenant Act 1954

56. Part 2 of the 1954 Act gives security of tenure to business tenants. Very broadly, it ensures that a tenancy granted for business purposes will continue in effect pursuant to section 24 of the 1954 Act, despite the expiry of its term, unless and until it is either brought to an end on the grounds prescribed in section 30 of the 1954 Act or a new tenancy is granted by the parties or arises through a court order pursuant to section 29 of that Act. An order renewing the lease under section 29 may be made at the request of the tenant under section 26 of the 1954 Act, or in response to a failed attempt by the landlord to bring the tenancy to an end after serving notice under section 25. Section 38A of the 1954 Act (inserted as from 1 June 2004 by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096)) allows the parties to a business lease to contract out of the Part 2 protection so that the lease will not have security of tenure.

57. In many cases the code rights are granted under an agreement which does not fall within Part 2 of the 1954 Act at all, for example because it is a licence and not a lease. But in many cases, as in the circumstances of these appeals, the initial conferring of code rights will be by way of a business lease within the 1954 Act with the operator either benefiting from, or contracting out of, security of tenure.

58. The Law Commission Report discussed the relationship between the old code and the protection conferred on some operators if the agreement by which their code rights were conferred was a lease to which Part 2 of the 1954 Act applied. The Report noted at para 6.56 that where code rights are conferred by the grant of a lease, that lease will be protected by the 1954 Act unless the parties have contracted out. This runs parallel with the protection given to the operator by para 21 of the old code (which prevented the landowner from enforcing the removal of the apparatus without an order of the court). The Law Commission doubted that this dual protection was necessary or helpful to either party and noted also that it was common practice for leases to operators to be contracted out of the 1954 Act protection.

59. The new Code deals with this relationship in Part 5 by para 29 which explains when Part 5 applies to agreements under Part 2 of the new Code. Para 29 excludes from the application of Part 5 agreements which are leases which:

(i) do not have as their primary purpose the grant of code rights and which

(ii) fall within Part 2 of the 1954 Act (even if the tenant does not in fact benefit from the protection of Part 2 because it has contracted out of that protection under section 38A).

60. A mirroring provision was inserted by the 2017 Act as subsection (4) of section 43 of the 1954 Act, providing that Part 2 of the 1954 Act does not apply to a tenancy the primary purpose of which is to grant code rights under the new Code provided the tenancy was granted after the new Code comes into force. Thus where a business lease of the kind usually falling within Part 2 of the 1954 Act is granted after the new Code came into force on 28 December 2017, it will be covered only by Part 5 of the new Code (and not by Part 2 of the 1954 Act) if its primary purpose is the granting of code rights. But it will not benefit from Part 5 if its primary purpose is a purpose other than the granting of code rights, whether or not the parties have contracted out of protection under Part 2 of the 1954 Act pursuant to section 38A.

61. The transitional provisions dealing with subsisting agreements which had the benefit of dual protection under the old code and under Part 2 of the 1954 Act are complex. First, as I have described earlier, the subsisting agreement may be one which is not troubled by this issue because it is, for example, an easement or licence. In that case it takes effect by virtue of para 2 of the transitional provisions as an agreement made under Part 2 of the new Code. It follows that an operator under an existing licence or easement can renew that licence or easement under Part 5 of the new Code.

62. Where the subsisting agreement made under the old code was a business tenancy falling within Part 2 of the 1954 Act it will not be affected by the new section 43(4) of the 1954 Act because that only applies to leases agreed after the new Code comes into effect. Such old code leases are dealt with in para 6 of the transitional provisions as follows:

(i) If the protection of Part 2 of the 1954 Act is in fact available to the tenant (because it did not contract out under s 38A), the tenant must then rely on the 1954 Act rights and cannot use Part 5 of the new Code. Part 5 of the new Code is excluded under para 6(2) of the transitional provisions. This is the case whether the grant of rights was the primary or subsidiary purpose of the lease.

(ii) If the grant of code rights was only the subsidiary purpose of the lease then Part 5 of the new Code is also excluded: para 6(3) of the transitional provisions. This exclusion applies if the tenant in fact has the protection of Part 2 of the 1954 Act but also applies even if the tenant has in fact contracted out of the Part 2 protection by an agreement under section 38A. The tenant in those

circumstances cannot rely on Part 5 of the new Code as conferring greater rights than the tenant bargained for under the 1954 Act.

(iii) If the primary purpose of the lease is the grant of code rights, then if the tenant has agreed under section 38A to exclude renewal rights under the 1954 Act, it is allowed to use Part 5 of the new Code: see para 7 of the transitional provisions which is not excluded by any provision in para 6.

(iv) Where the tenant who has the protection of Part 2 of the 1954 Act exercises the right to renew the lease, the new lease, once granted, will no longer be subject to Part 2 of the 1954 Act if its primary purpose was to grant code rights because it will fall within the new section 43(4) of the 1954 Act. It will not be a "subsisting agreement" within the meaning of the transitional provisions so there will be nothing to exclude the application of Part 5 of the Code.

63. Leases of land in Scotland fall outside para 6 of the transitional provisions, because there is no equivalent in Scotland of Part 2 of the 1954 Act; so all leases of land in Scotland will be in the same position as leases of land in England and Wales where the tenant does not have security of tenure.

3. THE FACTS AND THE PROCEEDINGS BELOW

(a) The Compton Beauchamp appeal

64. The first of the Court of Appeal's judgments under appeal to this court is the judgment in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755; [2020] RVR 20 handed down on 22 October 2019. Lewison LJ gave the substantive judgment with which Simon and David Richards LJJ agreed. That judgment was on appeal from the decision of the Upper Tribunal (Martin Rodger QC, Deputy President and P D McCrea FRICS). The Upper Tribunal decision is at [2019] UKUT 107 (LC); [2019] RVR 247. I shall refer to this appeal as the *Compton Beauchamp* appeal and to the Court of Appeal's judgment as the *Compton Beauchamp* Judgment.

65. The facts of the *Compton Beauchamp* appeal are as follows. The site concerned is on the edge of an arable field at Galleyherns Farm in the Vale of White Horse between Didcot and Swindon. Vodafone Ltd entered into a lease in March 2004 with Compton Beauchamp Estates Ltd, the freehold owner of the site ("Compton

Beauchamp"). The lease entitled Vodafone to install a telecommunications mast on a concrete base in a fenced compound. The term of the lease was ten years and the lease was contracted out of the protection of the 1954 Act. The lease did not demise any part of the land itself but granted Vodafone the right to install and use the mast and ancillary apparatus.

66. Cornerstone is a joint venture formed by Vodafone and Telefonica. It was set up in 2012 to own and manage their combined portfolio of telecoms sites on the basis that Cornerstone would then provide the sites to Vodafone and Telefonica.

67. Vodafone's lease expired on 25 March 2014. It is common ground between the parties that a tenancy at will then arose for the benefit of Vodafone by the middle of April 2014. Telefonica started to share the ECA in 2016. Importantly for our purposes, there was no assignment of any rights at the site from Vodafone to Cornerstone.

68. The tenancy at will was terminated by Compton Beauchamp by service of a notice to quit on 20 October 2017. The old code prevented Compton Beauchamp from removing the ECA by deeming the presence of Vodafone's apparatus on the land to be lawful (para 21(9) of the old code) and requiring Compton Beauchamp to apply for a court order under para 21(6) of the old code to remove it. Compton Beauchamp also served a notice on Vodafone under para 21 of the old code requiring Vodafone to remove the ECA. Vodafone served a counter-notice under para 21(4) of the old code.

69. Vodafone did not, however, pursue its acquisition of rights relying on the transitional provisions after the new Code came into effect at the end of December 2017. Instead, Cornerstone served a notice on Compton Beauchamp under para 20 of the new Code seeking longer term rights combined with a notice under para 27 of the new Code seeking temporary rights. Compton Beauchamp refused to grant the rights and Cornerstone applied to the Upper Tribunal. The parties to those proceedings agreed on the grant of the temporary rights without prejudice to their contentions as to jurisdiction and the possession proceedings in the County Court were stayed.

70. The Upper Tribunal held that the Tribunal had no jurisdiction to impose an agreement on Compton Beauchamp conferring code rights on Cornerstone under para 20 of the Code. They held that there was no jurisdiction because the person in occupation of the site was not Compton Beauchamp but Vodafone. The Upper Tribunal noted that paras 26 and 27 of the new Code expressly contemplated that rights could be granted to an occupier which was itself in occupation. They went on:

> "82. We agree with Mr Seitler [counsel for Cornerstone] that rights may be conferred on an operator who is already in occupation, and that in such a case the person who confers the rights (voluntarily or by compulsion) may not have been in occupation when the notice was given to them under para 20(2). But in such a case there are no third-party rights in play and therefore no obstacle to the grant of new rights in substitution for those which already exist. The effect of the same parties entering into a new agreement on different terms will be that the previous agreement will be terminated by operation of law. Where the agreement is consensual, under Part 2, the operator will not be able to suggest that the site provider was not the occupier at the moment the agreement conferring the rights was entered into since otherwise paragraph 9 would prevent the agreement having effect at all. The position is the same under Part 4. The Tribunal can compel the grant of new rights by a site owner to an operator which is itself in occupation but it cannot compel the grant of rights by a person who is not in occupation to an operator who is not in occupation."

71. On appeal the Court of Appeal also held in the *Compton Beauchamp* Judgment that the Tribunal had no jurisdiction but went further in its reasoning. They upheld the Upper Tribunal's finding 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": para 54.

72. The Court recognised that there was a difficulty where the operator is already on site and wishes to renew or vary his rights. They acknowledged, as the Upper Tribunal had, 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 [Upper Tribunal] for interim or temporary code rights under either paragraph 26 or 27": para 57. However, this presented a difficulty, given the wording of para 9 of the Code and the fact that it is legally impossible for someone to enter into a contract with itself.

73. Cornerstone had submitted that the solution to this conundrum was that the operator can never be an occupier when it is itself seeking a fresh right or another operator is seeking that right; in such a situation the new code right should be sought instead from the landowner or such other person who is also in occupation of the land. But the Court of Appeal held that that solution was impossible to square with the wording of the Code. The solution was instead provided by Part 5, at least principally.

The use of the term “site provider” in Part 5 rather than “occupier of the land” got over the problem of the operator and the occupier being the same person. This meant that “in many cases an application by an operator in situ need not be made under paragraph 20; but may be made under paragraph 34”: para 61. If such an application were made and approved then the deeming provisions in para 34(8) could be applied not only to code agreements imposed by the tribunal but also to those entered into voluntarily by the operator and site provider.

74. The Court of Appeal then had to address how to reconcile that with paras 26 and 27 of the Code. The Court held that there was nothing in those paragraphs that undermined the essential principle that code rights can only be conferred by agreement with the occupier. They rejected the submission that Compton Beauchamp was also the occupier of the site even if Vodafone was in occupation: paras 80-81. The Court of Appeal concluded by saying, at para 89:

> “There does not appear to be any impediment to Cornerstone and Vodafone entering into an agreement; and then seeking Compton’s agreement to be bound by it. If that agreement does not include rights over land which Compton is said to occupy, then as regards that land, Cornerstone and Compton may enter into an agreement. If Compton refuses, then Cornerstone may serve a fresh notice under paragraph 20, seeking to bind Compton to the terms of any agreement between it and Vodafone; and seeking the conferral of code rights by Compton limited to those code rights which affect the land of which it is said that Compton is the occupier. That seems to me to be the practical way forward.”

(b) The Ashloch appeal

75. The second appeal before us is from the decision of the Court of Appeal in *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and AP Wireless II (UK) Ltd* [2021] EWCA Civ 90 handed down on 29 January 2021. I shall call this appeal “the *Ashloch* appeal” and the Court of Appeal’s judgment, “the *Ashloch* Judgment”.

76. The site with which this appeal is concerned is the roof of a building called Windsor House in Birmingham. A ten year lease was granted in June 2002 to Vodafone by the then owner of the property. It is common ground that Part 2 of the 1954 Act applied to the lease and that Vodafone had been entitled to apply to the court for a

grant of a new tenancy under Part 2 of the 1954 Act, that is to say, there was no agreement under section 38A contracting out of the right of renewal.

77. In 2012 the fixed term of the lease expired but Vodafone remained on site and the tenancy continued by virtue of section 24(1) of the 1954 Act. Ashloch Ltd acquired the freehold subject to the tenancy in 2016 and in 2018 AP Wireless II (UK) Ltd ("AP Wireless") acquired a 99 year lease of the rooftop, also subject to the tenancy. On 28 December 2017 the new Code came into force.

78. In 2019, following the Court of Appeal's decision in *Compton Beauchamp,* Cornerstone took an assignment of Vodafone's continuation tenancy. It no doubt hoped by that means to avoid the three-party situation that had occurred in *Compton Beauchamp*. A direct relationship of landlord and tenant was therefore established between Cornerstone and AP Wireless. Cornerstone then served a notice under para 20 of the Code, calling on AP Wireless to enter into a new agreement under Part 2 of the Code.

79. In the proceedings before the Upper Tribunal AP Wireless relied on two arguments. The first was that, following *Compton Beauchamp*, Cornerstone was prevented from applying under para 20 because it was the occupier of the site. Secondly it argued that the transitional provisions applied limiting them to their rights under the 1954 Act so that the only way for Cornerstone to obtain new code rights over the site was by applying to the County Court for a new tenancy under section 24(1) of the 1954 Act.

80. The Upper Tribunal (Martin Rodger QC Deputy President) decided the issue of jurisdiction as a preliminary issue. Cornerstone's primary submission was that the Code did not exclude the tribunal's jurisdiction to impose a new agreement under Part 2 conferring code rights over a site in favour of an operator which was already in occupation of all or part of the same site. Where, as in the instant case, the operator was occupying the site under a subsisting agreement to which the 1954 Act applied, the operator had a choice either to apply for a renewal of the lease under that Act or for new code rights under Part 2 of the Code. Cornerstone argued that *Compton Beauchamp* dealt only with the position of a landowner (in that case Compton Beauchamp) who was not in occupation (because Vodafone was).

81. The Upper Tribunal recognised that the appeal in *Compton Beauchamp* was not specifically concerned with the question whether there is jurisdiction to require a freeholder to confer code rights on an operator where that operator is itself in occupation of the land: para 62. That was because the operator applying under para 20

of the Code in the earlier case was Cornerstone but it was Vodafone that was the occupier. It also noted, however, that Lewison LJ in *Compton Beauchamp* addressed the point that the Code clearly contemplates that a sitting operator can apply to the tribunal for interim or temporary code rights under paras 26 and 27 of the Code. The *Compton Beauchamp* Judgment said that these paragraphs were a limited exception to the general para 9 rule that an operator in occupation of the site cannot apply for rights under para 20.

82. Having considered and rejected all Cornerstone's arguments, the Upper Tribunal concluded at para 87 that *Compton Beauchamp* presented Cornerstone with 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."

83. On appeal to the Court of Appeal, the court recorded that Mr Seitler QC (appearing for Cornerstone in the *Ashloch* appeal) argued that the interpretation placed upon Part 4 of the Code in *Compton Beauchamp* did not allow for the possibility that during the currency of an agreement conferring code rights, the operator might wish to seek additional code rights or to modify code rights already granted. Lewison LJ said that he thought this could be done by an agreed variation to an existing agreement under para 11 of the Code. But could it be done in the absence of agreement, by the operator invoking Part 4? He held at para 69 that it could not.

> "It is to be noticed, first, that it is only the operator who can invoke Part 4. If Part 4 can be used to alter or modify code rights it would be an entirely one-sided procedure. From the perspective of the landowner, this is an unattractive position. Second, and perhaps more importantly, Part 5 of the Code does allow either the operator or the site provider to request an alteration in the terms of a Code agreement. That would include a request by the operator for additional Code rights: paragraph 33(1)(c)(i). But the ability to request such a change cannot come into effect until after the agreement could have been brought to an end by the site provider: paragraph 33(3). If the operator could side-step this limitation by recourse to Part 4, the limitation would become largely redundant."

84. As to the identity of the occupier, the Court of Appeal found that even if Cornerstone as an applicant under para 20 was not to be treated as the occupier, it did not follow that AP Wireless was the occupier. AP Wireless did not appear to have any physical presence on the roof and under the terms of the tenancy, AP Wireless was not entitled to interfere with Cornerstone's exclusive possession of the property comprised in the tenancy. The Court summarised the effect of the *Compton Beauchamp* decision as holding that "at least in the case of an operator holding under a lease, the operator is the occupier even if it does not have a physical presence on the ground": para 84.

85. Lewison LJ then summarised the effect of the transitional provisions, concluding that one way or another the operator under a subsisting agreement has the right to apply to renew it, either under Part 5 of the Code or under Part 2 of the 1954 Act, but not both: para 98.

86. He concluded by saying that many of Cornerstone's complaints about the disadvantages to operators in renewing leases under Part 2 of the 1954 Act compared with renewal under the Code were in reality complaints about the way the transitional provisions work, rather than defects in the Code itself. He recognised that the definition of subsisting agreements in the transitional provisions may have left some operators "out in the cold", particularly those who occupy under an unwritten tenancy at will. But that was, he held, a consequence of the transitional provisions and the Government's position that the new code should apply only to new agreements.

(c) The On Tower appeal

87. The third appeal before us is the leapfrog appeal in *On Tower UK Ltd (formerly known as Arqiva Services Ltd) v AP Wireless II (UK) Ltd*. I shall refer to this as the *On Tower* appeal and to the Upper Tribunal's judgment, *Arqiva Services Ltd v AP Wireless II (UK) Ltd* [2020] UKUT 195 (LC) issued on 19 June 2020, which is the subject of the appeal, as the *On Tower* judgment.

88. AP Wireless is the freehold owner of Queens Oak Farm in Towcester and has been since 2015. On Tower UK Ltd ("On Tower") originally entered into a lease to install ECA at the Farm in January 1997. The initial term of the lease was 20 years. Supplementary leases were entered into in 2000 and 2005 in respect of additional land to add to the first demise and those leases were granted for the residual term of the 1997 lease. The leases excluded the application of Part 2 of the 1954 Act.

89. All the leases expired on 20 October 2016. On Tower remained on site and made payments of rent and other sums and its customers continued to operate from the site under licence agreements. The new Code came into force on 28 December 2017. In July 2019, On Tower gave written notice seeking orders under paras 20 and 27 of the Code but this did not result in agreement. On Tower therefore applied to the tribunal.

90. Whilst the case was still awaiting a final hearing, the two Court of Appeal judgments in *Compton Beauchamp* and *Ashloch* were handed down. The Upper Tribunal (Judge Elizabeth Cooke) therefore ordered the hearing of two preliminary issues in the *On Tower* case:

> (i) did On Tower occupy the site under a "subsisting agreement" within the meaning of the transitional provisions?
>
> (ii) did the tribunal have jurisdiction to impose an agreement on the parties under para 20 of the new Code?

91. As regards the first issue, the Upper Tribunal considered whether, following the expiry of the initial terms of the leases, On Tower had a tenancy at will, a periodic tenancy or a contractual licence. The Upper Tribunal held that it had a tenancy at will: para 66. The Upper Tribunal then held that, since this was not in writing, it was not a "subsisting agreement" within the meaning of the transitional provisions: para 84. I note that before the Upper Tribunal it was On Tower which argued that its agreement was not a subsisting agreement and that it had no right to use Part 5 of the new Code. Its argument was that it should be able therefore to use Part 4. The Upper Tribunal considered that to include an unwritten tenancy at will in the term "subsisting agreement" would require too much violence to the wording.

92. In coming to this conclusion that an unwritten tenancy was not a "subsisting agreement", the Upper Tribunal had the support of an observation of the Court of Appeal in the *Ashloch* Judgment. At para 100 of that Judgment, Lewison LJ noted that if there is no written agreement which signified the occupier's consent to the exercise of rights under the old code, then it appeared that the transitional provisions did not apply because there is no subsisting agreement. Lewison LJ commented that this was not altogether surprising: "If an operator had no rights under the old code, there would be no particular reason for it to acquire rights under the Code by virtue of the transitional provisions; and every reason to give effect to the legitimate expectations of property owners that no such rights under the Code would be created".

93. It is not clear whether this point has been common ground between the parties from the start, but there has been no appeal from the Upper Tribunal's decision on this point. This seems to me a surprising conclusion. A "subsisting agreement" is defined by para 1(4) of the transitional provisions as "an agreement for the purposes of" para 2 of the old code rather than an agreement "falling within" para 2, and the purposes set out in para 2 are the statutory purposes of executing works, keeping apparatus installed and entering onto the land to inspect that apparatus and so forth. The operator who was on site holding over under an unwritten continuation of an agreement did have rights under the old code in the sense that, at least if it was vulnerable to a request for removal of its equipment, it could apply for fresh rights under para 5 of the old code: see para 43 above. It also seems to create a distinction between those operators who managed to arrive at an agreement with their landowner under the old code and those who had to bring court proceedings and had rights pursuant to a court order. All court orders made under para 5 of the old code are included in the definition of "subsisting agreement" in the transitional provisions no matter how long ago they were made whereas it appears that an operator who entered onto the premises under a written agreement will have dropped out of the transitional provisions if the initial contractual term of the agreement has expired and there is no written tenancy continuing.

94. The Upper Tribunal in *On Tower* then turned to the question whether the Tribunal had jurisdiction to impose an agreement on the parties under para 20 of the new Code given that On Tower had remained in occupation of the site without rights under the old code when the lease expired in October 2016 and remained there still without code rights. It was conceded by AP Wireless that even if the Tribunal concluded, as it in fact did conclude, that On Tower had no code rights, the Tribunal would have jurisdiction to make an order granting temporary rights under para 27 of the new Code: para 123 of the *On Tower* judgment.

95. Judge Cooke then described the decisions in *Compton Beauchamp* at Upper Tribunal and Court of Appeal level. She noted that in the *Compton Beauchamp* Judgment, the Court of Appeal had interpreted the new Code more restrictively than the Upper Tribunal had in that case and had found - or at least has been understood to have found - that there is no jurisdiction in any circumstances to impose an agreement under para 20 on an operator in occupation of the site. That had been confirmed by the *Ashloch* Judgment. Judge Cooke concluded that the consequence of the Court of Appeal's interpretation of the Code in the two earlier cases was that an operator in occupation of a site without code rights, even if providing a network or providing infrastructure to enable other operators to provide a network, cannot succeed in an application under para 20 of the new Code: see para 146 of the *On Tower* judgment.

96. Judge Cooke expressed her dissatisfaction with that result. AP Wireless had submitted that this conclusion was consistent with the policy of the Government that the new Code should not apply retrospectively. She rejected that argument, stating that the retrospectivity policy did not apply to operators who had no code rights and was not relevant to them. She regarded the consequences for On Tower of the Court of Appeal's construction as contrary to the policy behind the Code:

> "156. The policy of the Code is to facilitate the public interest in access to a choice of high quality electronic communications services. True, operators who have subsisting agreements have to honour that bargain while it lasts, and must then make use of Part 5 to extend or renew their rights. Operators without Code rights are supposed to be able to use Part 4, specifically paragraph 20, to get them. It is not possible to discern from the Law Commission's report, or from any Government statement, an intention that any such operator would be excluded from paragraph 20 in relation to a particular site, and I can think of no reason why that would have been Parliament's intention.
>
> 157. … The idea that an operator should be debarred from obtaining Code rights in relation to a particular site precisely because it is in occupation, has apparatus there, and is providing a service from the site is baffling and I do not understand why such a policy would be adopted."

97. She recognised that various workarounds could be devised including that the operator could apply for rights under para 20 for an immediately adjacent site in the same ownership and move its ECA a few yards sideways. Or it could shut down and remove its equipment temporarily to be in a position to start afresh. But she could see no justification for such a waste of time and effort or the risk of interruption in services. The construction also made a nonsense of para 27, since AP Wireless accepted at that stage that an operator in occupation could make an application for temporary rights under that paragraph. She held, however, that she was bound by the Court of Appeal's decisions in *Compton Beauchamp* and *Ashloch*.

98. Judge Cooke's view, cogently expressed, that a wrong turn may have been taken in those two Court of Appeal cases enabled Mr Seitler to make the unusual submission at the close of the hearing that this court "should overturn Judge Cooke's judgment for the reasons she gave."

99. The Upper Tribunal granted On Tower a “leapfrog certificate" pursuant to section 14A of the Tribunals, Courts and Enforcement Act 2007. Permission to appeal was granted by this court on 28 October 2021 with a direction that the appeal be heard at the same time as the *Compton Beauchamp* and *Ashloch* appeals.

4. THE MEANING OF “OCCUPIER” IN PARA 9 OF THE CODE

(a) Two kinds of argument

100. The decisions of the Upper Tribunal and the Court of Appeal focus on the meaning of the word “occupier” in para 9 in the new Code. The issue before this Court is whether, as Mr Pymont QC argues on behalf of AP Wireless, the word “occupier” includes an operator who is presently on the site as a result of having installed and operated ECA there or whether as Mr McGhee QC (appearing for Cornerstone) and Mr Seitler QC (appearing for On Tower) argue, you must ignore the presence of an operator on the site when deciding who is capable of conferring code rights for the purposes of para 9.

101. Both sides deployed two kinds of argument in support of their submissions as to the true construction of the new Code. The first kind was an argument to the effect that the regime created by the Code and by the transitional provisions only works as it should work if one construes “occupier” in the sense for which they were contending. Their different constructions of the word “occupier” therefore stemmed from different views as to how the Code is supposed to work. The second kind of argument focused on a series of textual indicators in other provisions of the Code which were said to demonstrate that it must be the case that an application under Part 4 can be made by an operator who had already installed ECA on site. Mr Seitler’s argument was a combination of the two approaches in that he presented the court with a number of more or less plausible ways by which we could, he proposed, respectably arrive at the desirable result which was, in effect, to get round the problem of the operator on site being in occupation of the site for the purposes of para 9.

(b) How is the Code intended to work?

102. I start from the proposition that the word “occupier” when it appears in different statutory provisions has no fixed meaning but must take its content from the context in which it appears and the purpose of the provisions in which it is used.

103. This is the course advocated by Lord Nicholls of Birkenhead in *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] AC 329. That case concerned whether the presence of a number of stall holders in an enclosed market hall who had exclusive possession of their stalls precluded the tenant of the hall from "occupying" the market hall for the purposes of its business within the meaning of the 1954 Act. The House of Lords held that the tenant in that case was not occupying the hall for the purposes of its business.

104. Lord Nicholls (with whom the other members of the Appellate Committee agreed) said at pp 334-335:

> "As has been said on many occasions, the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words 'occupied', and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used. Their meaning in the context of the Rent Acts, for instance, is not in all respects the same as in the context of the Occupiers' Liability Act 1957.
>
> This is not surprising. In many factual situations questions of occupation will attract the same answer, whatever the context … the answer in situations which are not so clear cut is affected by the purpose for which the concept of occupation is being used. In such situations the purpose for which the distinction between occupation and non-occupation is being drawn, and the consequences flowing from the presence or absence of occupation, will throw light on what sort of activities are or are not to be regarded as occupation in the particular context."

105. One of the many previous occasions to which Lord Nicholls was alluding may have been the observation made by Lord Mustill in *Southern Water Authority v Nature Conservancy Council* [1992] 1 WLR 775, at pp 781-782 where the House of Lords was considering the statutory obligation to notify "every owner and occupier" of the designation of an area as a site of special scientific interest:

> "No useful progress can be made towards an assessment of this argument by looking up in dictionaries the words 'occupy' and 'occupier', or by inquiring what meaning the courts have given them in reported cases, for they draw their meaning entirely from the purpose for which and the context in which they are used …
>
> "We must therefore consider what kinds of occupier must have been intended to fall within the prohibition with which we are here concerned."

106. In light of Lord Nicholls' and Lord Mustill's comments, with which I respectfully agree, the starting point here is not to try to define the word "occupier" and then allow that definition to mandate how the regime established by the code works. The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word "occupier" so as best to achieve that goal.

107. This also accords with the judgment of this court in Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs (Sea Fish Industry Authority intervening) [2011] UKSC 25; [2011] 1 WLR 1546, at para 10 (Lord Mance):

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. … 'the notion of words having a natural meaning' is not always very helpful …, and certainly not as a starting point, before identifying the legislative purpose and scheme. …"

108. AP Wireless argues that the regime is supposed to work in the following way. Para 9 and Parts 2 and 4 are primarily directed at a new operator wishing to come onto the site for the first time. It is assumed that, as happened with the three cases under appeal, the operator will be looking for a long initial contractual term for whatever land interest it is to be granted conferring the code rights because the capital investment required to install the ECA is very substantial. The operator needs to be sure it has secure rights for a long period. For an operator wishing to come onto the site for the first time, there is no difficulty in identifying the site owner as the "occupier" for the purposes of para 9. The notice procedure in para 20 can be instigated by the operator and, if the site owner is unwilling to agree to the operator's

proposed terms, the tribunal can settle the terms of the code rights and embody them in a lease or other arrangement which then becomes an agreement under Part 2.

109. But the key point, AP Wireless submits, is that the initial agreement, whether voluntary or imposed by the tribunal, should then run its course for that contractual term without either party having the power to change it by adding new rights. The parties are held to the bargain they have agreed or which has been imposed on them by the tribunal for the duration of the initial fixed term. Once the contractual term has expired, the code rights run on in accordance with para 30(2) of the Code. Part 5 then applies for the benefit of both parties. Each of the site provider and the operator can apply under para 33 to modify the terms of the code agreement, to remove a code right or confer an additional code right and can, if need be, invoke the jurisdiction of the tribunal to achieve this.

110. What the operator cannot do, AP Wireless submits, is bypass the fact that the powers in Part 5 are deliberately postponed until the expiry of the initial fixed term by choosing instead to apply under para 20 for additional code rights during that contractual term. If Part 4 were always available to an operator, Part 5 would be largely superfluous as far as the operator is concerned because it can take advantage of the 28 day notice period provided for in para 20(3) in Part 4 rather than the six month notice period required by para 33(3) in Part 5.

111. Mr Pymont accepts that the terms agreed or imposed by the tribunal when the operator first comes onto the land are not entirely immutable even during the initial term of the agreement. First, para 11 envisages that an agreement under Part 2 can be varied by the parties, provided that the variation is in writing and signed. So an agreement under Part 2 can be varied during its initial term, although Mr Pymont submitted that that variation could not go so far as to include the conferral of new code rights. Secondly, para 17 confers a power on the operator to upgrade the ECA to which the agreement relates. That is another route by which the operator can change the equipment (although without extending its code rights) during the initial contractual term. Thirdly, the freezing of code rights is not absolute because the operator is always able to apply under para 20(1)(b) for someone else to be bound by the code rights that have already been conferred. The fact that the operator is an occupier does not prevent that, because para 9 only limits the conferral of rights.

112. Mr Pymont points out that there is no provision in Part 4 envisaging an application to the tribunal by the site owner to modify the contractual term before Part 5 becomes available. Similarly, there should be no power for the operator to apply for new code rights either. That bar is achieved by treating the operator as now being the occupier so that the landowner is precluded by para 9 from granting code rights.

113. In answer to a question from the court as to the policy lying behind this postponement of the opportunity to apply for new code rights unless or until Part 5 becomes available, Mr Pymont submitted that it is to protect site owners from the risk of expensive and disruptive multiple applications by operators during the course of the initial contractual term.

114. Mr Pymont argues that this structure then flows through to how the transitional provisions are intended to apply. When there is a subsisting agreement within the meaning of the transitional provisions, the parties are also bound by the terms of that agreement until Part 5 becomes available to them either immediately (if not within the 1954 Act) or once they have renewed it creating a new lease after the coming into force of the new Code (so that section 43(4) of the 1954 Act applies henceforward to preclude the protection of Part 2 of that Act if the primary purpose of the lease is the grant of code rights).

115. In my judgment Mr Pymont is right to this extent; that once Part 5 has become available to the parties, it is the only route by which the operator and the site provider may agree to the kinds of changes envisaged by para 33 to the rights that are embodied in the code agreement and by which they can invoke the jurisdiction of the tribunal to settle any dispute between them. The appellants accept that this is the position in their written case. They point out that variations to existing code agreements (as opposed to the entry into a new agreement under Part 2 conferring additional code rights) can be effected by agreement between the parties at any time under para 11. But they accept that changes can be imposed by the tribunal only on the application of either party under para 34 in Part 5 and therefore only after the expiry of the term of the agreement. Nonetheless, they say that an operator with ECA on land is not to be regarded as the occupier of the land. Accordingly, the operator can reach agreement with the site owner under para 9 or seek an order under para 20 during the existing term of an agreement if it is seeking to have additional code rights conferred on it in respect of that land. It is not required to wait for that until the end of the contractual term of the existing agreement.

116. I accept the appellants' analysis of how the Code is supposed to work. They were right, in my judgment, to accept that an operator which is a party to an agreement under Part 2 can only apply to the tribunal to modify the terms of the code rights conferred by that agreement once Part 5 becomes available. But I disagree with Mr Pymont's submission that in order to achieve that, one must construe the Code as also preventing the operator on site from being able to obtain additional code rights in respect of the same land, either by agreement with the site provider or by invoking the jurisdiction of the tribunal. On the contrary, in my view, it is inherent in para 9, read in the context of the regime created by the Code, that the "operator" who seeks a code

right, as referred to in that provision, is different from “the occupier of the land”, as that term is used in that provision.

117. Both the old code and the new Code indicate that the negotiation of voluntary agreements between the parties for the conferral of code rights is the optimal way for the regime to operate. That is even more central to the new Code in which court orders in default of agreement under para 5 of the old code are replaced by imposed agreements under Part 2 of the new Code. Given the centrality of code rights to the operation of the whole regime and the creation of this sui generis form of statutory rights which use contractual agreement as their foundation, it seems to me that the fundamental premiss of para 9 is that the “operator” and the “occupier of the land” are different persons. That is in fact for the same reason given by the Court of Appeal, namely that a person cannot contract with himself. But, given the policy underlying the Code explained by the Government, it would not make sense that the mechanism for creation of new code rights should be disapplied in relation to all those sites - of which there will have been thousands under the old code - where the relevant operator who seeks to have new code rights in its favour happens, for historic reasons, to have installed ECA in such a way as to be in occupation of the land itself.

118. There are good reasons for interpreting the Code so that the rights conferred on the operator during what is expected to be a long initial contractual term of the agreement under Part 2 could be supplemented by an application for new Code rights. Those reasons in my judgment are as follows.

119. First, one must bear in mind that the Code was devised with the knowledge that on the one hand, operators will need a long fixed term interest in the land to justify their investment in installing the ECA on site, but on the other hand that this is an industry in which technology develops very quickly and where the Government’s policy is that new improvements to digital infrastructure are rolled out across the country swiftly. The concern that rights will be frozen during the initial fixed term and cannot be supplemented by a new agreement under Part 2 has, the parties told us, had the effect that operators insist on including all the code rights set out in para 3 in the agreement they seek and which they ask the tribunal to impose. They want to “future proof” the initial lease or licence by including all the code rights permitted by para 3, whether they foresee needing them or not. This is not the optimum way for the regime to operate. The fact that so many kinds of code rights are enumerated suggests to me that the parties should be able to choose from that menu which of those they need to include in the initial fixed term but should be able to add to them, either by agreement or by invoking the jurisdiction of the tribunal, at a later date.

120. Mr Pymont points to the right to upgrade the ECA under para 17 as resolving this problem. But this right is very limited. It cannot be relied on unless the upgrade has no adverse impact, or no more than a minimal adverse impact, on the appearance of the ECA. There is also scope for argument about how far a right to "upgrade" the ECA may allow an operator to change it, perhaps by replacing it in its entirety, if new technology is introduced. For these reasons, the operator may be concerned that in the later stages of the fixed term there will be more substantial changes needed to the equipment than can be carried out using the para 17 right.

121. This need to "future proof" the initial request under para 20 creates a further unfairness in assessing the appropriate payments under the agreement. By encouraging the operator to demand all possible code rights from the outset, such a freeze on the rights also obliges the operator to pay at least something for rights that it does not currently want but which it fears may be needed during the later stages of the initial term. This is inefficient and wasteful, and could serve as a deterrent to the introduction of ECA at some sites, contrary to the policy of the Code.

122. Secondly, if the Code is supposed, by the mechanism of para 9, to prevent the operator from being able to change its rights during the initial fixed term, that has only been partly achieved. Mr Pymont accepts that there are some operators who install ECA on site but do not thereby become occupiers, for example if they merely fix antennae to a roof or have an access right over land. Such an operator who is not an occupier is entitled to apply for more code rights against the same landowner (who has retained the status of occupier for para 9) under para 20. I agree with Mr McGhee's submission that this makes the application of Part 4 of the code arbitrary - there is no discernible policy reason for limiting para 20 in this way. The Code should not place such an arbitrary restriction on the ability of an operator to apply for additional code rights in relation to a site on which it has installed ECA.

123. Further, as the appellants point out in their written cases, the construction of para 9 for which Mr Pymont contends is likely to create more difficulties for operators seeking to install ECA to expand their networks in rural areas than in urban settings. On greenfield sites (that is sites on open, typically rural land such as the site in the *Compton Beauchamp* appeal) the code rights will often need to include a right to erect and maintain a concrete plinth and to fix to the plinth a tall mast and power supply. The area will normally be bounded by a fence for the purposes of security and for health and safety reasons. By contrast on rooftop sites there may be no plinth or fence and the code rights may simply grant a right to fix and maintain antennae and power supply directly to the roof. In either case the code rights will include the right to install and maintain power cables to the ECA and to exercise rights of access to maintain the ECA.

124. If an operator has a closed compound in a greenfield site then it is more likely to be regarded as a person in occupation of the land than if it merely has antennae fixed to the roof of a building. This appears contrary to the Government's stated wish to "deliver the coverage that is needed, even in hard to reach areas": see the Minister's foreword to the Government's May 2016 report.

125. Thirdly, such a construction of para 9 risks causing more disputes between the operator and the occupier which will then need to be settled by the tribunal. I can foresee a number of ways in which the tribunal would be burdened with additional disputes as a result of this construction of the Code which would be avoided if the appellants are correct in their interpretation of that provision:

(i) The landowner may be prepared to agree to the site being used for ECA for ten years provided that the equipment is installed out of sight under the land, that the trees on the site are not damaged and that there is no obstruction of its means of access to the land. The operator may also be happy to install the ECA on that basis as it may not envisage a need to use code rights which go beyond what the landowner is prepared to agree and so does not at present need to insist on having any more code rights conferred. However, if the operator fears that once it installs the ECA, it will be the "occupier" for the purposes of para 9 and so will be unable to apply for additional code rights for the duration of the ten years, it may insist on the grant of all those additional rights from the outset, in case they are needed later on during the ten year term. I do not see why it is desirable for the tribunal to be called upon to adjudicate on whether the agreement should confer rights which the operator does not currently envisage needing and which the landowner does not currently wish to confer.

(ii) Mr Pymont's construction also risks creating additional disputes over whether a variation under para 11 can be made. According to Mr Pymont, the operator cannot rely on the ability later to vary the agreement consensually under para 11 if that variation amounts to the conferral of a new code right. A landowner who is no longer in occupation cannot, consistently with para 9, purport to confer new code rights even by means of a variation of the agreement with an operator who is in occupation. This is likely to lead to arguments about whether a proposed variation of the agreement amounts to the conferring of new code rights or not and may make any consensual variations precarious if the landowner who later changes his mind can assert that he was not, as a matter of law, able to agree the variation which he signed.

(iii) Given that not every operator with ECA installed is the "occupier" of the site, the tribunal will be tasked with determining on the facts whether the operator or the landowner is the "occupier" of the site before it can consider the application made by the operator under para 20. That is a fact intensive issue which is not an issue which is likely to be relevant to any other point that the tribunal needs to address in order to determine the application.

126. Finally, I agree with the concern raised by Judge Cooke in the *On Tower* Judgment that the construction contended for by AP Wireless encourages operators to engage in the wasteful and pointless expense of either moving to a neighbouring sub-optimal site or removing the ECA, applying for new Code rights under para 20 and then moving the equipment back on to the site. Although such an exercise may be available as a work-around, it seems very unlikely that the new Code was supposed to generate this kind of activity at sites across the country.

127. Mr Pymont objects that if one wants to ensure that parties are kept to their bargain as far as the initial grant of Code rights is concerned and then restricted to the provisions of Part 5 thereafter, that can only be achieved by treating the operator on site as being in occupation of the land, thereby preventing any overlap between Parts 2 and 4 on the one hand and Part 5 on the other. There is nothing in Part 5 itself, he points out, to say that it applies to the exclusion of Part 4 once Part 5 becomes available to the operator under its agreement. If the appellants accept, as they do so far as modification or termination is concerned, that that is how the Code is supposed to work then they must accept that that is achieved by treating the operator on site as the occupier.

128. I do not accept that objection. In my judgment it is sufficiently clear from the Code read as a whole that Part 4 does not apply to code agreements to which para 30(2) applies:

(i) Part 4 of the Code is, as it says in para 19, about conferring code rights and binding people to those rights by imposing an agreement the terms and duration of which are settled by the tribunal.

(ii) There is no provision in Part 4 allowing either the landowner or the operator to apply to modify or vary the terms of a current agreement under Part 2; they are confined to consensual variation under para 11.

(iii) Part 5 applies to code agreements as defined for the purposes of Part 5; the term "code agreement" is introduced as a term different from the term

"agreement under Part 2". I recognise that although para 28 which opens Part 5 states that it makes provision about "the continuation of code rights after the time at which they cease to be exercisable under an agreement", there is nothing in the definition of "code agreement" in para 29 that limits a code agreement to one where the initial term for which the rights are exercisable has expired. But the parties are correct, in my view, in accepting that Part 5 is only available for code agreements to which para 30(2) applies, that is to agreements where the code rights are continued in operation by virtue of para 30(2) rather than under the terms of the agreement under Part 2 itself.

(iv) It is also clear that the later paragraphs of Part 5 only apply to code rights which continue to operate by virtue of para 30(2) and not to code rights which are operated under the terms of the agreement.

129. That is why Part 5 applies to the exclusion of Part 4 once Part 5 becomes applicable to a code agreement which used to be an agreement under Part 2 and the terms of which are continued in effect by Part 5. I do not therefore accept that one needs to construe "occupier" as including the operator on site in order to ensure that Part 4 does not apply to code agreements to which para 30(2) applies. Although that could, like much in this Code, have been made clearer, that is achieved by paras 28, 29 and 30. The Code does not need to rule out the ability of an operator on site to apply for new code rights which will then be embodied in an agreement under Part 2 (whether voluntary or imposed by the tribunal) running alongside either a current agreement under Part 2 or a current code agreement to which Part 5 applies.

130. I would hold therefore that para 20 can only be used to impose additional code rights and not to impose a modification of the rights already conferred in an existing Part 2 agreement or in a code agreement to which Part 5 applies. The parties should generally be kept to their bargains and just because, for example, an operator has second thoughts about the consideration it has agreed to pay for the grant of code rights, that does not entitle it to ask the tribunal to vary the agreement before the Part 5 rights become available (of course, it always has the option of negotiating a consensual variation under para 11).

131. But if the operator needs additional code rights in respect of the land on which its ECA is already installed during the term of an existing agreement in order, for example, to facilitate the roll out of a new network, it can seek an order imposing a new agreement for the grant of such rights if the landowner is not willing to confer them. I see no reason why one would wish to produce a result whereby the parties to an existing agreement are unable to agree to confer new code rights as well as to

modify the rights in the existing agreement under Part 2 by way of a consensual variation of the existing agreement under para 11. That makes no sense.

132. Furthermore, I referred earlier to the fact that the old code imposed rights on an unwilling landowner by a court order rather than an imposed agreement and, further, that para 5(7) of the old code provided that the terms of the court order were capable of variation or release by subsequent agreement in the same way as a consensual agreement: see para 35 above. I see no reason why this facility should have been wholly taken away from the parties by the introduction of the new Code. Instead, it makes more sense that in such cases an operator with ECA installed on a site should be able to negotiate for changes to give it more extensive code rights where that is necessary to adapt to changing circumstances.

133. This accords with what was said in paras 499 and 497 of the Explanatory Notes for the new Code which were set out in the *Ashloch* Judgment at paras 70 and 71. Para 499 of the Explanatory Notes posits a situation where an operator wishes to shorten the period of notice it must give the landowner to enter the land to maintain apparatus. The Notes say that that would be a new code right, more onerous for the landowner, and that if the landowner failed to agree the tribunal would be required to apply the test under para 21. Para 497 by contrast seems to emphasise that agreements for code rights are final so that once agreed it is not possible for either party to re-open the agreement to get a better price or improve the accompanying terms that relate to the code right that has been agreed. The Court of Appeal described these two Notes as difficult if not impossible to reconcile. But they seem to me to be attempting to capture the distinction I have drawn above between requiring the existing agreement to run on undisturbed until Part 5 becomes available whilst giving the operator the flexibility to add further code rights if the need for them arises during the course of the initial contractual term.

134. AP Wireless argues that there are no criteria set out in the new Code for determining when a claim for a modification to an existing code right becomes a claim for an additional code right. I recognise that the appellants' interpretation of the new Code which I prefer may create the need in some cases for nice distinctions to be made. It may well be open to argument, for example, whether the scenario described in the Explanatory Notes of a change from a 72 to a 48 hour notice period really would constitute a new code right rather than a variation of the existing code right. But the parties to the existing agreement should be able to agree that variation if they so wish. If the landowner is faced with an unwelcome application under para 20 by an operator who is party to an existing agreement under Part 2 in respect of the same land, he may submit to the tribunal that the operator is illegitimately dressing up a modification of the existing agreement as a request for new rights. That would be an illegitimate

attempt to bypass the fact that the existing agreement has not yet reached the end of its contractual term and Part 5 is not available.

135. In most circumstances the tribunal will be able without much difficulty to determine whether the application is really for new code rights or whether it is a disguised attempt to improve on the bargain struck as to the price or duration of the existing rights. In any event, any such dispute focuses on the rights needed and how they are to be exercised rather than on the side issue of whether the operator is already in occupation or not. The tribunal will also be astute to ensure that an operator whose application under Part 5 for new rights or for its right to continue an agreement has already been rejected by the tribunal cannot have a second bite at the cherry by making an application under Part 4. The Upper Tribunal has powers under its rules to deal promptly with applications such as those; no doubt the landowner will draw the failed application under Part 5 to the attention of the tribunal.

136. I do not accept Mr Pymont's policy argument about the need to protect landowners from frequent importuning by operators on site. That is not a sufficient reason to incur all the disadvantages that I have identified as flowing from barring an operator on site from making an application under para 9 where it happens to be in occupation of the site. In any event, it seems to me unlikely that operators will regard it as in their interests to revisit the agreements of each of the many thousands of sites on which their ECA is installed unless there is a pressing need to do so.

137. I would conclude therefore that where an operator requests or applies for code rights under para 20 of the new Code, it is not to be regarded as the occupier of the site for the purposes of para 9 merely because it has ECA installed on that site because of code rights that have previously been conferred on it for that equipment on that site. To hold otherwise would in my judgment frustrate the way the Code should operate.

138. Both parties referred us to the observation of Sir Andrew Morritt C in *The Bridgewater Canal Co Ltd v Geo Networks Ltd* [2011] 1 WLR 1487, para 26 when considering the old code that "The general regime concentrated at the outset on the occupier no doubt because he was primarily affected but also most easily identified." This remains an important consideration when interpreting the new Code, and para 105 gives the necessary clarity. In the circumstances of the appeals before us, there is no difficulty about identifying the occupier, for the purposes of para 9, if it is not the operator on site. It will usually be the person who has conferred the rights which led to the installation of the ECA on the site, but may be its successor in title.

139. In the light of that conclusion, I do not therefore have to consider Mr McGhee's secondary argument that the operator is only the "occupier" if he has some legal rights over and above the mere right (which Vodafone had on the facts of the *Compton Beauchamp* appeal) to resist the removal of the ECA by the landowner if the landowner applied to remove the ECA. I also do not need to consider Mr Seitler's selection of ingenious interpretations of other provisions of the Code, some of which were considered and rightly rejected by the Upper Tribunal and the Court of Appeal.

140. I am not, however, able to go as far as Mr McGhee submitted and my conclusion does not assist Cornerstone in the *Compton Beauchamp* appeal. The proper implementation of the Code does not require that all occupation of any operator with ECA installed on the site falls to be disregarded. The interpretation of para 9 set out above means only that it is the occupation (if any) of the operator who seeks to have a new code right conferred on it which is ignored when considering how to identify the "occupier of the land" (as that term is used in para 9, according to the definition in para 105). If, having allowed for this, it can be seen that another person who happens to be an operator is "the occupier of the land for the time being" (para 105(1)), then the operator seeking to have the new code right has to approach that person (and any person who would also need to be bound) to seek their agreement. I return to this point when considering where my conclusions leave each of the judgments under appeal.

(c) Textual indicators

141. Mr McGhee and Mr Seitler provided a list of different provisions which they say show that the wording used assumes that the operator would be able to make an application under para 20 even after it had installed its ECA on the site, whether or not it was then in occupation of the site. They refer for example to the list of code rights in para 3 which includes the right not only to install ECA on the land but the right "to keep installed [ECA] which is on, under or over the land".

142. The primary indicators that were considered by the Upper Tribunal and the Court of Appeal are para 26 (interim rights) and para 27 (temporary rights) (reproduced so far as relevant in the Annex to this judgment).

143. Looking first at para 26, this entitles an operator to apply to the tribunal for an order imposing an agreement which confers code rights on the operator "on an interim basis", that is to say, for the period specified in the order or until the occurrence of a specified event. Generally, 28 days' notice must first be given of the operator's intention to apply for such an order. An order granting interim code rights

under para 26 is excluded from the continuation provisions of para 30 in Part 5: see para 30(3). Accordingly, upon the expiry of the interim period specified in the order, the operator's code rights cease.

144. The paragraph then deals with what is to happen to the ECA that has been installed on the site pursuant to the interim right granted under para 26. According to para 26(8), as one might expect, the landowner has the right to invoke Part 6 of the Code to require the operator to remove the ECA installed pursuant to the interim right. However, the appellants point out that that entitlement to invoke Part 6 is subject to para 26(7). That provides that the entitlement to invoke Part 6 arises if the interim right expires without a code right having been imposed on the person by order under para 20. This clearly envisages that an operator who has installed equipment on the site relying on interim rights can make an application for an order under para 20 for full rights even if he is in occupation of the site.

145. Para 27, which enables an operator to apply for temporary rights, gives rise to the same issue. Indeed, the appellants say it makes it even clearer that a person who has installed ECA on site pursuant to temporary rights can apply under para 20 for full rights, even if it is in occupation of the site under those temporary rights. This is because an application for temporary rights under para 27 can only be made where:

(i) the operator has given notice under para 20(2) and, significantly,

(ii) where that notice under para 20 is in respect of a right which is to be exercisable in relation to ECA "which is already installed on, under or over the land," and

(iii) where the recipient of the request for temporary rights has a right to require the removal of the apparatus under Part 6 but has not for the time being required the operator to remove the ECA.

146. Temporary rights are thus intended to be used where the operator has ECA installed on the site but has no code rights entitling him to keep the equipment there but only pending the determination of his application under para 20 to acquire the full code rights needed. As the appellants submit, if an operator with ECA on the land is to be regarded as an occupier of the land for the purposes of para 9 then its application under para 20 for an order is bound to fail. Para 27 could never assist him because his application under para 20 is invalid.

147. The *Compton Beauchamp* Judgment accepted that it must be possible for a para 20 order to be made for someone who has installed ECA on the site pursuant to an interim or temporary right. The Court of Appeal held that this was achieved by the deeming provision in paras 26(4)(b) and 27(4)(b) whereby an order granting interim or temporary rights is *deemed* to be an agreement under Part 2 between the operator and the relevant person. In this way, the Court of Appeal said, the circle is squared because for this purpose only, the landowner upon whom the agreement is imposed is treated as if he were the occupier: see paras 73 and 74 of the *Compton Beauchamp* Judgment.

148. On this point I accept the appellants' submission that this deeming provision does not solve the problem. It may allow the operator to jump over the obstacle of being the occupier of the land in so far as he needs to overcome that obstacle when applying for interim or temporary rights. But it does not help the operator jump over the obstacle that its occupation under the interim or temporary right creates as regards its application for rights under para 20. There is nothing in para 20 or in paras 26 or 27 that deems the operator not to be an occupier for the purposes of its application for full rights under para 20, merely because its ECA is installed there pursuant to an interim or temporary right. If the answer is that the deeming provision in paras 26 and 27 should be read as enabling the operator to jump over that obstacle too, then it creates an odd situation. An operator would be well advised to make an application for interim or temporary rights even if it does not really need them because the opportunity to apply for full rights under para 20 will then suddenly be available whereas it will not be available if the operator simply applies under para 20 when it has its ECA installed on the site.

149. In the *Ashloch* Judgment, the Court of Appeal referred to para 27(8) which requires the Upper Tribunal to disregard the fact that the ECA is already on site when it is determining an application under para 20. Again, I do not see that that is an answer to the problem. First it is not relevant to para 26 and, secondly, the Upper Tribunal is only required to ignore the presence of the ECA when the landowner could have required the removal of the ECA "immediately after it was installed": see para 27(7). That does not apply when the ECA was properly installed pursuant to the old code or the new Code, but is intended to prevent an operator from changing the status quo in his favour for the purposes of a para 20 application by unlawfully installing the ECA.

150. Another textual indicator relied on by the appellants concerns what happens when the contractual term ceases and the landowner applies to enforce his entitlement to require the removal of the apparatus under para 40 in Part 6 of the new Code. As I have explained, even if the landowner has a right to require the removal of the equipment, he must still give notice to the operator under para 40 requesting the removal of the apparatus. If no agreement is reached with the operator for the ECA's

removal, the landowner can apply for an order under para 44(1) requiring the operator to remove the ECA or under para 44(3) authorising the landowner to sell the apparatus himself. But, the appellants point out, para 40(8) provides that the tribunal cannot make an order under either para 44(1) or (3) if an application has been made under para 20(3) in relation to the apparatus and that application has not been determined. Thus para 40 assumes, just as para 27 which entitles the operator to apply for temporary rights in this circumstance assumes, that an operator whose ECA is on the site only pursuant to the continuation of code rights under para 30(2) can apply under para 20 to improve those rights.

151. This point is also significant for the operation of the transitional provisions. Take for example, the position of Vodafone in the *Compton Beauchamp* appeal. At the time that the new Code came into force, Vodafone's ECA had been installed on site pursuant to a lease which had long since expired and Vodafone was, most likely, in the same position as On Tower, namely in occupation under an unwritten tenancy at will.

152. At the moment when the new Code replaced the old code, Compton Beauchamp had already served a notice on Vodafone under para 21 of the old code requiring Vodafone to remove the ECA. Vodafone had served a counter-notice under para 21(4) of the old code, setting out the steps that they proposed to take for the purpose of securing a right as against Compton Beauchamp to keep the apparatus on the land. One can assume that those steps included making an application under para 5 of the old code for fresh rights, in which case the tribunal would have to decide whether Vodafone was proceeding with that application for fresh rights in a reasonable way and whether it was likely to get those rights. One outcome under the old code might well have been, therefore, that the tribunal would dismiss Compton Beauchamp's application under para 21 for the removal of Vodafone's ECA and thereafter grant Vodafone's application for new rights under para 5.

153. Before the tribunal could determine those applications, the new Code came into force. What did the transitional provisions indicate should happen? Pending applications by an operator under para 5 are dealt with in paras 11 and 12 of the transitional provisions and pending applications by a landowner to enforce removal under para 21 of the old code are dealt with by para 20 of the transitional provisions. Those provisions would have the following effect:

(i) If Vodafone had already given notice to Compton Beauchamp requesting new rights under para 5(1) of the old code but had not yet made an application to the court, then that notice would have effect as if given under para 20(2) of the new Code: see para 11 of the transitional provisions.

(ii) If Vodafone had got as far as making an application to the court under para 5 of the old code, that application would continue to be dealt with under the old code and any order made by the court under the old code would have effect as an order under para 20 of the new Code: see para 12 of the transitional provisions.

(iii) Compton Beauchamp's application for the removal of Vodafone's ECA from the site under para 21(2) of the old code would carry on under the old code unaffected by the repeal of the old code: para 20(1) of the transitional provisions.

(iv) Vodafone would therefore have to serve a counter-notice under para 21(4) of the old code resisting Compton Beauchamp's application. It would need in that counter-notice to specify the steps it intended to pursue to resist the application for removal. Any steps specified in a counter-notice served before 28 December 2017, would be "read as including any corresponding steps that the operator could take under the new code": see para 20(3) of the transitional provisions.

154. Since it is common ground that Vodafone is not a party to a subsisting agreement, it can have no rights under Part 5 of the new Code because para 6 of the transitional provisions applies Part 5 only to subsisting agreements. Its position following the introduction of the new Code could be very uncomfortable, if it were precluded from applying for rights under para 20 of the new Code because it occupies the site with its ECA:

(i) If as at 28 December 2017 it had made an application to the court under para 5 of the old code, all would be well. Its application would continue under the old code provisions (see para 12 of the transitional provisions) and presumably it could be granted code rights because it has not been suggested that the "occupier" problem presented an obstacle under the old code in these circumstances. It would then have code rights under an order under para 5 of the old code; that is a subsisting agreement within the meaning of the transitional provisions (see para 1(4)(b) of the transitional provisions) and its position would be secure going forward.

(ii) However, if Vodafone had made its request to Compton Beauchamp under para 5 of the old code but had not yet made an application to the court, then it would appear to be stymied. Its application may well have effect as if made under para 20(2) of the new Code as indicated by para 11 of the new

Code. But that would not help Vodafone if an application under para 20(2) of the new Code would have to be dismissed because Vodafone is the occupier of the site.

(iii) Similarly, there appear to be no useful "corresponding steps" for the purposes of para 20(3) of the transitional provisions that could be read into Vodafone's counter-notice served under para 21(4)(b) resisting Compton Beauchamp's application to enforce removal of the apparatus. If that counter-notice had stated that Vodafone intended to apply under para 6 of the old code for temporary rights, one might say that the "step" of applying under para 26 of the new Code corresponds to the step specified in the counter-notice. But if the counter-notice had stated that Vodafone intended to apply for full rights under para 5 of the old code, there would now be no step that Vodafone could take under the new Code which corresponds to that, if it were precluded from applying to the tribunal under para 20 of the new Code because it is now the occupier of the site for the purposes of para 9. It could not therefore now resist Compton Beauchamp's application which has been carried forward by the transitional provisions.

155. I cannot accept that the switch from the old code to the new Code was intended to operate so randomly to the potentially great detriment of an operator in Vodafone's position as at 28 December 2017. That seems to go much further than simply not applying the new Code retrospectively.

156. AP Wireless argues that the new Code interpreted as it proposes works without difficulties for new operators to which it is primarily directed and that any glitches apparently created by the transitional provisions are of temporary concern only. I do not regard that as a reason for disregarding the problems that arise with the new Code in combination with the old code and the transitional provisions. The ECA network was already mature at the time the new Code was introduced and the Law Commission noted the need to avoid "radical change" causing practical and economic problems. The appellants told us that about 1,616 of the sites that Cornerstone manages are held on informal unwritten agreements, under agreements which expired before the new Code came into force or under agreements granted by someone other than the person who would, on the basis of the Court of Appeal's reasoning, not be regarded as the occupier. The appellants estimate that moving to a new site will typically cost approximately £100,000 per site (excluding legal and other professional costs).

157. The *Ashloch* Judgment also shows the difficulties created for an operator which has the benefit of a tenancy protected by Part 2 of the 1954 Act. The appellants accept that an operator with a tenancy as at 28 December 2017 whose primary purpose is to

confer code rights may be granted a new tenancy pursuant to section 29 of the 1954 Act after that date and that the provisions of Part 5 of the new Code are disapplied by para 6 of the transitional provisions. That renewed tenancy, granted after 28 December 2017, will then not be protected by Part 2 of the 1954 Act because of section 43(4) of the 1954 Act. Does that new tenancy then go forward with the protection of Part 5 of the new Code? The Court of Appeal said it did in the *Ashloch* Judgment. However, it is not clear that this is the case. According to para 29(1) of the new Code, Part 5 only applies to certain agreements under Part 2 of the new Code. If the operator were to be not only the tenant under the lease but both the occupier and the operator under the lease as it embodies code rights, it would be open to question whether this is indeed an "agreement under Part 2" and hence protected by Part 5.

158. It might be said that the transitional provisions provide another exception whereby one must ignore the obstacle set by para 9 in order to apply those provisions sensibly. But there comes a point when there are so many occasions on which one needs to ignore the obstacle presented by para 9 in order to make the provisions work, that one can conclude that the obstacle does not in fact exist. I reach that point on the basis of the examples I have set out above and so do not need to explore further the other difficulties on which the appellants rely as textual indicators.

159. The textual indicators therefore confirm my view that an operator which has ECA installed on a site is not to be regarded as the occupier of that site for the purposes of para 9 of the new Code. Thus, it can agree new code rights with the occupier of the site, identified in accordance with para 105. Such an operator can also give notice under para 20 requesting a relevant person to confer a new code right on it and may apply to the Upper Tribunal under para 20 for an order imposing an agreement conferring those rights on it.

5. THE OUTCOME OF THE APPEALS

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

161. For two of the appeals the outcome emerges reasonably clearly.

162. The *Compton Beauchamp* appeal must be dismissed if Vodafone rather than Compton Beauchamp is the "occupier" of the site as that term is used in para 9 and para 105. Vodafone did not pursue the process under para 21 of the old code that was

pending at the date when the new Code came into force (as permitted by para 20 of the transitional provisions). There is no reason to disregard Vodafone's occupation of the site for the purposes of considering who is the "occupier of the land" under para 9 since it was not Vodafone who was seeking to have new code rights conferred under para 9 or para 20. On the facts as found by the Upper Tribunal, Vodafone was "the occupier of the land for the time being" (para 105(1)). Compton Beauchamp was therefore not the "occupier" of the site and so was not able to confer code rights under the new Code.

163. As to who in fact was the occupier at the time the dispute arose, the parties chopped and changed on this point, depending on whether they thought the tactical advantage in the proceedings was for Vodafone to be the occupier or not. These changes of position by Vodafone and Compton Beauchamp in the course of inter-solicitor correspondence are recorded by the Upper Tribunal in its judgment in the *Compton Beauchamp* case: paras 55 onwards. The Upper Tribunal concluded at para 66 that it intended to approach the issue of the tribunal's jurisdiction on the basis that Vodafone remained in occupation of the site but that its only rights to occupy were those arising from the old code. The old code deems the continuing presence of its apparatus to be lawful and prevents the removal of that apparatus except by an order of the court. The Upper Tribunal concluded on the facts before it that Vodafone remained in occupation and that Compton Beauchamp was not the occupier for the purposes of para 9.

164. We see no reason to upset that conclusion, so Cornerstone's appeal must be dismissed.

165. On Tower's appeal should, by contrast, be allowed. On Tower's ECA is present on the site pursuant to an initial lease which fell within Part 2 of the 1954 Act but which had been contracted out of the protection of tenure provided by that Act. If its current rights had been contained in a "subsisting agreement" within the meaning of the transitional provisions, it would have been entitled to use Part 5 of the new Code. This is because para 6 of the transitional provisions applies Part 5 to subsisting agreements and On Tower's agreement would not be in the category of excluded agreements. The Upper Tribunal held, however, that On Tower's rights were no longer embodied in a "subsisting agreement" because they were in an unwritten tenancy at will. On Tower could not rely on the transitional provisions because they only applied Part 5 to subsisting agreements. The Upper Tribunal's conclusion that On Tower was also prevented from using para 20 of the new Code was based solely on the judgments in *Compton Beauchamp* and *Ashloch* which had ruled that an operator with ECA on site such as On Tower was the occupier of the site for the purposes of para 9 and therefore unable to apply under para 20. As explained above, I consider that no such bar is created by the new Code and that the Upper Tribunal has jurisdiction to determine On

Tower's application. I reiterate the point I made in para 93 above, that this conclusion does not improve the position of On Tower over the position it was in under the old code as the Upper Tribunal and the Court of Appeal have suggested. There was nothing in the old code which precluded an operator vulnerable to an application to remove his apparatus from applying for fresh rights to be imposed by order of the court under para 5 of the old code.

166. The position of Cornerstone in the *Ashloch* appeal is more difficult. It appears that Cornerstone had an assignment of Vodafone's rights on the site. It was common ground that the lease initially granted to Vodafone fell within Part 2 of the 1954 Act and there was no contracting out of that protection: see para 7 of the Upper Tribunal's judgment. It seems clear, therefore, that whether or not Cornerstone's rights had been embodied in a written agreement at the point when the new Code replaced the old, Cornerstone would not have been able to rely on Part 5 of the new Code. It would have been expressly excluded from that by para 6(2) of the transitional provisions. Before the Upper Tribunal, Cornerstone argued that it had a choice either to seek a new tenancy under the 1954 Act or to apply for the imposition of code rights under Part 4 of the new Code. The Upper Tribunal rejected the numerous arguments put forward as to why this should be so. It pointed out at para 96 that such a choice would go against the Law Commission's recommendation that operators should not obtain the benefits of the new Code retrospectively and that operators with the benefit of the protection of Part 2 of the 1954 Act should be required to use that route even though it had serious disadvantages compared with Part 4 of the new Code. One disadvantage highlighted was that "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 para 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."

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

168. There is a difficulty here that, on the basis of the decision in *On Tower*, Cornerstone may not in fact have a subsisting agreement precluded by para 6 of the transitional provisions from the benefit of Part 5 of the new Code because its agreement is not in writing. The absence of writing does not, however, affect its

continued ability to apply to the County Court to renew its tenancy under Part 2 of the 1954 Act. My understanding is that that option was and is open to Cornerstone in respect of this site. I do not consider that the fact that Part 5 of the new Code may not be available to Cornerstone for the reason that its agreement is not in writing should mean that it is in a better position than a tenant whose agreement is in writing but who cannot rely on Part 5 because of para 6 of the transitional provisions. Cornerstone must therefore use its rights under Part 2 of the 1954 Act to renew its lease; that lease will then be caught by section 43(4) of the 1954 Act so that when that lease expires, Part 5 will be available.

169. Cornerstone in this case is therefore in the same position as an operator who has an existing code agreement granted under the new Code but which is not protected by Part 2 of the 1954 Act. It is open to Cornerstone to apply for additional code rights under Part 4 of the Code even though it is in occupation of the site. But it cannot bypass the fact that it has ongoing rights under a tenancy which it is entitled to renew - or bypass the terms of the renewed tenancy once it is granted - by applying in effect for modifications of those rights under Part 4. The same nice distinctions may well arise as I have described in paras 134 and 135 above as to whether the para 20 application is really an attempt to avoid the tenancy renewal route and to modify the existing code rights before Part 5 becomes available. It is right that the tenant should be in no better but no worse position that other operators with an agreement under Part 2.

170. It is not apparent from the facts as set out in the judgments below whether the application under para 20 made by Cornerstone in the *Ashloch* case covered new rights in that sense or only sought to renew the rights that I have held should be renewed under Part 2 of the 1954 Act. I would invite submissions from the parties whether the appeal should be remitted to the Upper Tribunal to consider this.

CONCLUSION

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

172. On Tower's appeal is allowed.

173. Cornerstone's appeal in the *Compton Beauchamp* appeal is dismissed because on the facts assumed before the Upper Tribunal and the Court of Appeal, Compton

Beauchamp was not the occupier of the site to which Cornerstone's application related and so was not the appropriate recipient of Cornerstone's notice under para 20(1)(a) of the new Code.

174. The outcome of Cornerstone's appeal in the *Ashloch* case will await the further submissions of the parties as I have indicated.

ANNEX

SECTION 1: EXTRACTS FROM

THE ELECTRONIC COMMUNICATIONS CODE

SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

(INSERTED BY THE DIGITAL ECONOMY ACT 2017)

PART 1

KEY CONCEPTS

…

The operator

2. In this code "operator" means -

(a) where this code is applied in any person's case by a direction under section 106, that person, and

(b) where this code applies by virtue of section 106(3)(b), the Secretary of State or (as the case may be) the Northern Ireland department in question.

The code rights

3. 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,

(d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,

(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,

(g) to connect to a power supply,

(h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or

(i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus.

The statutory purposes

4. In this code "the statutory purposes", in relation to an operator, means -

(a) the purposes of providing the operator's network, or

(b) the purposes of providing an infrastructure system.

5. [*Definition of "electronic communications apparatus"*]

6. [*Definition of "network"*]

7. [*Definition of "infrastructure system"*]

PART 2

CONFERRAL OF CODE RIGHTS AND THEIR EXERCISE

Introductory

8. This Part of this code makes provision about -

(a) the conferral of code rights,

(b) the persons who are bound by code rights, and

(c) the exercise of code rights.

Who may confer code rights?

9. 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.

Who else is bound by code rights?

10(1) This paragraph applies if, pursuant to an agreement under this Part or Part 4A, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred.

(2) If O has an interest in the land when the code right is conferred, the code right also binds -

(a) the successors in title to that interest,

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

(i) O's interest, or

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

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

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

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

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

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

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

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

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

(i) P's interest, or

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

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

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

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

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

Requirements for agreements

11(1) An agreement under this Part -

(a) must be in writing,

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

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

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

(2) Sub-paragraph (1)(a) and (b) also applies to the variation of an agreement under this Part.

(3) The agreement as varied must still comply with sub-paragraph (1)(c) and (d).

12. [*Exercise of code rights*]

13. [*Access to land*]

14. [*Code rights and land registration*]

PART 3

ASSIGNMENT OF CODE RIGHTS, AND

UPGRADING AND SHARING OF APPARATUS

Introductory

15. This Part of this code makes provision for -

(a) operators to assign agreements under Part 2,

(b) operators to upgrade electronic communications apparatus to which such an agreement relates, and

(c) operators to share the use of any such electronic communications apparatus.

Assignment of code rights

16(1) Any agreement under Part 2 of this code is void to the extent that -

(a) it prevents or limits assignment of the agreement to another operator, or

(b) it makes assignment of the agreement to another operator subject to conditions (including a condition requiring the payment of money).

(2) Sub-paragraph (1) does not apply to a term that requires the assignor to enter into a guarantee agreement (see sub-paragraph (7)).

(3) In this paragraph references to “the assignor” or “the assignee” are to the operator by whom or to whom an agreement under Part 2 of this code is assigned or proposed to be assigned.

(4) From the time when the assignment of an agreement under Part 2 of this code takes effect, the assignee is bound by the terms of the agreement.

(5) …

Power for operator to upgrade or share apparatus

17(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 sub-paragraphs (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.

18. [*Effect of agreements enabling sharing between operators and others*]

PART 4

POWER OF COURT TO IMPOSE AGREEMENT

Introductory

19. This Part of this code makes provision about -

(a) certain circumstances in which the court can impose an agreement on a person by which the person confers or is otherwise bound by a code right (see also Part 4A),

(b) the test to be applied by the court in deciding whether to impose such an agreement,

(c) the effect of such an agreement and its terms,

(d) the imposition of an agreement on a person on an interim or temporary basis.

When can the court impose an agreement?

20(1) This paragraph applies where the operator requires a person (a "relevant person") to agree -

(a) to confer a code right on the operator, or

(b) to be otherwise bound by a code right which is exercisable by the operator.

(2) The operator may give the relevant person a notice in writing -

(a) setting out the code right, the land to which it relates and all of the other terms of the agreement that the operator seeks, and

(b) stating that the operator seeks the person's agreement to those terms.

(3) The operator may apply to the court for an order under this paragraph if -

(a) the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or

(b) at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.

(4) An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which -

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

(b) provides for the code right to bind the relevant person.

What is the test to be applied by the court?

21(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.

(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.

(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.

(4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.

(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

What is the effect of an agreement imposed under paragraph 20?

22. 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.

What are the terms of an agreement imposed under paragraph 20?

23(1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.

(2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).

(2A) In determining the terms of the agreement the court may take into account, among other things, any breach by the operator of an agreement between the operator and the relevant person which was imposed by an order under Part 4A (whether or not in force).

(3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).

(4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).

(5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who -

(a) occupy the land in question,

(b) own interests in that land, or

(c) are from time to time on that land.

(6) Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement.

(7) The terms of the agreement must include terms specifying for how long the code right conferred by the agreement is exercisable.

(8) The court must determine whether the terms of the agreement should include a term -

(a) permitting termination of the agreement (and, if so, in what circumstances);

(b) enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates (and, if so, in what circumstances).

How is consideration to be determined under paragraph 23?

24(1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 20 must be an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be).

(2) For this purpose the market value of a person's agreement to confer or be bound by a code right is, subject to sub-paragraph (3), the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement -

(a) in a transaction at arm's length,

(b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and

(c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.

(3) The market value must be assessed on these assumptions -

(a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network;

(b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;

(c) that the right in all other respects corresponds to the code right;

(d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.

(4) The terms of the agreement may provide for consideration to be payable -

(a) as a lump sum or periodically,

(b) on the occurrence of a specified event or events, or

(c) in such other form or at such other time or times as the court may direct.

25. [*Rights to the payment of compensation*]

Interim code rights

26(1) An operator may apply to the court for an order which imposes on the operator and a person, on an interim basis, an agreement between them which -

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

(b) provides for a code right to bind that person.

(1A) But an operator may not make an application under this paragraph if there is a relevant Part 4A agreement in effect between the operator and the person.

(1B) In sub-paragraph (1A) "relevant Part 4A agreement" means an agreement imposed by an order under Part 4A by which the person -

(a) confers a Part 4A code right on the operator, or

(b) otherwise agrees to be bound by a Part 4A code right which is exercisable by the operator,

where the Part 4A code right is in respect of the same land as the code right mentioned in sub-paragraph (1).

(2) An order under this paragraph imposes an agreement on the operator and a person on an interim basis if it provides for them to be bound by the agreement -

(a) for the period specified in the order, or

(b) until the occurrence of an event specified in the order.

(3) The court may make an order under this paragraph if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis and -

(a) the operator and that person have agreed to the making of the order and the terms of the agreement imposed by it, or

(b) the court thinks that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met.

(4) Subject to sub-paragraphs (5) and (6), the following provisions apply in relation to an order under this paragraph and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it -

(a) paragraph 20(3) (time at which operator may apply for agreement to be imposed);

(b) paragraph 22 (effect of agreement imposed under paragraph 20);

(c) paragraph 23 (terms of agreement imposed under paragraph 20);

(d) paragraph 24 (payment of consideration);

(e) paragraph 25 (payment of compensation);

(f) paragraph 84 (compensation where agreement imposed).

(5) The court may make an order under this paragraph even though the period mentioned in paragraph 20(3)(a) has not elapsed (and paragraph 20(3)(b) does not apply) if the court thinks that the order should be made as a matter of urgency.

(6) Paragraphs 20(3), 22, 23, 24 and 25 apply by virtue of sub-paragraph (4) as if -

(a) references to the relevant person were to the person mentioned in sub-paragraph (1) of this paragraph, and

(b) the duty in paragraph 23 to include terms as to the payment of consideration to that person in an agreement were a power to do so.

(7) Sub-paragraph (8) applies if -

(a) an order has been made under this paragraph imposing an agreement relating to a code right on an operator and a person in respect of any land, and

(b) the period specified under sub-paragraph (2)(a) has expired or, as the case may be, the event specified under sub-paragraph (2)(b) has occurred without (in either case) an agreement relating to the code right having been imposed on the person by order under paragraph 20.

(8) From the time when the period expires or the event occurs, that person has the right, subject to and in accordance with Part 6 of this code, to require the operator to remove any electronic communications apparatus placed on the land under the agreement imposed under this paragraph.

Temporary code rights

27(1) This paragraph applies where -

(a) an operator gives a notice under paragraph 20(2) to a person in respect of any land,

(b) the notice also requires that person's agreement on a temporary basis in respect of a right which is to be exercisable (in whole or in part) in relation to electronic communications apparatus which is already installed on, under or over the land, and

(c) the person has the right to require the removal of the apparatus in accordance with paragraph 37 or as mentioned in paragraph 40(1) but the operator is not for the time being required to remove the apparatus.

(2) The court may, on the application of the operator, impose on the operator and the person an agreement between them which confers on the operator, or provides for the person to be bound by, such temporary code rights as appear to the court reasonably necessary for securing the objective in sub-paragraph (3).

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

(4) Subject to sub-paragraphs (5) and (6), the following provisions apply in relation to an order under this paragraph and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it -

(a) paragraph 20(3) (time at which operator may apply for agreement to be imposed);

(b) paragraph 22 (effect of agreement imposed under paragraph 20);

(c) paragraph 23 (terms of agreement imposed under paragraph 20);

(d) paragraph 24 (payment of consideration);

(e) paragraph 25 (payment of compensation);

(f) paragraph 84 (compensation where agreement imposed).

(5) The court may make an order under this paragraph even though the period mentioned in paragraph 20(3)(a) has not elapsed (and paragraph 20(3)(b) does not apply) if the court thinks that the order should be made as a matter of urgency.

(6) Paragraphs 20(3), 22, 23, 24 and 25 apply by virtue of sub-paragraph (4) as if -

(a) references to the relevant person were to the person mentioned in sub-paragraph (1) of this paragraph, and

(b) the duty in paragraph 23 to include terms as to the payment of consideration to that person in an agreement were a power to do so.

(7) Sub-paragraph (8) applies where, in the course of the proceedings under paragraph 20, it is shown that a person with an interest in the land was entitled to require the removal of the apparatus immediately after it was installed.

(8) The court must, in determining for the purposes of paragraph 20 whether the apparatus should continue to be kept on, under or over the land, disregard the fact that the apparatus has already been installed there.

[PART 4A CODE RIGHTS IN RESPECT OF LAND CONNECTED TO LEASED PREMISES: UNRESPONSIVE OCCUPIERS]

PART 5

TERMINATION AND MODIFICATION OF AGREEMENTS

Introductory

28. This Part of this code makes provision about -

(a) the continuation of code rights after the time at which they cease to be exercisable under an agreement,

(b) the procedure for bringing an agreement to an end,

(c) the procedure for changing an agreement relating to code rights, and

(d) the arrangements for the making of payments under an agreement whilst disputes under this Part are resolved.

Application of this Part

29(1) This Part of this code applies to an agreement under Part 2 of this code, subject to sub-paragraphs (2) to (4).

(2) This Part of this code does not apply to a lease of land in England and Wales if -

(a) its primary purpose is not to grant code rights, and

(b) it is a lease to which Part 2 of the Landlord and Tenant Act 1954 (security of tenure for business, professional and other tenants) applies.

(3) In determining whether a lease is one to which Part 2 of the Landlord and Tenant Act 1954 applies, any agreement under section 38A (agreements to exclude provisions of Part 2) of that Act is to be disregarded.

(4) This Part of this code does not apply to a lease of land in Northern Ireland if -

(a) its primary purpose is not to grant code rights, and

(b) it is a lease to which the Business Tenancies (Northern Ireland) Order 1996 (SI 1996/725 (NI 5)) applies.

(5) An agreement to which this Part of this code applies is referred to in this code as a "code agreement".

Continuation of code rights

30(1) Sub-paragraph (2) applies if -

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

(b) under the terms of the agreement -

(i) the right ceases to be exercisable or the site provider ceases to be bound by it, or

(ii) the site provider may bring the code agreement to an end so far as it relates to that right.

(2) Where this sub-paragraph applies the code agreement continues so that -

(a) the operator may continue to exercise that right, and

(b) the site provider continues to be bound by the right.

(3) Sub-paragraph (2) does not apply to a code right which is conferred by, or is otherwise binding on, a person by virtue of an order under paragraph 26 (interim code rights) or 27 (temporary code rights).

(4) Sub-paragraph (2) is subject to the following provisions of this Part of this code.

How may a person bring a code agreement to an end?

31(1) A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement.

(2) The notice must -

(a) comply with paragraph 89 (notices given by persons other than operators),

(b) specify the date on which the site provider proposes the code agreement should come to an end, and

(c) state the ground on which the site provider proposes to bring the code agreement to an end.

(3) The date specified under sub-paragraph (2)(b) must fall -

(a) after the end of the period of 18 months beginning with the day on which the notice is given, and

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

(4) The ground stated under sub-paragraph (2)(c) must be one of the following -

(a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;

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

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

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

What is the effect of a notice under paragraph 31?

32(1) Where a site provider gives a notice under paragraph 31, the code agreement to which it relates comes to an end in accordance with the notice unless -

(a) within the period of three months beginning with the day on which the notice is given, the operator gives the site provider a counter-notice in accordance with sub-paragraph (3), and

(b) within the period of three months beginning with the day on which the counter-notice is given, the operator applies to the court for an order under paragraph 34.

(2) Sub-paragraph (1) does not apply if the operator and the site provider agree to the continuation of the code agreement.

(3) The counter-notice must state -

(a) that the operator does not want the existing code agreement to come to an end,

(b) that the operator wants the site provider to agree to confer or be otherwise bound by the existing code right on new terms, or

(c) that the operator wants the site provider to agree to confer or be otherwise bound by a new code right in place of the existing code right.

(4) If, on an application under sub-paragraph (1)(b), the court decides that the site provider has established any of the grounds stated in the site provider's notice under paragraph 31, the court must order that the code agreement comes to an end in accordance with the order.

(5) Otherwise the court must make one of the orders specified in paragraph 34.

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

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

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

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

(c) the code agreement should -

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

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

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

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

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

(2) The notice must -

(a) comply with paragraph 88 or 89, according to whether the notice is given by an operator or a site provider,

(b) specify -

(i) the day from which it is proposed that the modified terms should have effect,

(ii) the day from which the agreement should no longer provide for the code right to be conferred by or otherwise bind the site provider,

(iii) the day from which it is proposed that the additional code right should be conferred by or otherwise bind the site provider, or

(iv) the day on which it is proposed the existing code agreement should be terminated and from which a new agreement should have effect, (as the case may be), and

(c) set out details of -

(i) the proposed modified terms,

(ii) the code right it is proposed should no longer be conferred by or otherwise bind the site provider,

(iii) the proposed additional code right, or

(iv) the proposed terms of the new agreement,

(as the case may be).

(3) The day specified under sub-paragraph (2)(b) must fall -

(a) after the end of the period of 6 months beginning with the day on which the notice is given, and

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

(4) Sub-paragraph (5) applies if, after the end of the period of six months beginning with the day on which the notice is given, the operator and the site provider have not reached agreement on the proposals in the notice.

(5) Where this paragraph applies, the operator or the site provider may apply to the court for the court to make an order under paragraph 34.

What orders may a court make on an application under paragraph 32 or 33?

34(1) This paragraph sets out the orders that the court may make on an application under paragraph 32(1)(b) or 33(5).

(2) The court may order that the operator may continue to exercise the existing code right in accordance with the existing code agreement for such period as may be specified in the order (so that the code agreement has effect accordingly).

(3) The court may order the modification of the terms of the code agreement relating to the existing code right.

(4) Where under the code agreement more than one code right is conferred by or otherwise binds the site provider, the court may order the modification of the terms of the code agreement so that it no longer provides for an existing code right to be conferred by or otherwise bind the site provider.

(5) The court may order the terms of the code agreement relating to the existing code right to be modified so that -

(a) it confers an additional code right on the operator, or

(b) it provides that the site provider is otherwise bound by an additional code right.

(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which -

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

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

(7) The existing code agreement continues until the new agreement takes effect.

(8) This code applies to the new agreement as if it were an agreement under Part 2 of this code.

(9) The terms conferring or providing for an additional code right under sub-paragraph (5), and the terms of a new agreement under sub-paragraph (6), are to be such as are agreed between the operator and the site provider.

(10) If the operator and the site provider are unable to agree on the terms, the court must on an application by either party make an order specifying those terms.

(11) Paragraphs 23(2) to (8), 24, 25 and 84 apply -

(a) to an order under sub-paragraph (3), (4) or (5), so far as it modifies or specifies the terms of the agreement, and

(b) to an order under sub-paragraph (10)

as they apply to an order under paragraph 20.

(12) In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement.

(13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to -

(a) the operator's business and technical needs,

(b) the use that the site provider is making of the land to which the existing code agreement relates,

(c) any duties imposed on the site provider by an enactment, and

(d) the amount of consideration payable by the operator to the site provider under the existing code agreement.

…

35. [*What arrangements for payment can be made pending determination of the application?*]

PART 6

RIGHTS TO REQUIRE REMOVAL OF ELECTRONIC COMMUNICATIONS APPARATUS

Introductory

36. This Part of this code makes provision about -

(a) the cases in which a person has the right to require the removal of electronic communications apparatus or the restoration of land,

(b) the means by which a person can discover whether apparatus is on land pursuant to a code right, and

(c) the means by which a right to require removal of apparatus or restoration of land can be enforced.

When does a landowner have the right to require removal of electronic communications apparatus?

37(1) A person with an interest in land (a "landowner") has the right to require the removal of electronic communications apparatus on, under or over the land if (and only if) one or more of the following conditions are met.

(2) The first condition is that the landowner has never since the coming into force of this code been bound by a code right entitling an operator to keep the apparatus on, under or over the land.

(3) The second condition is that a code right entitling an operator to keep the apparatus on, under or over the land has come to an end or has ceased to bind the landowner -

(a) as mentioned in paragraph 26(7) and (8),

(aa) as mentioned in paragraph 27G(1) and (4);

(b) as the result of paragraph 32(1), or

(c) as the result of an order under paragraph 32(4) or 34(4) or (6), or

(d) where the right was granted by a lease to which Part 5 of this code does not apply.

This is subject to sub-paragraph (4).

(4) The landowner does not meet the first or second condition if -

(a) the land is occupied by a person who -

(i) conferred a code right (which is in force) entitling an operator to keep the apparatus on, under or over the land, or

(ii) is otherwise bound by such a right, and

(b) that code right was not conferred in breach of a covenant enforceable by the landowner.

(5) In the application of sub-paragraph (4)(b) to Scotland the reference to a covenant enforceable by the landowner is to be read as a reference to a contractual term which is so enforceable.

(6) The third condition is that -

(a) an operator has the benefit of a code right entitling the operator to keep the apparatus on, under or over the land, but

(b) the apparatus is not, or is no longer, used for the purposes of the operator's network, and

(c) there is no reasonable likelihood that the apparatus will be used for that purpose.

(7) The fourth condition is that -

(a) this code has ceased to apply to a person so that the person is no longer entitled under this code to keep the apparatus on, under or over the land,

(b) the retention of the apparatus on, under or over the land is not authorised by a scheme contained in an order under section 117, and

(c) there is no other person with a right conferred by or under this code to keep the apparatus on, under or over the land.

(8) The fifth condition is that -

(a) the apparatus was kept on, under or over the land pursuant to -

(i) a transport land right (see Part 7), or

(ii) a street work right (see Part 8),

(b) that right has ceased to be exercisable in relation to the land by virtue of paragraph 54(9), and

(c) there is no other person with a right conferred by or under this code to keep the apparatus on, under or over the land.

(9) This paragraph does not affect rights to require the removal of apparatus under another enactment (see paragraph 41).

38. [*Removal of ECA from neighbouring land*]

39. [*Identifying whether a code right has been granted for ECA*]

How does a landowner or occupier enforce removal of apparatus?

40(1) The right of a landowner or occupier to require the removal of electronic communications apparatus on, under or over land, under paragraph 37 or 38, is exercisable only in accordance with this paragraph.

(2) The landowner or occupier may give a notice to the operator whose apparatus it is requiring the operator -

(a) to remove the apparatus, and

(b) to restore the land to its condition before the apparatus was placed on, under or over the land.

(3) The notice must -

(a) comply with paragraph 89 (notices given by persons other than operators), and

(b) specify the period within which the operator must complete the works.

(4) The period specified under sub-paragraph (3) must be a reasonable one.

(5) Sub-paragraph (6) applies if, within the period of 28 days beginning with the day on which the notice was given, the landowner or occupier and the operator do not reach agreement on any of the following matters -

(a) that the operator will remove the apparatus;

(b) that the operator will restore the land to its condition before the apparatus was placed on, under or over the land;

(c) the time at which or period within which the apparatus will be removed;

(d) the time at which or period within which the land will be restored.

(6) The landowner or occupier may make an application to the court for -

(a) an order under paragraph 44(1) (order requiring operator to remove apparatus etc), or

(b) an order under paragraph 44(3) (order enabling landowner to sell apparatus etc).

(7) If the court makes an order under paragraph 44(1), but the operator does not comply with the agreement imposed on the operator and the landowner or occupier by virtue of paragraph 44(7), the landowner or occupier may make an application to the court for an order under paragraph 44(3).

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

41. [*Enforcement of other rights to require removal of apparatus*]

42. [*Alteration in consequence of street works*]

43. [*Restoration of land*]

What orders may the court make on an application under paragraphs 40 to 43?

44(1) An order under this sub-paragraph is an order that the operator must, within the period specified in the order -

(a) remove the electronic communications apparatus, and

(b) restore the land to its condition before the apparatus was placed on, under or over the land.

(2) An order under this sub-paragraph is an order that the operator must, within the period specified in the order, restore the land to its condition before the code right was exercised.

(3) An order under this sub-paragraph is an order that the landowner, occupier or third party may do any of the following -

(a) remove or arrange the removal of the electronic communications apparatus;

(b) sell any apparatus so removed;

(c) recover the costs of any action under paragraph (a) or (b) from the operator;

(d) recover from the operator the costs of restoring the land to its condition before the apparatus was placed on, under or over the land;

(e) retain the proceeds of sale of the apparatus to the extent that these do not exceed the costs incurred by the landowner, occupier or third party as mentioned in paragraph (c) or (d).

(4) An order under this sub-paragraph is an order that the landowner may recover from the operator the costs of restoring the land to its condition before the code right was exercised.

(5) An order under this paragraph on an application under paragraph 40 may require the operator to pay compensation to the landowner for any loss or damage suffered by the landowner as a result of the presence of the apparatus on the land during the period when the landowner had the right to require the removal of the apparatus from the land but was not able to exercise that right.

(6) Paragraph 84 makes further provision about compensation under sub-paragraph (5).

(7) An order under sub-paragraph (1) or (2) takes effect as an agreement between the operator and the landowner, occupier or third party that -

(a) requires the operator to take the steps specified in the order, and

(b) otherwise contains such terms as the court may so specify.

…

PART 17

SUPPLEMENTARY PROVISIONS

Relationship between this code and existing law

99(1) This code does not authorise the contravention of any provision of an enactment passed or made before the coming into force of this code.

(2) Sub-paragraph (1) does not apply if and to the extent that an enactment makes provision to the contrary.

Relationship between this code and agreements with operators

100(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.

Ownership of property

101. The ownership of property does not change merely because the property is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with this code.

102. [*Conduits*]

103. [*Duties for OFCOM to prepare codes of practice*]

104. [*Application of this code to the Crown*]

Meaning of "occupier"

105(1) References in this code to an occupier of land are to the occupier of the land for the time being.

(2) References in this code to an occupier of land, in relation to a footpath or bridleway that crosses and forms part of agricultural land, are to the occupier of that agricultural land.

(3) [*Occupier in relation to streets and roads*]

(4) [*Occupier in relation to streets and roads*]

(5) Sub-paragraph (6) applies in relation to land which -

(a) is unoccupied, and

(b) is not a street in England and Wales or Northern Ireland or a road in Scotland.

(6) References in this code to an occupier of land, in relation to land within sub-paragraph (5), are to -

(a) the person (if any) who for the time being exercises powers of management or control over the land, or

(b) if there is no person within paragraph (a), to every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land.

(7) …

106. [*Lands Tribunal for Scotland procedure rules*]

107. [*Arbitrations in Scotland*]

General interpretation

108(1) In this code -

…

"land" does not include electronic communications apparatus;

SECTION 2:

THE OLD CODE

SCHEDULE 2 TO THE TELECOMMUNICATIONS ACT 1984

(AS AMENDED)

1. [*Interpretation*]

Agreement required to confer right to execute works etc

2(1) The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes -

(a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of telecommunication apparatus; or

(b) to keep telecommunication apparatus installed on, under or over that land; or

(c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's system.

(2) A person who is the owner of the freehold estate in any land or is a lessee of any land shall not be bound by a right conferred in accordance with sub-paragraph (1) above by the occupier of that land unless -

(a) he conferred the right himself as occupier of the land; or

(b) he has agreed in writing to be bound by the right; or

(c) he is for the time being treated by virtue of sub-paragraph (3) below as having so agreed; or

(d) he is bound by the right by virtue of sub-paragraph (4) below.

(3) If a right falling within sub-paragraph (1) above has been conferred by the occupier of any land for purposes connected with the provision, to the occupier from time to time of that land, of any telecommunication services and -

(a) the person conferring the right is also the owner of the freehold estate in that land or is a lessee of the land under a lease for a term of a year or more, or

(b) in a case not falling within paragraph (a) above, a person owning the freehold estate in the land or a lessee of the land under a lease for a term of a year or more has agreed in writing that his interest in the land should be bound by the right,

then, subject to paragraph 4 below, that right shall (as well as binding the person who conferred it) have effect, at any time when the person who conferred it or a person bound by it under sub-paragraph (2)(b) or (4) of this paragraph is the occupier of the land, as if every person for the time being owning an interest in that land had agreed in writing to the right being conferred for the said purposes and, subject to its being exercised solely for those purposes, to be bound by it.

(4) In any case where a person owning an interest in land agrees in writing (whether when agreeing to the right as occupier or for the purposes of sub-paragraph (3)(b) above or otherwise) that his interest should be bound by a right falling within sub-paragraph (1) above, that right shall (except in so far as the contrary intention appears) bind the owner from time to time of that interest and also -

(a) the owner from time to time of any other interest in the land, being an interest created after the right is conferred and not having priority over the interest to which the agreement relates; and

(b) any other person who is at any time in occupation of the land and whose right to occupation of the land derives (by contract or otherwise) from a person who at the time the right to occupation was granted was bound by virtue of this sub-paragraph.

(5) A right falling within sub-paragraph (1) above shall not be exercisable except in accordance with the terms (whether as to payment or otherwise) subject to which it is conferred; and, accordingly, every person for the time being bound by such a right shall have the benefit of those terms.

(6) A variation of a right falling within sub-paragraph (1) above or of the terms on which such a right is exercisable shall be capable of binding persons who are not parties to the variation in the same way as, under sub-paragraphs (2), (3) and (4) above, such a right is capable of binding persons who are not parties to the conferring of the right.

(7) It is hereby declared that a right falling within sub-paragraph (1) above is not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land.

(8) In this paragraph and paragraphs 3 and 4

(a) references to the occupier of any land shall have effect -

…

(iii) in relation to any land (not being a street) which is unoccupied, as references to the person (if any) who for the time being exercises powers of management or control over the land or, if there is no such person, to every person whose interest in the land would be prejudicially affected by the exercise of the right in question; …

Power to dispense with the need for required agreement

5(1) Where the operator requires any person to agree for the purposes of paragraph 2 or 3 above that any right should be conferred on the operator, or that any right should bind that person or any interest in land, the operator may give a notice to that person of the right and of the agreement that he requires.

(2) Where the period of 28 days beginning with the giving of a notice under sub-paragraph (1) above has expired without the giving of the required agreement, the operator may apply to the court for an order conferring the proposed right, or providing for it to bind any person or any interest in land, and (in either case) dispensing with the need for the agreement of the person to whom the notice was given.

(3) The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order -

(a) is capable of being adequately compensated for by money; or

(b) is outweighed by the benefit, accruing from the order to the persons whose access to a telecommunication system will be secured by the order;

and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person should unreasonably be denied access to a telecommunication system.

(4) An order under this paragraph made in respect of a proposed right may, in conferring that right or providing for it to bind any person or any interest in land and in dispensing with the need for any person's agreement, direct that the right shall have effect with such modifications, be exercisable on such terms and be subject to such conditions as may be specified in the order.

(5) The terms and conditions specified by virtue of sub-paragraph (4) above in an order under this paragraph, shall include such terms and conditions as appear to the court appropriate for ensuring that the least possible loss and damage is caused by the exercise of the right in respect of which the order is made to persons who occupy, own interests in or are from time to time on the land in question.

(6) …

(7) Where an order under this paragraph, for the purpose of conferring any right or making provision for a right to bind any person or any interest in land, dispenses with the need for the agreement of any person, the order shall have the same effect and incidents as the agreement of the person the need for whose agreement is dispensed with and accordingly (without prejudice to the foregoing) shall be capable of variation or release by a subsequent agreement.

Acquisition of rights in respect of apparatus already installed

6(1) The following provisions of this paragraph apply where the operator gives notice under paragraph 5(1) above to any person and -

(a) that notice requires that person's agreement in respect of a right which is to be exercisable (in whole or in part) in relation to telecommunication apparatus already kept installed on, under or over the land in question, and

(b) that person is entitled to require the removal of that apparatus but, by virtue of paragraph 21 below, is not entitled to enforce its removal.

(2) The court may, on the application of the operator, confer on the operator such temporary rights as appear to the court reasonably necessary for securing that, pending the determination of any proceedings under paragraph 5 above or paragraph 21 below, the service provided by the operator's system is maintained and the apparatus properly adjusted and kept in repair.

(3) In any case where it is shown that a person with an interest in the land was entitled to require the removal of the apparatus immediately after it was installed, the court shall, in determining for the purposes of paragraph 5 above whether the apparatus should continue to be kept installed on, under or over the land, disregard the fact that the apparatus has already been installed there.

…

Restriction on right to require the removal of apparatus

21(1) Where any person is for the time being entitled to require the removal of any of the operator's telecommunication apparatus from any land (whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub-paragraph (12) below, in accordance with the following provisions of this paragraph.

(2) The person entitled to require the removal of any of the operator's telecommunication apparatus shall give a notice to the operator requiring the removal of the apparatus.

(3) Where a person gives a notice under sub-paragraph (2) above and the operator does not give that person a counter-notice within the period of 28 days beginning with the giving of the notice, that person shall be entitled to enforce the removal of the apparatus.

(4) A counter-notice given under sub-paragraph (3) above to any person by the operator shall do one or both of the following, that is to say -

(a) state that that person is not entitled to require the removal of the apparatus;

(b) specify the steps which the operator proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land.

(5) Those steps may include any steps which the operator could take for the purpose of enabling him, if the apparatus is removed, to re-install the apparatus; and the fact that by reason of the following provisions of this paragraph any proposed re-installation is only hypothetical shall not prevent the operator from taking those steps or any court or person from exercising any function in consequence of those steps having been taken.

(6) Where a counter-notice is given under sub-paragraph (3) above to any person, that person may only enforce the removal of the apparatus in pursuance of an order of the court; and, where the counter-notice specifies steps which the operator is proposing to take to secure a right to keep the apparatus on the land, the court shall not make such an order unless it is satisfied -

(a) that the operator is not intending to take those steps or is being unreasonably dilatory in the taking of those steps; or

(b) that the taking of those steps has not secured, or will not secure, for the operator as against that person any right to keep the apparatus installed on, under or over the land or, as the case may be, to re-install it if it is removed.

(7) Where any person is entitled to enforce the removal of any apparatus under this paragraph (whether by virtue of sub-paragraph (3) above or an order of the court under sub-paragraph (6) above), that person may, without prejudice to any method available to him apart from this sub-paragraph for enforcing the removal of that apparatus, apply to the court for authority to remove it himself; and, on such an application, the court may, if it thinks fit, give that authority.

(8) Where any apparatus is removed by any person under an authority given by the court under sub-paragraph (7) above, any expenses incurred by him in or in connection

with the removal of the apparatus shall be recoverable by him from the operator in any court of competent jurisdiction; and in so giving an authority to any person the court may also authorise him, in accordance with the directions of the court, to sell any apparatus removed under the authority and to retain the whole or a part of the proceeds of sale on account of those expenses.

(9) Any telecommunication apparatus kept installed on, under or over any land shall (except for the purposes of this paragraph and without prejudice to paragraphs 6(3) and 7(3) above) be deemed, as against any person who was at any time entitled to require the removal of the apparatus, but by virtue of this paragraph not entitled to enforce its removal, to have been lawfully so kept at that time.

…

SECTION 3:

THE TRANSITIONAL PROVISIONS

SCHEDULE 2 TO THE DIGITAL ECONOMY ACT 2017

Interpretation

1(1) This paragraph has effect for the purposes of this Schedule.

(2) The "existing code" means Schedule 2 to the Telecommunications Act 1984.

(3) The "new code" means Schedule 3A to the Communications Act 2003.

(4) A "subsisting agreement" means -

(a) an agreement for the purposes of paragraph 2 or 3 of the existing code, or

(b) an order under paragraph 5 of the existing code,

which is in force, as between an operator and any person, at the time the new code comes into force (and whose terms do not provide for it to cease to have effect at that time).

(5) Expressions used in this Schedule and in the new code have the same meaning as in the new code, subject to any modification made by this Schedule.

Effect of subsisting agreement

2(1) A subsisting agreement has effect after the new code comes into force as an agreement under Part 2 of the new code between the same parties, subject to the modifications made by this Schedule.

(2) A person who is bound by a right by virtue of paragraph 2(4) of the existing code in consequence of a subsisting agreement is, after the new code comes into force, treated as bound pursuant to Part 2 of the new code.

…

Termination and modification of agreements

6(1) This paragraph applies in relation to a subsisting agreement, in place of paragraph 29(2) to (4) of the new code.

(2) Part 5 of the new code (termination and modification of agreements) does not apply to a subsisting agreement that is a lease of land in England and Wales, if -

(a) it is a lease to which Part 2 of the Landlord and Tenant Act 1954 applies, and

(b) there is no agreement under section 38A of that Act (agreements to exclude provisions of Part 2) in relation [to] the tenancy.

(3) Part 5 of the new code does not apply to a subsisting agreement that is a lease of land in England and Wales, if -

(a) the primary purpose of the lease is not to grant code rights (the rights referred to in paragraph 3 of this Schedule), and

(b) there is an agreement under section 38A of the 1954 Act in relation [to] the tenancy.

(4) Part 5 of the new code does not apply to a subsisting agreement that is a lease of land in Northern Ireland, if it is a lease to which the Business Tenancies (Northern Ireland) Order 1996 (SI 1996/725 (NI 5)) applies.

7(1) Subject to paragraph 6, Part 5 of the new code applies to a subsisting agreement with the following modifications.

(2) The "site provider" (see paragraph 30(1)(a) of the new code) does not include a person who was under the existing code bound by the agreement only by virtue of paragraph 2(2)(c) of that code.

(3) Where the unexpired term of the subsisting agreement at the coming into force of the new code is less than 18 months, paragraph 31 applies (with necessary modification) as if for the period of 18 months referred to in sub-paragraph (3)(a) there were substituted a period equal to the unexpired term or three months, whichever is greater.

(4) Paragraph 34 applies with the omission of sub-paragraph (13)(d).

…

Court applications for required rights etc

11(1) This paragraph applies where -

(a) before the time when the new code comes into force, a notice has been given under paragraph 5(1) of the existing code, and

(b) at that time no application has been made to the court in relation to the notice.

(2) The notice has effect as if given under paragraph 20(2) of the new code.

12(1) This paragraph applies where before the time when the new code comes into force -

(a) a notice has been given under paragraph 5(1) of the existing code, and

(b) an application has been made to the court in relation to the notice.

(2) Subject to sub-paragraph (3), the existing code continues to apply in relation to the application.

(3) An order made under the existing code by virtue of sub-paragraph (2) has effect as an order under paragraph 20 of the new code.

Temporary code rights

13. The coming into force of the new code does not affect any application or order made under paragraph 6 of the existing code.

…

Right to require removal of apparatus

20(1) This paragraph applies where before the repeal of the existing code comes into force a person has given notice under paragraph 21(2) of that code requiring the removal of apparatus.

(2) The repeal does not affect the operation of paragraph 21 in relation to anything done or that may be done under that paragraph following the giving of the notice.

(3) For the purposes of applying that paragraph after the repeal comes into force, steps specified in a counter-notice under sub-paragraph (4)(b) of that paragraph as steps which the operator proposes to take under the existing code are to be read as including any corresponding steps that the operator could take under the new code or by virtue of this Schedule.

…