SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 27
XA63/20

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

by

(1) EE LIMITED and (2) HUTCHISON 3G UK LIMITED

Appellants

against

JOHN STEWART DUNCAN

Respondent

Appellants: Barne QC; Shepherd and Wedderburn LLP
Respondent: Upton; Davidson Chalmers Stewart LLP

7 May 2021

[1] This is an appeal against a decision of the Lands Tribunal for Scotland (the tribunal). The main issue concerns the proper approach to paragraph 33(14) of the Electronic Communications Code contained in schedule 3A to the Communications Act 2003, as amended by the Digital Economy Act 2017. This new code replaced the old code set out in schedule 2 to the Telecommunications Act 1984. In terms of transitional provisions the old code remains relevant to agreements made under it.

Background

[2] In 2003 Mr John Stewart Duncan (the owner) entered into an agreement with EE Ltd, which that company subsequently assigned to itself and Hutchison 3G UK Ltd (the operators), granting certain rights to keep, operate and inspect telecommunications apparatus on a site at Wester Dullatur Farm, North Lanarkshire. After the expiry of the agreed term in 2012 the lease has continued from year to year by way of tacit relocation (a rule under Scots law whereby a lease will be extended beyond its agreed term if neither party serves a notice ending the agreement).

[3] In 2018 the operators sought agreement as to a new lease containing provisions designed to update the agreement in accordance with the minimum provisions imposed by the new code, including assignation rights; ability to share and upgrade the facilities without additional payment; and a "no network scheme" basis for the assessment of rental and compensation (which would be less costly for the operators). The owner preferred continuation of the agreement under the old code (described as a "subsisting agreement" in the new code). It seems plain that the proposed change in the financial arrangements was the main stumbling block.

[4] The operators each served a notice on the owner in terms of paragraph 33 of the new code proposing termination of the agreement on 8 November 2019 and its replacement with the draft lease annexed thereto. It was stated that in the absence of an agreed outcome, the operators could apply to the tribunal for an order that the notice takes effect. In due course such an application was made, and after a debate on the pleadings it was refused for want of a relevant case for the termination of the subsisting agreement. The appeal is against that decision.

[5] The tribunal reached the same decision in respect of similar applications concerning another eight sites. Appeals in respect of those cases have been sisted pending the outcome of this appeal.

The tribunal's reasons for refusal of the application

[6] The tribunal held that a relevant case had not been presented by the operators. In other words, not enough had been pled such as might persuade the tribunal to exercise its discretion in favour of the application. It was acknowledged that the new lease would bring the parties' relationship into line with the minimum non-derogable provisions in any agreement for a new site under the new code, but it had not been contended that there was any particular need for such changes at the Wester Dullatur site. For example it was not said that a specified third party wanted to install its apparatus there, nor that the operators had a current intention to assign rights. The tribunal appreciated that the new code was designed to facilitate such matters, and to reduce costs for operators, however that did not mean that in respect of subsisting agreements they would be available simply by asking for them.

[7] Paragraph 33(14) of the code states that when determining which order to make under the paragraph, along with all the circumstances of the case, the tribunal must have regard in particular to certain factors, the first being: "(a) the operator's business and technical needs". The tribunal commented that Parliament had "set the bar as high as need." It had not been suggested that any new provisions were required to give the agreement business or technical efficacy, nor that consumers would be better served than as at present. Only something rendering an agreement unduly onerous or restrictive would allow "judicial cancellation of an existing contract." Parliament had envisaged that

subsisting agreements might be so unfit for purpose that complete replacement was justified, though the tribunal found it hard to envisage what such an agreement would look like.

The submissions for the operators in support of the appeal

[8] The new code was designed for the roll out of, and investment in, new electronic communications equipment, something which was being impeded by the old code. It should be interpreted broadly and in a manner consistent with its purpose; for an example of this see *Cornerstone Telecommunications Infrastructure Ltd* v *University of London* [2020] 1 WLR 2124 at paragraphs 47/48 and 55. Reference was made to the relevant EU Directives and the emphasis in the EU Common Regulatory Framework on the prevention of restrictions on the installation of new technologies and the upgrading of electronic communications equipment. Landowners have a public duty to participate, see *CTIL* v *University of Arts London* [2020] UKUT 248 (LC) at paragraph 51. One of the purposes of the transitional provisions was to preserve old agreements after they have expired and allow for them to be aligned with the new code.

[9] There is no sound basis for the view that the reference to "business and technical needs" in paragraph 33(14) creates a bar or hurdle which has to be cleared, let alone a high one. The tribunal introduced requirements which are inconsistent with the purpose of the new code. It was wrong to discuss matters in terms of the judicial cancellation of contracts. This part of the code applies to contracts which have expired. The term of this lease ended in 2012. The code ensures that the agreement can be ended only by the consent of the parties or by an order of the tribunal, and that, so long as six months' notice is given, the operators will have the opportunity to apply for a replacement agreement in line with it. In *On Tower*

UK Ltd v *JH & FW Green Ltd* [2020] UKUT 348 (LC) the Upper Tribunal south of the border disagreed with the restrictive approach adopted by the Scottish tribunal in an earlier case concerning sharing rights, see paragraphs 23-25.

[10] Rather than applying a test of necessity, the tribunal should have addressed what it is that the operators might reasonably require. Parliament has identified certain minimum rights which agreements for new sites must provide, see the code at paragraphs 16(1), 17(5), and 100(2). For public interest reasons they must be set on a "no network" valuation basis, see paragraph 24. The replacement lease sought by the operators reflects and brings into effect benefits which Parliament considers to be requirements of operators in respect of their business and technical needs, all with a view to assisting them in the delivery of the policy aims of the new code.

The submissions for the owner

[11] There was no error in law. The tribunal correctly applied the relevant parts of the new code when deciding that the case advanced by the operators did not provide sufficient grounds for the order sought. It was being asked to end an existing contract which was running on tacit relocation. Neither party had served a notice to end the arrangement. Parliament decided not to apply part 3 of the code to subsisting agreements, and part 5 was subject to specific modifications, see schedule 2 to the 2017 Act, paragraphs 5 and 7. Paragraph 34 of the code gives the tribunal a discretionary power as to whether to order the parties to enter into a new agreement under the new code.

[12] Specific justification for such an order is required. The business wishes, profit or convenience of the operators are not enough, otherwise it would be as if, contrary to Parliament's intention, part 3 applied to subsisting agreements. Instead the tribunal had to

have particular regard to the operators' business and technical needs. The court should be slow to interpret a statute in a liberal fashion regarding interference with freely-negotiated contracts; for example, see *Allen* v *Thorn Electrical Industries Ltd* [1968] 1 QB 487 and *CTIL* v *Compton Beauchamp Estates Ltd* [2019] UKUT 107 (LC) at paragraphs 86/7.

The background to and the policy aims of the new code

[13] Modern electronic communications rely on a network of physical infrastructure, including antennae and masts. A code regulating the legal relationship between landowners and operators was introduced by the 1984 Act. After European intervention in a series of Directives, it was updated by the 2003 Act. In due course the Law Commission was asked to review the code. It presented a detailed report in 2013 (Law Com no 336). The conclusion was that the code was complex, difficult to understand, and outdated. It lacked clarity and was inhibiting the roll out of electronic communications. It did not strike the right balance as between owners, operators and the public interest. The Commission's recommendations were designed to form the basis for a new code.

[14] In May 2016, in recognition of a need for more extensive coverage, better connectivity and faster services, the Department for Culture, Media and Sport published a policy document entitled "A New Electronic Communications Code" setting out the government's proposals. They were designed to "pave the way for future technological evolution" and "provide a robust platform to enable long-term investment and development of digital communications infrastructure" throughout the UK (Ministerial foreword). The main reforms would be a "no scheme" valuation basis to bring electronic communications into line with utilities such as water and electricity, and new rights to share and upgrade facilities to aid the speedy and cost-effective deployment of new technology. The context

was widespread acceptance of the importance of digital communications in respect of economic growth, productivity gains and social interaction.

[15] The new code was introduced by the 2017 Act. There had been a debate as to whether it would apply immediately to extant agreements made under the old regime, see the discussion at paragraphs 48-51 of the policy paper. The view was taken that immediate imposition of the changed valuation basis on negotiated contracts could not be justified. New code rights would be phased in for existing sites when such agreements ended, with the old code becoming obsolete over time. This would "ensure for a steady phasing in of new code rights while preserving better investment incentives on new sites from day one." The government would bring forward transitional provisions "to set out how and when existing agreements transition to the new code". Those provisions are contained in schedule 2 to the 2017 Act. A "subsisting agreement" is an agreement made under the old code which is in force after the introduction of the new regime. It continues as if made under part 2 of the new code but subject to the modifications in the schedule, which include disapplication of the minimum assignment/upgrading/sharing rights under part 3. The result is that the parties' agreement concerning the facilities at Wester Dullatur is a subsisting agreement subject to part 5 of the code, as modified.

The new code

[16] Turning to the structure of the new code; parts 2-4 deal with applications concerning new sites, and respectively with the conferral and exercise of the new code rights; assignment of code rights, upgrading and the sharing of apparatus; and the power of the court to impose agreements. The latter includes a public interest test and the no network assumption regarding valuation and compensation.

[17] The present case concerns part 5 of the code so it is necessary to describe it in more detail. It provides for the continuation of code rights after the time at which they cease to be exercisable and sets out the procedure for changing or ending an agreement (paragraph 28). It applies to agreements made under the new code and, subject to the modifications in the transitional provisions, to "subsisting agreements" made under the old code. Paragraph 30 is an important provision. Subject to the rest of part 5, it prevents a code right or a code agreement being brought to an end at the expiry of the agreed term. Paragraph 31 narrates the limited grounds upon which a site provider can bring an agreement to an end, namely if the operator is in breach; if redevelopment plans require termination; or the public interest test is not met. If the notice is challenged by a counter notice, or the operator seeks a paragraph 34 order, and the tribunal upholds one of these grounds, it must end the agreement. If no grounds are made out the tribunal must make one of the orders specified in paragraph 34, see paragraphs 32(4) and (5).

[18] Paragraph 33 is headed:

> *"How may a party to a code agreement require a change to a code agreement which has expired?"*

Either party can propose changes, including, as was done in this case, that a wholly new agreement should take effect. A notice must be served specifying, amongst other things, the day when the new agreement will commence. (A specific issue concerning this part of the code has been raised by the owner and will be addressed below.) If after six months the parties have not reached an agreed outcome either can apply for an order under paragraph 34.

[19] Paragraph 34 is headed:

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

The parties having failed to reach an agreement, the operators asked the tribunal to make an order under this paragraph imposing the new agreement annexed to the notice. It would have the same general effect as an agreement made under the earlier parts of the code in respect of a new site in that the minimum non-derogable rights under the new code would apply, including the new financial arrangements and assignation/sharing/upgrading rights. Paragraph 34(8) applies the code to the new agreement as if it were an agreement under part 2 (that is concerning a new site). Paragraph 34(11) applies the new code provisions as to rental and compensation to an order made under paragraph 34.

[20] As the tribunal recognised, the operators are seeking no more than they would enjoy if granted an order under parts 2-4 of the code. There is no doubt as to the power of the tribunal to make the requested order. Indeed in terms of paragraph 34(10), if the parties are unable to reach agreement, the tribunal must make an order specifying the terms of their relationship. However it refused to do so for the reasons set out above which, in summary, were that the operators had failed to demonstrate that the changes were needed in terms of paragraph 34(13)(a).

[21] Paragraph 34(13) provides as follows:

> *"In determining which order to make under this paragraph, the (tribunal) 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. "*

In recognition that a subsisting agreement made under the old code (such as the current lease) would have been negotiated on a market basis free of any no network scheme valuation assumption, paragraph 7(4) of the transitional provisions provides that the last factor does not apply in such cases. The operators point to this as being a clear indication that the minimum code rights for applications under earlier parts of the code should be available in the same way when an order is sought in respect of a subsisting agreement. It is argued that it follows that the tribunal erred in imposing an additional burden of proof of specific necessity regarding such rights as a precondition to the relevance or validity of the application.

Discussion in respect of the proper approach to paragraph 34(13)

[22] We agree with the tribunal when it said that applications of the present kind for a paragraph 34 order imposing a new arrangement can be made once the stipulated duration of the existing lease has come and gone; "expired" is the language used in the code. Thereafter operators of sites established under the old code have the opportunity to seek enjoyment of the same code rights as are available to operators of new sites. Since July 2012 the present lease has been an "expired" agreement notwithstanding that it has continued from year to year by way of tacit relocation. In the language of the code it is a "subsisting agreement" made under the old code.

[23] We also agree with the tribunal that paragraph 34 opens up a wide range of possible orders. However we part company with the tribunal in its assertion that the operators required to do more than point to the current arrangements as being out of step with the minimum rights available under the new code, for example in terms of assignation, upgrading, sharing and rent. Such would not be necessary if an application was made

under part 4 for a new site. We can identify nothing which points to a need for it in respect of applications concerning subsisting agreements made under the old code.

[24] The tribunal read the requirement to have regard to the operators' "business and technical needs" as setting a high bar, in the sense that it must be demonstrated that the agreement is operating in an unduly onerous or restrictive way, for example by thwarting a specific project or rendering it unfit for purpose. However Parliament has identified certain minimum code rights for operators, including sharing/upgrading abilities and reduced outlays resulting from valuation on a no scheme basis. The view was taken that these are required if network operators and infrastructure providers are to be in a position to deliver the modern low cost electronic communications system which Parliament wants and which business and the public at large expect. Given the underlying aims and purposes of the new code, which include that over time old agreements will be brought into line with new ones, we understand the phrase "business and technical needs" where it appears in paragraph 34(13) to be a generic term which, whatever else, includes the benefits for operators mandated by the new code. We agree with the operators' submission that it can be construed as a reference to matters which are reasonably required from a business and/or technical point of view.

[25] If the tribunal's analysis is correct, an operator might gain a code right, for example to allow the sharing of apparatus, but then have to wait till the expiry of the new agreement before there can be a further application for upgrading, notwithstanding that in the meantime new technology has become available; see the discussion in *On Tower (UK) Ltd*, cited above, at paragraph 30. Bearing in mind that the effect of paragraph 30 of the code is that paragraphs 33 and 34 provide the mechanism available to subsisting agreement

operators who want new code rights, the tribunal's approach would result in the old code remaining alive long after it was intended to be obsolete.

[26] It may be important to remember that part 5, including paragraph 34, also applies to agreements made under the new code which will already be subject to the minimum rights and will be likewise continued in force beyond their term by virtue of paragraph 30. No doubt a wide variety of new terms or variations of existing ones could be proposed in respect of which specific justification and a consideration of all the circumstances of the case might well be required. A decision in favour of the operators in this appeal does not rob the reference to an operator's "business and technical needs" of content or potential relevance. Quite rightly we have been asked to address issues of general principle, thus we know little about the particular circumstances of this case and how they might impact upon the appropriateness of the terms of the proposed lease. We do know that the owner has not relied on either of the factors mentioned in paragraphs 34(13)(b) and (c), and absent some particular contra-indicator, it is not easy to see how or why a tribunal could reasonably prefer to prolong an old code agreement rather than update it in accordance with the new code rights.

[27] Attention has been drawn to the tribunal's use of the phrase "judicial cancellation of an existing contract". This may help to explain its reluctance to impose new terms. We would not use such language. There were supporters of retrospective application of the new code when it came into force, but the decision was taken not to allow it to have an impact on an old site until the relative agreement could be ended, for example by the use of a break clause or service of a notice to quit at the agreed term. Paragraph 30 prevents the unilateral termination of a contract even after the expiry of the agreed duration; itself a significant interference with contractual rights and freedoms. This, allied to the transitional provisions,

enables operators to maintain continuity of an installation on an old site while seeking the benefits available under the new provisions. The tribunal was not being asked to cancel a contract, but rather to replace it with one in tune with the provisions of the new code. None of this implies a presumption in favour of the site provider's interests which has to be overcome by reference to a specific need or justification.

Summary and decision on paragraph 34(13)

[28] Our opinion can be summarised as follows. The tribunal erred in its approach to the requirement to have regard to the operators' "business and technical needs". In particular there is no sound basis for requiring demonstration of a provision in the lease which is thwarting a specific project or is rendering the arrangement unduly onerous. The tribunal was wrong in inserting a "high bar" into its assessment. Too much was imported into the term "needs". It does not exclude the general business and technical opportunities afforded by, for example, agreements which reflect the new code's approach to matters such as sharing and upgrading facilities, and "no scheme" valuations. The tribunal's analysis would severely curtail the legislative intention to create the opportunity to bring old agreements into line with new code arrangements. These aims are of a piece with those of the new code as a whole. The overall scheme of this part of the code is inimical to the proposition that significant weight should be given to the existing rights and obligations of the parties.

Other issues raised by the operators

[29] The operators submitted that the tribunal erred in dismissing the application on the basis of the relevancy of their pleadings. An application under paragraph 34 is a different matter from a court action in which a party seeks to vindicate a right against another. The tribunal should have approached the matter on the basis that their pleadings were only one

element to be taken into account when deciding how to exercise the discretionary power granted to it.

[30] In addition there was criticism of certain remarks at paragraph 53 of the tribunal's judgment which were construed as indicating that it considered that it only had power to either grant the specific order sought by the operators in all its parts, or refuse it. It could not substitute some lesser or different order.

[31] On the latter point, if that is the correct interpretation of the judgment, we agree that the tribunal erred. It is clear that within certain constraints the tribunal has power to make such order as it considers to be appropriate, including by way of modification of an applicant's proposals. In paragraph 23 such is expressly permitted, and paragraph 34 is couched in broad discretionary language. However rather than laying down a restrictive rule, we consider that the tribunal was saying no more than that, in the particular circumstances of this case, it considered that there was no room for an amended order.

[32] On the first point, it is true that the decision was expressed in terms of a lack of relevant pleadings. However it could equally have been explained on the basis that on the facts of the case as revealed at the hearing the tribunal was not prepared to exercise its discretion in favour of the application, and this because of the approach it took to the burden placed on the operators in terms of demonstration of their "business and technical needs". That highlights the real issue in the appeal which has been resolved in favour of the operators. In general we agree with the operators that a strict adversarial relevancy approach is inappropriate in applications of this nature, though there will always be room for a view that the pleadings demonstrate that the application is bound to fail.

The owner's cross appeal

[33] The owner contended that the tribunal erred in rejecting two of his submissions. The first was that the notice served under paragraph 33 was invalid in having specified a date for termination of the lease which was not an anniversary of its ish (the day when the agreed term expired, namely 30 July 2012). This argument turns on the proper interpretation of paragraph 33(3) of the code. The second submission was that the application is invalid in that a written lease continuing in force by way of tacit relocation falls outside the scope of the code in that it is no longer an agreement made in writing; the code only applying to written agreements.

Notice requirements under paragraph 33(3)

[34]] Paragraph 33(3) provides that the day specified in the notice for modification of the terms of the agreement or, as the case may be, its replacement with a new one:

> *" --- must fall-*
> *(a) after the end of the period of six 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. "*

In the circumstances of the present case the notice must satisfy the six months requirement and the second part of sub-paragraph (b). The owner contends that when a lease is continuing from year to year on tacit relocation, the phrase "at a time when … the code agreement could have been brought to an end by the site provider" means the next anniversary when it can be brought to an end by an appropriate notice.

[35] The lease's natural term expired on 30 July 2012. It could have been terminated by the owner then or yearly thereafter. The notice was dated 3 May 2019 against a specified day

for application of the proposed new agreement of 8 November 2019. It follows that the six months period was met; the issue turns on the proper approach to paragraph 33(3)(b). If the owner's interpretation is correct, the notice should have referred to a new agreement coming into operation on 30 July 2020. The submissions before us proceeded on the basis that exact compliance with these provisions is essential to the validity of the application to the tribunal, though we note that in rejecting the owner's objection the tribunal took a more flexible approach which it described as "purposive".

[36] The tribunal suggested that "--- a time when -– the code agreement could have been brought to an end –"suggests a time which on the appointed date for the introduction of the new agreement is in the past. It does not refer to the next occasion when the agreement can be terminated. As was discussed earlier, the scheme of the code is to leave agreements under both the old and new codes in place for the period agreed by the parties. On this view the present lease "could have been brought to an end" in July 2012 long before the new code was brought into force, and therefore all that the notice required to provide for was six months' notice under paragraph 33(3)(a). The first part of paragraph 33(3)(b) refers to a time occurring after something which, but for paragraph 30, would have happened, which at the time of the notice might well be in the past. It is hard to understand why the second part, which again refers to paragraph 30, should in all cases refer to a specified date in the future.

[37] The tribunal formed what it described as a "tentative view" to the above effect, however it was persuaded that it could not be correct. For example, it considered that paragraph 34(15) required a date when termination could have occurred to be identified. That said, it was not satisfied with the submissions of either party on the point, nor could it reach any clear view as to the meaning and effect of the words used in paragraph 33(3)(b). After a detailed discussion it opted for what it described as a "purposive" approach. In its

view no useful purpose would be served by insisting that the date specified be an anniversary of the ish of the lease. If paragraph 33(3)(b) was intended to ensure that the operator gave the notice required at common law, that was achieved by any notice which specified the anniversary of the ish or any later date, thus the objection was repelled.

[38] In our opinion in this context the code was intended to reflect paragraph 6.117 of the Law Commission report mentioned earlier, namely to capture cases where code rights in a lease would have come to an end by effluxion of time. In *CTIL* v *Ashloch Ltd* [2021] EWCA Civ 90 the same approach was taken in respect of additional code rights requested under paragraph 33(1)(c)(i). At paragraph 69 Lewison LJ said that a change "cannot come into effect until after the agreement could have been brought to an end by the site provider: paragraph 33(3)." The Commission designed its recommendations to fit into the law of England and Wales, which may explain any difficulty in applying the relevant wording to leases in Scotland continuing from year to year on tacit relocation.

[39] The sub-paragraph with which we are concerned is less than pellucid, and one is left with an impression that something has gone awry. In any event, a consideration of the structure of paragraph 33(3) suggests that the overall intention was to postpone the introduction of a new agreement until after the first time when the existing agreement could be terminated by the site provider (though in a case such as the present when that time has come and gone, ex hypothesi that option was not exercised), and also give the parties at least six months from the date of the notice to try to reach an agreed outcome. This would be in line with paragraph 33(4) which allows for an application by either party to the tribunal for a paragraph 34 order if they have not reached agreement within that period.

[40] The only impediment to this analysis is the use of the phrase "or at a time when" rather than "or after a time when" in the second part of sub-paragraph (3)(b). However,

given the difficulty of applying the wording actually used, amply demonstrated by the tribunal's discussion of the issue, we are persuaded that these words should be interpreted in accordance with the tribunal's "tentative view" described earlier. It does little if any violence to the wording of the sub-paragraph, and is consistent with the intended purpose of the notice provisions. Unlike the tribunal, we do not see paragraph 34(15) as necessarily inconsistent with this approach. It is aimed at giving the tribunal power to backdate an order which increases the compensation payable to the site provider. The fact that it involves identification of a period beginning at a specified date in the past does not strike us as requiring a different analysis of the provisions in paragraph 33(3).

Agreement in writing

[41] The owner contends that after the expiry of the agreed term of the lease and its continuation by virtue of tacit relocation the parties' relationship ceased to be governed by an agreement in writing as required by paragraph 1 of schedule 2 to the 2017 Act, therefore the code does not apply and the tribunal had no jurisdiction. Reference was made to *Arqiva Services Ltd* v *AP Wireless II (UK)* Ltd [2020] UKUT 195 (LC), especially at paragraphs 68/9, 78/9 and 84. The tribunal held that tacit relocation operates to extend a lease, and since this was a written lease, the parties' relationship was a "subsisting lease" in terms of the transitional provisions and was subject to the new code when it came into force. The problem identified in *Arqiva*, where it was common ground that a tenancy at will is a new tenancy, did not arise north of the border.

[42] At the hearing counsel for the owner accepted that tacit relocation involves a prolongation of the original agreement. Given the authorities in this area of the law, that

concession could not have been withheld. However he submitted that the code should be interpreted in a manner which involves the least interference with property rights.

[43] In our view the tribunal reached the correct decision on this matter. When the new code came into force the operators occupied the site under the terms of a written agreement which had been extended from year to year on tacit relocation. It follows that both parties were subject to its terms and the tribunal had jurisdiction to deal with the application.

Disposal

[44] We shall allow the operators' appeal; refuse the cross appeal; quash the tribunal's decision to dismiss the application as irrelevant; and remit the matter to the tribunal for further procedure in accordance with the guidance in this opinion.