UPPER TRIBUNAL (LANDS CHAMBER)

UTLC No: LC-2021-613

Royal Courts of Justice,
London WC2A

17 August 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – NEW AGREEMENT – preliminary issues – procedure for obtaining renewal of Code rights where a concurrent lease of the reversion to a Code agreement has been granted – whether head lessor or concurrent lessee is the proper party to confer new Code rights – whether the Tribunal may order parties to enter into a tripartite agreement – para 10 and Pts 4 and 5, Sch. 3A, Communications Act 2003

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

VODAFONE LIMITED

Claimant

-and-

GENCOMP (NO.7) LIMITED (1)
A P WIRELESS II (UK) LIMITED (2)

Respondents

Re: The Old Fire Station,

Market Street,

Bingley

Martin Rodger QC, Deputy Chamber President
Heard on 12-13 July 2022

Graham Read QC, instructed by Osborne Clarke LLP, for the claimant
Wayne Clark and *Fern Schofield*, instructed by Eversheds Sutherland LLP, for the respondents

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The following cases are referred to in this decision:

Barrett v Morgan [2000] 2 AC 264

Cornerstone v Compton Beauchamp [2019] EWCA Civ 1755

Cornerstone v Compton Beauchamp [2022] UKSC 18

EE and H3G v Edelwind [2020] UKUT 0272 (LC)

Graysim Holdings Ltd v P & O Property Holdings Ltd [1996] AC 329

Introduction

1. The tower of the Old Fire Station at Market Street in Bingley is used by the claimant, Vodafone Ltd, as a site for its electronic communication apparatus. In 2003 Vodafone was granted a lease of parts of the tower and rights over other parts of the Old Fire Station by the owner of the freehold. The lease expired in 2018 and in this reference Vodafone invites the Tribunal to make orders under the new Electronic Communications Code for the renewal of its rights for a further term of ten years.

2. The freehold of the building has changed hands several times since the grant of the original lease and it now belongs to the first respondent, Gencomp (No. 7) Ltd (Gencomp).

3. In 2018, after the commencement of the new Code but before the expiry of Vodafone's lease, a previous freeholder granted a concurrent lease of parts of the tower to the second respondent, AP Wireless II (UK) Ltd (APW), subject to and with the benefit of Vodafone's lease. The concurrent lease was for a term continuing until 2058 and when it was granted APW became Vodafone's immediate landlord.

4. Neither APW nor Gencomp objects to the renewal of Vodafone's rights, but the parties disagree about how that renewal should be achieved. Vodafone considers that only Gencomp can grant it new rights under the Code, and that those rights should be made binding on APW by an order of the Tribunal. APW says that it is the only party capable of granting new rights to Vodafone and that they should then be made binding on Gencomp. Gencomp has not participated in the proceedings and is understood to be happy to do whatever is required of it.

5. The parties agreed that I should hear preliminary issues to determine what orders the Tribunal has power to make in these circumstances.

6. I heard argument on the preliminary issues less than three weeks after the Supreme Court handed down its decision in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp* [2022] UKSC 18 (*Compton Beauchamp*). The Supreme Court resolved critical questions about the basic structure of the Code and how Parliament intended it to operate. As a result, the debate over the preliminary issues has narrowed, but this reference demonstrates that the task of understanding the Code's complicated structure is not yet complete.

7. At the hearing Vodafone was represented by Mr Graham Read QC and APW was represented by Mr Wayne Clark and Ms Fern Schofield. I am grateful to each of them for their assistance.

The relevant Code provisions

8. Vodafone is an operator for the purposes of Schedule 3A of the Communications Act 2003 which came into force on 28 December 2017 (the Code). The Code enables operators to compel owners of land to grant rights over their land for the statutory purposes in

paragraph 4, or to require them to agree to be bound by rights granted by others. The rights which may be obtained under the Code include the right to install electronic communications apparatus on land.

9. Part 2 of the Code (containing paragraphs 8 to 14) is concerned with the conferral of code rights and their exercise. Paragraph 9 provides that a code right in respect of any land may only be conferred on an operator by an agreement between the occupier of the land and the operator.

10. Code rights are rights in respect of land. Because land is capable of being disposed of and may already be, or may become, subject to other interests, it was essential that the Code specify who else is to be bound by a code right, apart from the occupier of the land who originally conferred the right by an agreement with the operator. Paragraph 10 does that job. It is central to the argument on two of the preliminary issues and, so far as relevant, it says this:

> "*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.

11. Two points about paragraph 10 can be noted at this stage.

12. First, paragraph 10 is concerned with two distinct groups. Sub-paragraphs (1), (2) and (3) deal with the occupier of the land who conferred the code rights, designated "O", and its successors in title and others who derive their interest or right of occupation out of its interest or that of a successor in title to its interest. Those provisions apply only where O has an interest in land (so a licensee cannot grant code rights which will bind others). Sub-paragraphs (4), (5) and (6) deal separately with those, designated "P", who agree to be bound by code rights granted by O, and with P's successors in title and others who derive their interest or rights of occupation out of P's interest.

13. Secondly, although sub-paragraph (2) identifies three different categories of person who will also be bound by code rights conferred by O, sub-paragraph (3) picks out only one of those categories, namely a successor in title who is bound by a code right by virtue of sub-paragraph (2)(a), and provides that they are to be "treated as a party to the agreement by which O conferred the right". Sub-paragraph (6) similarly treats only one of the categories identified in sub-paragraph (5) as parties to the agreement by which P agreed to be bound by the code right, namely the successors in title to P's interest referred to in sub-paragraph (5)(a).

14. The important division which is seen in paragraph 10 between those who confer code rights and those who are bound by them is reflected throughout the Code. It is introduced in Part 2, by paragraph 8, which explains that "This Part of this code makes provision about – (a) the conferral of code rights, (b) the persons who are bound by code rights, …".

15. In Part 4, which deals with the power to impose agreements, paragraph 20 distinguishes between agreements imposed by the Tribunal on occupiers of land, and agreements imposed on others who have been asked by an operator to agree to be bound by a code right exercisable by the operator. Both classes are included in the expression "relevant person" defined in paragraph 20(1) and used throughout Part 4, but they receive separate consideration in paragraphs 20, 21 and 23 and their place in the scheme of the Code is quite different. The basic principle reflected in Parts 2 and 4 is that only occupiers of land can *confer* code rights, while others with an interest in land, or rights over it, may only be *bound* by code rights. In *EE and H3G v Edelwind* [2020] UKUT 0272 (LC) the Tribunal (Judge Cooke) referred to an agreement by which a person becomes bound by a code agreement as a "secondary code agreement" to distinguish it from the "primary" agreement between the operator and someone else by which the code rights were conferred. An alternative classification would be to refer to "conferring agreements" and "binding agreements".

16. Part 5 deals with the termination and modification of agreements and the continuation of code rights after they cease to be exercisable under an agreement. It applies to an agreement under Part 2 (and therefore, by the application of paragraph 22, to an agreement imposed by an order under paragraph 20). An agreement to which Part 5 applies is referred to in the Code as a "code agreement" (paragraph 29(5)).

17. Paragraph 31 is headed "How may a person bring a code agreement to an end?" By sub-paragraph (1) it permits "A site provider who is a party to a code agreement" to bring the agreement to an end by giving notice "to the operator who is a party to the agreement".

18. Amongst other requirements, a site provider's notice under paragraph 31 must state the ground on which the site provider proposes to bring the code agreement to an end (paragraph 31(2)(c)). The only permissible grounds are found in sub-paragraph (4), which states:

> "(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."

19. Where a site provider gives a notice under paragraph 31, paragraph 32(1) provides that the code agreement to which it relates comes to an end in accordance with the notice unless the operator gives the site provider a counter-notice and applies to the Tribunal for an order under paragraph 34. Where an application is made for such an order, the Tribunal must make one of the range of orders specified in paragraph 34 unless the site provider establishes the ground of opposition stated in its paragraph 31 notice.

20. Paragraph 33 is headed "How may a party to a code agreement require a change to the terms of an agreement which has expired?"; it also provides for the renewal or replacement of existing code agreements with new agreements. So far as relevant to termination and renewal it provides:

> "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) – (c) …

(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)-(3) [notice requirements]

(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."

21. It is relevant to the arguments on the preliminary issues that the right to give a notice under paragraph 33 seeking the termination of a code agreement and its replacement with a new agreement is available only to "an operator or site provider who is a party to a code agreement".

22. Paragraph 34 sets out the orders which the Tribunal may make on an application by an operator or a site provider under paragraphs 32 or 33. These include an order for the termination of the code agreement and for the operator and the site provider to enter into a new agreement which either confers a code right on the operator, or provides for a code right to bind the site provider (sub-paragraph (6)). The terms of a new agreement are to be such as are agreed between the operator and the site provider, or as specified by the Tribunal where the parties are unable to agree (sub-paragraphs (9)-(10)). Where an order for a new agreement is made by the Tribunal, the existing code agreement continues until the new agreement takes effect (sub-paragraph (7)).

23. Schedule 2 to the Digital Economy Act 2017 contained transitional provisions explaining how the Code was to apply to agreements already in existence to which the old Code applied (Schedule 2 to the Telecommunications Act 1984). The application of the Code depended on whether an agreement was a "subsisting agreement", an expression mainly covering agreements in writing for the purposes of paragraphs 2 or 3 of the old Code. Broadly, the effect of the transitional provisions was that subsisting agreements took effect as if they were agreements under Part 2 of the new Code, subject to some modifications.

Compton Beauchamp

24. *Compton Beauchamp* concerned the question whether an operator who had already installed electronic communications apparatus on a site could acquire new code rights from the site provider under Part 4 of the Code by giving 28 days' notice under paragraph 20. The Court of Appeal ([2019] EWCA Civ 1755) interpreted paragraph 9 restrictively and

concluded that because under Part 2 a code right may only be conferred on an operator by an agreement between the occupier of the land and the operator, an operator which was already in occupation of the site could not enter into such an agreement. The same principle excluded an application by such an operator under Part 4. If the operator was already the occupier of the site it could apply for new rights under Part 5, but these would be available only at the end of the existing agreement.

25. The Supreme Court disagreed with the Court of Appeal's interpretation of paragraph 9. Lady Rose JSC, with whom the other Justices agreed, started from the proposition, at [102], "that the word "occupier" when it appears in different statutory provisions has no fixed meaning but takes its content from the context in which it appears and the purpose of the provisions in which it is used." That led her to the conclusion, at [106], that:

> "… 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."

26. Looking at the new Code as a whole, the Supreme Court concluded that it was inherent in paragraph 9 when read in context that the "operator" seeking a code right is different from the "occupier of the land" [116]. It would impede the policy of the Code if operators could not apply for the new rights they need for their network simply because their apparatus was already installed on the site. Parties should generally be kept to their bargains so an operator which is already a party to a code agreement can only apply to the Tribunal to modify the terms of existing code rights it already has once Part 5 of the Code becomes available [115-116]. That did not, however, prevent an operator on site from being able to obtain additional code rights in respect of the same land.

27. Lady Rose concluded, at [137], that an operator was not to be regarded as the occupier of a site for the purposes of paragraph 9 merely because it had apparatus installed on that site. That conclusion did not require that the occupation of other operators must be disregarded, as Lady Rose explained at [140]:

> "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."

28. On the facts found by the Upper Tribunal in *Compton Beauchamp* the occupier of the site was not the appellant, Cornerstone, which had served notice under paragraph 20, but was

Vodafone, one of Cornerstone's shareholders. That was fatal to Cornerstone's claim, because as Lady Rose explained, at [162]:

> "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."

The agreed facts

29. The parties agreed a statement of facts on the basis of which I was invited to determine the preliminary issue. I take the following summary from that document and from the documents referred to in it.

30. In modern times the Old Fire Station has been used as a bar and restaurant. On 14 November 2003 a company named Publico Ltd entered into an agreement with Vodafone permitting Vodafone to install, keep and operate electronic communications apparatus on a part of the roof of the building (the Original Agreement). No coloured copy of the plan showing the area over which Vodafone was granted rights is available, but it is agreed that it included the tower.

31. The Original Agreement was a lease for a term of 15 years expiring on 13 November 2018. It was excluded from the security of tenure provisions of the Landlord and Tenant Act 1954. At the time it was entered into the relationship between the owners of land and operators was regulated by the old Code.

32. When it entered into the Original Agreement Publico was the freehold owner of the Old Fire Station. The first preliminary issue is concerned with whether it is necessary for Vodafone to show that Publico was also the occupier of the building at that time.

33. Publico was dissolved in 2010 and by 2018 the freehold owner of the Old Fire Station was Potting Shed Trading Ltd. On 22 June 2018 it granted APW a concurrent lease of an area measuring 2.23 metres by 2.23 metres comprising all or part of the area demised to Vodafone by the Original Agreement (the Concurrent Lease). The Concurrent Lease is for a term of 40 years continuing until 2058. It was granted in return for a substantial premium but reserves only a peppercorn rent. Since being notified of the grant of the Concurrent Lease Vodafone has paid the rent due under the Original Agreement to APW.

34. Gencomp purchased the Old Fire Station in December 2019 and was registered as the freehold owner on 19 March 2020.

35. Vodafone has served a series of notices on APW and Gencomp with the intention of obtaining new rights under the Code. It has explained that these notices have been served in the alternative, intending to cover all possible permutations.

36. In total, six notices in OFCOM's prescribed form were served on APW on 31 March 2020. The first four notices relied on paragraph 33 of the Code, each specifying 8 October 2020 as the date on which the Original Agreement would terminate and a new Code agreement should take effect. The notices invited APW to enter into a new agreement which would either confer code rights or cause code rights to become binding on it, although because of the standard form in which the notices were prepared, with only tiny textual differences, that distinction was not obvious.

37. On the same date two further notices relying on paragraph 20 were also served on APW, one inviting it to enter into a new Code agreement conferring rights on Vodafone, and the other inviting it to be bound by an agreement to be entered into by Gencomp and Vodafone.

38. Six notices were also served on Gencomp, all dated 6 October 2020. Once again, four relied on paragraph 33 and specified 12 April 2021 as the date on which the Original Agreement should be terminated and a new Code agreement should take effect. A further two notices served pursuant to paragraph 20 invited Gencomp to agree to confer rights on Vodafone or to be bound by rights to be granted by APW.

39. Attached to each of the notices was the same form of draft agreement. The agreement was in a tripartite form, naming Gencomp, APW and Vodafone as parties. It was designed to secure all of the rights Vodafone required over different parts of the building in a single document. Gencomp and APW were each to confer the rights provided for in the agreement so far as they were able to do so, while simultaneously agreeing to be bound by the rights conferred by the other. Vodafone's wish to have a tripartite agreement dealing with all its rights over different parts of the building has given rise to the final preliminary issue.

The preliminary issues

40. The Tribunal gave directions for the determination of four preliminary issues suggested by the parties. With slight tidying up, the issues were as follows:

    (1) On the commencement of the new Code on 28 December 2017, was the Original Agreement a "subsisting agreement" within the meaning of paragraph 1(4) of the transitional provisions in Schedule 2 to the Digital Economy Act 2017? (The Tribunal indicated that it would determine whether it was necessary for Vodafone to show that Publico had been the occupier of the land at the time it granted the 2003 lease and, if so, whether it had done so.)

    (2) Does the Tribunal have jurisdiction in this reference: (a) to impose Code rights on the parties under paragraph 20 of the Code; (b) to make orders binding the parties under paragraph 34 of the Code?

    (3) If the Tribunal is to order the termination of Vodafone's existing lease and to direct the parties to enter into a new agreement under paragraph 34(6) of the Code, which of the

respondents is the correct party (a) to confer the rights to be contained in the new agreement and (b) to be bound by those rights?

(4) Does the Tribunal have jurisdiction to order or impose a new tripartite Code agreement on the parties or only separate bipartite agreements on Vodafone and each respondent?

Issue 1 – when the Code commenced was the Original Agreement a subsisting agreement?

41. The first issue is whether the Original Agreement (Vodafone's 2003 lease) was a subsisting agreement at the commencement of the Code. If so, it will have had effect as an agreement under Part 2 of the Code (by paragraph 2(1) of the transitional provisions in Schedule 2 to the 2017 Act). If not, the Code will not apply to it and Vodafone will have no right to seek its renewal.

42. The Original Agreement will have been a subsisting agreement if it was an agreement for the purposes of paragraph 2 of the old Code (paragraph 3 is not relevant in this case).

43. Paragraph 2 of the old Code was headed "Agreement required to confer right to execute works etc" and provided by paragraph 2(1) 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 for the statutory purposes' to do certain things including installing, keeping and inspecting electronic communications apparatus on that land.

44. The first issue was prompted by the decision of the Court of Appeal in *Compton Beauchamp* that an operator which was itself in occupation of land could not apply under Part 4 of the Code because, by paragraph 9, code rights may only be conferred by an agreement between the occupier of the land and the operator. The question it raised was whether the same qualification applied to the grant of rights under the old Code. The Supreme Court's decision in *Compton Beauchamp* has reduced the significance of this issue considerably (and almost to nothing on the facts of this case).

45. In its statement of case, supported by a statement of truth signed by its solicitor, Vodafone pleaded that Publico "was the freehold owner and occupier of the Land" when it granted the Original Agreement to Vodafone on 14 November 2003. Vodafone also pleaded that the Original Agreement is a "subsisting agreement" for the purposes of the transitional provisions. In response, APW put Vodafone to proof of those assertions.

46. The parties now agree that, in the light of the Supreme Court's conclusion that an operator is not prevented from relying on Part 4 of the Code simply because it is the occupier of the land in respect of which it seeks a right, the same approach should be applied to paragraph 2(1) of the old Code. The person whose agreement was required to confer an old Code right should be understood to have been the person who would have been the occupier if occupation by the operator seeking the right was ignored. I accept that interpretation of paragraph 2 of the old Code.

47. Mr Clark also accepted that the 2003 lease itself was material from which it could safely be concluded (in the absence of evidence to the contrary) that Publico had in fact been the occupier for the time being at the time the lease was granted. The Original Agreement was a lease which included a warranty by Publico that it had sufficient legal title to the site and the building to enable it to grant the agreement to Vodafone. That warranty supports the inference that Publico was in occupation and places an evidential burden on anyone who wishes to assert that Publico was not in a position to confer code rights because, for example, it had sublet the Building to someone else. Mr Clark made it clear that APW had never advanced any positive case that Publico had not been in occupation at the relevant time, but had merely put Vodafone to proof of the assertions it had made in its own statement of case.

48. Those acknowledgements enable the Tribunal to determine issue 1 in Vodafone's favour without the need for further discussion. It is to be inferred from the Original Agreement itself that Publico was the occupier for the time being when the agreement was granted. Paragraph 2(1) of the old Code was therefore satisfied and as a result, paragraph 2(1) of the transitional provisions was also satisfied. On that basis the 2003 Agreement was a subsisting agreement on the commencement of the Code on 28 December 2017.

49. Mr Read QC nevertheless urged me to go further and to determine that the Original Agreement was a subsisting agreement whether or not Publico had been the occupier of the site when it was entered into. He suggested that it was important that I determine that question to avoid any doubt about the effect of the statutory language and to dispel any uncertainty over what evidence might be relevant when an operator sought to renew Code rights. Mr Clark submitted that I ought not to determine that question, because it does not arise in this case, but the question whether it was necessary for Vodafone to show that Publico had been the occupier of the land at the time it granted the lease had been highlighted in the drafting of the preliminary issue and, for the reasons urged by Mr Read, it would be convenient for me briefly to state my conclusions on it.

50. Mr Read QC postulated a situation in which someone other than the party granting rights under the old Code had been in occupation when the agreement was entered into; for example, he suggested, a grazing licence might have existed over a field in respect of which code rights were granted (that seems to me to be a bad example, since the existence of a grazing licence would not prevent a landowner from being in occupation of land for other purposes). But assuming an agreement was entered into between an operator and a site provider which was not itself in occupation (for example because another operator was in occupation), then under the new Code such rights would not be Code rights (as the Supreme Court held in *Compton Beauchamp,* at [140], see [28] above). Is there any reason to interpret the old Code differently? I do not think there is.

51. Mr Read QC suggested that an agreement of the sort referred to in paragraph 2(4) of the old Code was an example of "an agreement for the purposes of paragraph 2" which would not have been made between the operator and the occupier of land. That is true, but where it was not entered into by an occupier such an agreement could not confer code rights but could only be an agreement to be bound by rights conferred by someone else. In such a case, the conferring agreement would be a subsisting agreement if it was in force at the commencement of the Code. Additionally, paragraph 2(2) of the transitional provisions

deals separately with the position of a person who is bound by a right by virtue of paragraph 2(4) of the old Code "in consequence of a subsisting agreement" and treats them as bound under the Code. That treatment does not seem to me to justify a departure from the principle that rights conferred by someone who was not in occupation are not code rights under the Code and were not code rights under the old Code.

52. The result, therefore, is that to be a subsisting agreement, an agreement conferring rights under the old Code must have been granted by a person who was the occupier for the time being (unless the agreement was granted to an operator which was itself in occupation). In most cases it is likely that the proper inference from a formal agreement conferring code rights (especially if it is a lease) will be that the grantor and not a third party was in occupation. An operator wishing to obtain an order from the Tribunal for termination of an existing agreement and the grant of a new agreement will not be required to plead or prove that nobody else was in occupation (which, as Mr Read submitted, may be very difficult). The burden of establishing that the original grantor was not in occupation at the relevant time, and that the existing agreement was therefore not a subsisting agreement, will fall on the site provider trying to defeat the claim for new rights. The circumstances in which proof of those unusual facts is available are likely to be wholly exceptional, and Vodafone's fears that this issue may create intolerable uncertainty in other cases seems to me to be unjustified.

Issue 2 – Does the Tribunal have jurisdiction in this reference: (a) to impose Code rights on the parties under paragraph 20 of the Code; (b) to make orders binding the parties under paragraph 34 of the Code?

Issue 3 - If the Tribunal is to order the termination of Vodafone's existing lease and to direct the parties to enter into a new agreement under paragraph 34(6) of the Code, which of the respondents is the correct party (a) to confer the rights contained in the new agreement on Vodafone and (b) to be bound by those rights?

53. The parties addressed these issues together in their written and oral submissions.

54. The same two issues could be simplified and reframed in a single question: where a concurrent lease is entered into by a site provider after it has entered into a code agreement what procedure under Parts 4 or 5 of the Code must an operator follow to obtain a new code agreement?

55. Expressing the issues in that way has the advantage of identifying the underlying premise of the debate, which is that a third party has acquired concurrent rights and obligations in respect of the same land after the original Code agreement was entered into. It also highlights the fact that the issue is a structural one about how the Code is designed and operates and has nothing to do with the characteristics of this site or with the commercial objectives or risks assumed by the parties in this case. Arguments based on those sorts of considerations can all be set to one side.

Concurrent leases

56. Before considering the parties' arguments in detail, it is next necessary to consider the consequences of the grant of a concurrent lease by a landlord as a matter of general law. Such leases are not unusual and their characteristics are reasonably well understood.

57. A concurrent or overriding lease is one granted subject to and with the benefit of a lease which is already in existence. The term of the concurrent lease begins before the expiration or other determination of the existing lease. Although the concurrent lease does not carry with it the right to immediate physical possession of the land comprised in the lease, it does confer on the lessee the immediate right to the rents and profits of the land and the benefit of the covenants in the original lease as from the beginning of the concurrent term. (See Woodfall, Law of Landlord and Tenant, vol 1, 6.018).

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

59. Under clause 2.2 of the Concurrent Lease granted to APW, it, and not Gencomp as successor to Potting Shed Trading Ltd, is the party entitled to receive the rent under the Original Agreement and by reason of section 15(1)(a) of the 1995 Act APW would be the party entitled to exercise the right under paragraph 4 of the Fifth Schedule to terminate the Original Agreement for breach. Importantly, a surrender of the Original Agreement could only be completed between Vodafone and APW, and a transaction between Gencomp and Vodafone would not have that effect. As Lord Millett explained in *Barrett v Morgan* [2000] 2 AC 264 at 270: "If a tenant surrenders his lease to his immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's reversion and is extinguished by operation of law." (See Megarry and Wade at 17.083 and Woodfall, Law of Landlord and Tenant, vol 1, at 17.035).

The proper approach to construction

60. Both Mr Read QC and Mr Clark referred to the guidance given by Lady Rose in *Compton Beauchamp* when interpreting the meaning of the word "occupier" in paragraph 9 of the Code.

61. Lady Rose started from the proposition, at [102], 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." Having referred to dicta about the concept of occupation in other cases she went on, at [106]-[107]:

> "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. …"

62. Both parties treated Lady Rose's guidance as being of general application to the interpretation of the Code. Without wishing to cast any doubt at all on the central importance of the statutory purpose and general scheme of the Code in approaching its interpretation, it is worth keeping in mind that the particular issue of interpretation in *Compton Beauchamp* was the meaning of "occupier", a word which is always heavily conditioned by its context. Thus, Lady Rose referred to *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] AC 329 where, at pp 334-335, Lord Nicholls said: "As has been said on many occasions, the concept of occupation is not a legal term of art …".

63. Lady Rose was not considering how an expression with a less flexible and more recognised meaning should be interpreted when used in the Code. An example of particular relevance to the preliminary issues is the expression "successor in title". One would expect the drafter of the Code to have used a technical expression of that sort with the intention that it would convey its usual technical meaning.

64. It is convenient at this stage to address a general point on the interpretation and operation of the Code on which Mr Read QC placed considerable reliance. He drew attention to a passage in the judgment of Lady Rose in *Compton Beauchamp* at [117] in which she said this:

> "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."

65. Picking up on Lady Rose's description of code rights as "this *sui generis* form of statutory rights" Mr Read submitted that the Code forms a "a self-contained set of rules to govern and regulate Code rights in all situations", and that "Parliament intended that all issues between the parties should first and foremost be determined by the Code", not by "esoteric principles of landlord and tenant". That intention meant, according to Mr Read, that any attempt to "use legal principles based on an entirely separate legal corpus, such as landlord and tenant law, to supplement the construction of the Code, is flawed."

66. I do not accept Mr Read's submission on this point. It is not an orthodox approach to statutory interpretation, and it does not seem to me to be required or supported by Lady Rose's description of code rights as *sui generis* statutory rights. Orthodoxy requires that a statute be interpreted with the same awareness of the relevant pre-existing law as Parliament must be presumed to have had (*R v G* [2004] 1 AC 1034 at [46] *per* Lord Steyn, and *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436, at 461 per Lord Simmonds). Nor does any provision of the Code itself justify interpreting it in a vacuum.

67. Code rights are rights "in relation to land" and are exercisable "on, under or over" land (paragraph 3) and there is no suggestion in the Code that the legal consequences of conferring rights in relation to land should generally be ignored or disapplied. On the contrary, where it is intended that existing statutory provisions should be disapplied, this is done expressly, as in paragraph 14, where normal land registration requirements are set aside and the provisions of the Code about who is bound by a Code right have effect whether or not the right is registered.

68. As Lady Rose recognised in her discussion of the relationship between the Code and the Landlord and Tenant Act 1954, at [56] to [63], rights under the old Code were often created by way of a business lease which might be within or contracted out of the 1954 Act and could also be conferred by a lease or a licence. The transitional provisions deal specifically with the future relationship between the Code and the 1954 Act, so that the Code will apply to some leases but not to others. It also allows for the renewal of licences and easements [61]. There is no suggestion in *Compton Beauchamp* that the former diversity of legal relationships within which Code rights were enjoyed has been replaced by a homogeneous form of Code agreement existing in a Code bubble.

Vodafone's case

69. Vodafone's case was based on the language of paragraphs 33 and 34 of the Code which Mr Read QC submitted was clear and was to the effect that the correct parties to any application under paragraph 33 or an order under paragraph 34 were the operator seeking to renew its rights and the grantor of the code agreement which originally conferred those rights on its successor in title.

70. Mr Read QC pointed out that paragraph 33(1) identifies the only persons who are able to give a notice requiring a change to the terms of a code agreement which has expired (including a change involving the grant of a new agreement). Those persons are "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". The only site provider who is in a position to give a notice under paragraph 33 is therefore one who is a party to the code agreement. The same language is used in paragraph 31 which permits a "site provider who is a party to a code agreement" to bring the agreement to an end by giving notice.

71. The expression "a site provider who is a party to a code agreement" obviously includes the person who originally conferred the right, but its meaning is extended by paragraph 10(3). The purpose of paragraph 10 is to identify who else, other than the person who originally conferred a code right, is bound by the right. The full text of the paragraph has already been set out above at [10]. Paragraph 10(2) identifies three categories of persons who will also be bound by a code right conferred on an operator in respect of land by a person ("O") who was the occupier of the land and had an interest in it when the right was conferred. Mr Read QC submitted that those categories did not overlap and that someone who was within one category could not also fall within another. It is of significance therefore that paragraph 10(3) singles out only one of the categories as being a person who is to be treated as a party to the agreement.

72. The three categories are: (a), successors in title to the interest O held when the code right was conferred (so if O was the freeholder at the time it granted the code right, a subsequent freeholder will also be bound); (b) those who have an interest in the land which was created after the code right was conferred and which is derived directly or indirectly out of O's interest or out of the interest of a successor in title to O's interest (so if O or its successor granted a lease after conferring code rights on an operator, the lessee will also be bound by those rights); and, (c) any other person in occupation of the land whose right of occupation was granted by O, at a time O was bound by the code right, or by a person within category (a) or (b).

73. Paragraph 10(3) provides that "A successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement by which O conferred the right." In contrast, nothing is said about treating a person who is bound by a code agreement by virtue of sub-paragraphs 10(2)(b) or (c) as a party to the agreement. Such a person is certainly a "site provider", (defined in paragraph 30(1)(a) to include any person on whom a code agreement is binding) but is not within the narrower class of site providers who are parties to a code agreement or who, by paragraph 10(3), are treated as parties to a code agreement.

74. In this case Publico granted the Original Agreement to Vodafone and, if it still had its interest in the land, it would be the "site provider who is a party to a code agreement". When Publico sold its freehold interest its successor in title became bound by the code rights under sub-paragraph 10(2)(a). The person who currently answers the description of successor in title to Publico's interest is the first respondent, Gencomp, and by paragraph 10(3) Gencomp is treated as a party to the agreement.

75. In contrast, APW was bound by Vodafone's code rights because it fell within paragraph 10(2)(b); its Concurrent Lease was created after the code rights were conferred by the Original Agreement and derived directly out of the interest of Publico's successor in title,

Potting Shed Trading Ltd. Paragraph 10(3) does not require that APW should be treated as a party to the Original Agreement.

76. Mr Read QC suggested that while the Original Agreement was being continued under paragraph 30, Vodafone could obviously reach agreement with Gencomp to modify the Original Agreement under paragraph 33(1)(a), for example by agreeing to an extension of the term. APW would then remain bound by the Original Agreement in its modified form. If that was correct, it was, he suggested, "inconceivable" that Parliament would have intended a different result for an application under paragraph 33(1)(d) for Gencomp to enter into a new agreement. It was also "implausible" that Parliament would have contemplated that APW could "intervene" to require modification of the terms of the agreement by giving its own notice under paragraph 33. That, he suggested, would permit a party, who had nothing to do with the agreement which granted code rights, to intermeddle in it, even when both the freeholder and operator were content for the agreement simply to carry on under paragraph 30(2).

77. In short, Mr Read QC submitted, it was Gencomp, as successor in title to Publico's freehold interest out of which the Original Agreement was granted, which is in a position to give or receive a notice under paragraph 33(1) requiring a new agreement or a modification of the existing agreement.

78. Mr Read QC acknowledged that, on his primary case, there appeared to be no power under paragraph 34 to make an order providing that the code rights in a new agreement between Vodafone and Gencomp would be binding on APW. That was because paragraph 33(1) enabled an operator to give notice requiring "the other party to the agreement" to agree to confer new or modified rights; notice could not be given to a site provider (like APW) which was not a party to the code agreement. A notice under paragraph 33 was an essential precondition of an order under paragraph 34.

79. The solution to this problem, Mr Read QC suggested, would be for the Tribunal to make an order under paragraph 20, providing for APW to be bound by the code rights conferred on Vodafone by Gencomp. Following the Supreme Court decision in *Compton Beauchamp*, an order under Part 4 may be made where Part 5 is not available. In any event, as APW would not confer any rights, but would only be bound by them, the Court of Appeal's original objection to the use of Part 4 (that only an occupier can confer code rights under Part 4) would not have applied.

APW's case

80. On behalf of APW, Mr Clark submitted that the only rights available to an operator which is already in occupation are under Part 5 of the Code and that Part 4 was not relevant to this reference.

81. APW's case was that it is, or is to be treated as, a party to the Original Agreement, and thus it is a "site provider who is a party to a code agreement" capable of giving notice under paragraphs 31 or 33 of Part 5. Mr Clark maintained that there was therefore no

impediment to an order by the Tribunal pursuant to paragraph 34 requiring APW to confer code rights on Vodafone, to which, if required, Gencomp could then be bound.

82. Mr Clark put APW's case into two ways. First, he submitted that paragraph 10 is not exhaustive as to the circumstances in which a person is to be regarded as a "party to a Code agreement". In particular, as Vodafone's immediate landlord, and the only person entitled to receive the rent and enforce the tenant's covenants under the Original Agreement, and as it holds a term which will continue for a further 36 years, it would be odd, to say the least, if APW was not the appropriate party to enter into a new agreement in accordance with paragraph 33 of the Code.

83. Alternatively, Mr Clark submitted, APW should be viewed as a "successor in title" within the meaning of paragraph 10(2)(a), because it was a successor to the reversion to the Original Agreement. On that basis paragraph 10(3) would require that it be treated as a party to the Original Agreement with the right to give and receive notices under paragraphs 31 and 33.

84. Mr Clark submitted that the basic principles of how the Code was intended to operate were clear enough and he suggested that the same approach as had been applied in *Compton Beauchamp* to the interpretation of paragraph 9 should now be applied to paragraph 10. A code right could only be conferred by the "occupier" (disregarding the presence of an operator in situ). That meant that if a new code right had been required during the continuance of the contractual term of the Original Agreement (in the manner contemplated in *Compton Beauchamp* at [140] and [159]) only APW would have been the appropriate "relevant person" within the terms of paragraph 20 against whom additional rights could be sought. Gencomp would not be the relevant person to confer rights because it would not be the "occupier" after Vodafone's occupation had been disregard.

85. If Mr Read's analysis was correct, Mr Clark suggested, the paradoxical outcome would be that during the contractual term Vodafone would have to seek any additional Code rights it required under Part 4 from the immediate reversioner, APW, but once the term had expired, new rights could only be granted by Gencomp. If new rights were obtained during the contractual term from APW there would then be two code agreements and Gencomp would not be a party to the code agreement conferring the additional rights. Nor would it be bound by the additional rights by virtue of any of the provisions of paragraph 10. It would be unable to give notice in respect of them under paragraphs 31 or 33 and would not be the correct party to receive a notice given by the operator wishing to renew them under paragraph 34. Mr Clark suggested these consequences of Mr Read's analysis were bizarre and no logic or policy reason could justify them.

86. Mr Clark pointed out that a new consensual Code agreement could be effected between Vodafone and APW as site provider, with Vodafone's occupation being ignored and the grant of the new agreement giving rise to a surrender by operation of law of the Original Agreement. Vodafone and APW could also agree to vary the Original Agreement. But any consensual agreement between Gencomp and Vodafone would not cause a surrender by operation of law of the Original Agreement, because Gencomp is not Vodafone's immediate landlord and could not confer the right to immediate possession, given the

existence of APW's concurrent lease. For the same reason Gencomp would not be the 'occupier' for the purpose of granting code rights.

87. One would expect that a renewal of an existing lease would be a transaction between the landlord and the tenant under that existing lease, and not between the tenant and a superior landlord with a reversion to an unexpired 36-year term. Mr Clark pointed out that Vodafone's analysis would require Gencomp to be the conferring party for new or renewed code rights even if APW had a term of 999 years. That, he suggested, could not be right.

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

89. Mr Clark therefore submitted that the purpose of paragraph 10 was not to limit those who would be bound by code rights, but rather was to facilitate the operation of the Code where only contractual rights were concerned. The Law Commission had proposed that where code rights were contained in a lease, "the lease itself must govern priority" and would bind successors in title to the lessor (Law Comm No.336, paragraph 2.107). The Law Commission had wanted contractual interests to behave in the same way as property interests (*ibid*, paragraph 2.108), but it did not intend to change how property interests themselves would normally operate. Asked why paragraph 10(2)(a) refers to successors in title, which was clearly language apt to refer to property rights, if paragraph 10 was not intended to deal with property rights Mr Clark suggested that it was intended to cover the case of a lease which was not binding for want of registration.

90. Mr Clark also relied on one or two textual indicators, including the fact that the grounds provided in paragraph 31(4) for termination of a code agreement (substantial breaches of obligation by the tenant, persistent delay in making payments to the site provider, and an intention on the part of the site provider to redevelop the land) were all clearly intended to benefit the operator's immediate landlord and owner of the reversion.

91. Mr Clark's alternative submission was that the same outcome could be achieved by a non-technical interpretation of the words "successor in title" in paragraph 10. APW has

succeeded to the reversion immediately expectant on the expiry of the term of the Original Agreement and that was sufficient to make it a successor in title.

92. Mr Clark's suggested answer to the second and third preliminary issues was therefore that APW was the relevant party for the purpose of giving or receiving notice under paragraph 33 and was the only relevant party to any new conferral agreement. It was not necessary for Gencomp to be bound by the agreement by Tribunal order, because it was already bound by the terms of the Concurrent Lease.

Discussion

93. In *Compton Beauchamp*, after analysing the structure of the Code Lady Rose concluded, at [117], that "the negotiation of voluntary agreements between the parties for the conferral of code rights is the optimal way for the regime to operate". It is therefore instructive to consider what rights could be obtained by Vodafone under the Code through voluntary agreements, rather than by applying to the Tribunal.

94. If Vodafone's occupation of the site is ignored, as *Compton Beauchamp* requires, APW is "the occupier for the time being" of the tower and the party identified in paragraph 105(1) of the Code as the occupier. APW is therefore in a position to enter into an agreement under paragraph 9 of the Code. It also has sufficient rights under the Concurrent Lease to enable it to grant easements over the rest of the building equivalent to those enjoyed by Vodafone under the Original Agreement. Vodafone and APW could therefore at any time enter into an agreement under Part 2 of the Code by which APW would confer code rights on Vodafone in respect of the tower itself and the other parts of the Old Fire Station required for access and temporary working. As explained at [59] above, because it would be made between the lessee under the Original Agreement and the owner of the immediate reversion, the new agreement would operate as a surrender of the Original Agreement by operation of law. The rights which APW conferred on Vodafone would also be binding on Gencomp because they have already been granted by the Concurrent Lease and APW is entitled to authorise Vodafone to make use of them (clause 3.1 of the Concurrent Lease).

95. In contrast, Gencomp is not the occupier of the tower for the purpose of any request by Vodafone for new code rights. Having demised it to APW by the Concurrent Lease, APW, and not Gencomp, is the occupier for the time being within paragraph 105(1). Gencomp is therefore not in a position to confer new code rights on Vodafone and any agreement between them would not be a code agreement to which the remaining provisions of the Code would apply.

96. Moreover, a consensual agreement between Vodafone and Gencomp could not grant Vodafone effective rights of occupation, or rights to install or retain its apparatus on the tower. Any agreement between Gencomp and Vodafone would be subject to the continuing rights of APW under the Concurrent Lease. If Gencomp purported to demise the tower to Vodafone, the effect in law would be to create a lease of the reversion to APW's Concurrent Lease; Vodafone would become APW's landlord but would have no right to occupy the site under the new agreement.

97. Nor would entry into the new agreement between Gencomp and Vodafone bring the Original Agreement to an end, since a surrender of the Original Agreement (including a surrender by operation of law on the execution of a new lease) could only be effected between Vodafone and APW as the immediate reversioner.

98. Because the negotiation of voluntary agreements is the optimal way for the Code regime to operate, one would expect the power of the Tribunal to impose agreements under Part 4 and Part 5 would operate in a similar way. One would expect it to be possible for additional or renewed rights to be obtained by an operator against the person who (ignoring the presence of the operator) was the occupier of the land. However, Mr Read QC maintained that the clear language of paragraphs 10, 31 and 33 do not allow for that outcome. For his part, Mr Clark sought to find some means to achieve it without abandoning the normal principles of statutory interpretation. Neither of their approaches is without difficulty.

99. There is little difficulty in understanding paragraph 10. I agree with Mr Read QC's approach and I reject Mr Clark's submission that paragraph 10(3) is not intended comprehensively to define all those who are to be treated as parties to a code agreement.

100. Where an agreement has been entered into the parties to that agreement are obviously bound by the rights which it creates. The purpose of paragraph 10 is to identify who else is bound by those rights. Where code rights have been created by a conferring agreement, the three categories of persons identified in paragraph 10(2) are bound by them despite not being parties to the agreement. They are (a) successors in title to the interest in the land of the occupier who conferred the code rights, (b) those with an interest in the land derived out of the original occupier's interest and which was created after the code rights were conferred, and (c) those with rights of occupation not amounting to an interest in the land which were granted by a person already bound by the code rights (and therefore, necessarily, which were granted after the code rights were conferred).

101. The inclusion in paragraph 10(2) of successors in title to the original occupier's interest in the land, and others with derivative interests in the land, points decisively against Mr Clark's suggestion that paragraph 10 is not intended to capture all of the ways in which a code right may bind a third party. The Law Commission did recommend that "the lease itself must govern priority" and that where under the general law a lease required to be registered to be binding on a successor, the same should apply to a lease which confers code rights. But that recommendation was not accepted by the government which preferred instead to retain the approach taken by the old Code that code rights should be binding on successors without any requirement for registration (A New Electronic Communications Code, paras 40-47). The premise of Mr Clark's submission was therefore flawed.

102. In any event, even if Mr Clark was correct that there is room outside paragraph 10 for code rights to bind third parties, that would not assist him with the meaning of paragraph 10(3) which singles out only one of the three categories in sub-paragraph (2) for special status. By specifying that "a successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement", sub-paragraph (3) does two

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

103. Paragraph 10(3) is critical to the functioning of Part 5. In Part 5 anyone who conferred a code right or on whom a code right is otherwise binding is referred to as a "site provider" (paragraph 30(1)). But not all site providers are entitled to bring a code agreement to an end or to require a renewal or a change to the terms of a code agreement which has expired. Paragraphs 31(1) and 33(1) limits the right to take those steps to "a site provider who is party to a code agreement". Where the necessary notice is served by the operator rather than by the site provider it must nevertheless be served on "the other party to the agreement" and not on anyone else who is bound by the code rights.

104. I therefore reject Mr Clark's submission that APW is entitled to be treated as a party to the Original Agreement because it holds the Concurrent Lease of the reversion to that agreement. The only parties to the Original Agreement were Publico and Vodafone. I can see no permissible approach to statutory interpretation which allows the expression "a party to the agreement" to include the lessee under a concurrent lease of the reversion to the code agreement. Nor, applying the ordinary meaning of "successor in title", can the lessee under a concurrent lease be described as the successor in title to the interest of the lessor. The grant of a concurrent lease does not transfer the lessor's title to the lessee, it creates a new interest while the lessor's original interest remains with the lessor. As far as paragraph 10 is concerned, APW's interest does not fall under sub-paragraph (2)(a), but under sub-paragraph (2)(b) as having been created after the Original Agreement and being derived out of the interest of a successor in title to Publico.

105. I therefore agree with Mr Read QC that a lessee of the reversion to a code agreement which is a lease cannot bring that lease to an end by giving notice under paragraph 31 and cannot seek modification or renewal under paragraph 33, in each case because it is not a party to the agreement and is not required by paragraph 10(3) to be treated as a party to the agreement.

106. For the same reason, an operator is not entitled to give notice to a concurrent lessee under paragraph 33. They are not "the other party to the agreement".

107. However, although I agree with Mr Read QC on the construction of paragraphs 10, 31 and 33, I do not agree that his analysis enables the Code to operate in a satisfactory way as must be assumed to have been intended. On the contrary, the consequences of Mr Read's analysis (if it is taken no further) appears to me to be that the Code breaks down when it encounters a concurrent lease. In contrast to the Landlord and Tenant Act 1954, which contains comprehensive provisions in section 65 and Schedule 6 dealing with reversions and situations where the immediate landlord is not the freeholder, the Code contains no such bespoke treatment, and it may be that the problems to which this not uncommon form

of property arrangement gives rise were simply not considered by the drafters of the Code. Be that as it may, Mr Read QC's proposition that in these circumstances Gencomp can confer code rights (or be ordered to do so) simply does not work.

108. The fundamental problem which Vodafone's preferred analysis fails to overcome is that there is no route by which Gencomp can enter into an agreement conferring code rights on Vodafone which are not subject to the prior rights of APW under the Concurrent Lease. Gencomp does not have the right to possession or occupation of the site and it cannot confer them or any other right which requires occupation of the site on Vodafone. That is nothing to do with Gencomp's status under the Code but is simply because it cannot grant to Vodafone what it no longer has, having already granted it to APW.

109. Nor can the Tribunal assist. Paragraphs 20 and 34 operate by ordering or imposing agreements and their reach is limited by what could otherwise be achieved by agreement. The Tribunal is given power to order site providers to enter into agreements which, having been requested to do so, they are unwilling to enter into voluntarily. Thus, where a notice has been served under paragraph 33(1) the operator may apply to the Tribunal for an order under paragraph 34 "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" (paragraph 33(4)). But the Tribunal has no power to order a site provider to do something which it could not do voluntarily. The Tribunal could not, for example, order Gencomp and Vodafone to enter into a new agreement conferring rights on Vodafone which would allow it to install apparatus on land in which Gencomp has no interest. Nor could the Tribunal order Gencomp to grant rights to Vodafone over land which is in the possession of APW. Gencomp has no power to grant such rights and an order requiring it to do so would be ineffective.

110. Nor could such a conferring order be made effective by the Tribunal making a binding order on APW. The Tribunal's power under paragraph 34(6) to order that a site provider be bound by a code right exercisable by an operator does not enable the Tribunal to compel the site provider to confer rights. If the operator wants a site provider to confer rights it must give notice asking it to do so and negotiate with it over the terms on which those rights are to be conferred; it cannot enter into an agreement with a different site provider who has no power to confer the rights it seeks and then ask the Tribunal to make those rights binding on the person who would have been in a position to grant them voluntarily. Code rights can be conferred only by the occupier (or the person who would be in occupation if the operator's presence was ignored), and in a chain of leasehold interests a site provider further up the chain may then be bound by those rights, but they cannot purport to confer them.

111. Additionally, paragraph 33(1) allows an operator or site provider who is a party to a code agreement to require "the other party to the agreement" to agree to one of a menu of modifications, additions or renewals. Where what is proposed is a new right or a new agreement, the site provider may be asked either to agree to confer or to be bound (sub-paragraph (1)(c), (d)). But in all cases the site provider must first have been given notice, and notice may only be given to "the other party to the agreement". An application to the Tribunal under paragraph 34 may then only be made where the operator and the site provider have failed to reach agreement on the proposal in the notice. It appears to follow

that the only person who may be the subject of a request to enter into a "binding" agreement under paragraph 33 is the other party to an existing "binding" agreement. A person who is bound by the original code right because they are the holders of an interest in the land created after the original right was conferred would appear not to be capable of being the recipient of a notice under paragraph 33(1) or the subject of an order under paragraph 34 binding them to code rights conferred on the operator after the creation of their interest. Whether paragraph 10 would apply to such a site provider is unclear; a consensual renewal between the occupier and the operator would create new code rights which would come into existence after the interest of the other site provider and would not appear to be covered by paragraph 10(2).

112. Finally, and contrary to Mr Read QC's submission [76] above, where a concurrent lease had been granted after the original code agreement, an operator could not agree a modification of that original agreement with the original grantor in a way which would be binding on the concurrent lessee. For example, if the modification was to confer an additional code right (whether under paragraph 20 during the term, or under paragraph 33(1)(c) after the term had expired) the additional right would not be binding on the concurrent lessee because the concurrent lessee is not a successor in title to the interest of the original grantor, and the new code right would not have been conferred before the lessee's interest or right of occupation as required by paragraph 10(2)(b) or (c).

113. Accordingly, the code rights which Vodafone seeks in this reference by notices served on Gencomp requiring it to enter into a conferring agreement are not available either under Part 4 or under Part 5 of the Code, whether by agreement or by an order of the Tribunal. I have already explained why I consider, in agreement with Mr Read QC, that the same code rights are not available in an application under Part 5 against APW. Where does that leave the parties?

114. In *Compton Beauchamp* the Supreme Court held that although the parties to a code agreement could agree between themselves to modify the terms of that agreement without waiting for the Part 5 procedure to become available at the end of the agreement an operator could not make use of Part 4 to compel a variation during the contractual term if agreement could not be reached. Parties should be held to their bargain and operators should not be able to force premature changes in an agreement which has not yet run its course. As Lady Rose explained, at [115]: "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 disputes between them."

115. The situation in which the parties find themselves in this case is that, despite the Original Agreement having reached its contractual conclusion, Part 5 has not become available to them; the conferring party under the Original Agreement is no longer in a position to confer code rights, nor is its successor in title, because the power to confer code rights now rests with the concurrent lessee. The machinery of Part 5 does not accommodate these circumstances because it allows for participation only by the original conferring party and its successors.

116. These apparent limits to Part 5 are in contrast to what could be achieved by agreement between the operator and the concurrent lessee when the contractual term has expired. In my judgment it would be anomalous if what could be achieved by agreement were to be incapable of being achieved by compulsion. It is therefore necessary that the Code be interpreted in such a way as to provide a procedural route to enable an effective conferring agreement to be obtained through the Tribunal if necessary.

117. The solution to the problem highlighted by this reference appears to me to be available in Part 4 of the Code. I appreciate that Lady Rose stated at [128] that "it is sufficiently clear from the Code read as a whole that Part 4 does not apply to code agreements to which para 30(2) applies". It is also the case that the Original Agreement is continuing under paragraph 30 which ordinarily would exclude the application of Part 4. But in this case the code agreement is continuing in circumstances where the provisions of Part 5 dealing with termination, variation and renewal are not available to the parties. Lady Rose's observation was addressing the submission recorded at [127] that "there is nothing in Part 5 itself … to say that it applies to the exclusion of Part 4 once Part 5 becomes available to the operator under the agreement", and she was not considering the anomalous situation where, despite the agreement being continued under paragraph 30(2), Part 5 is not available.

118. Part 5 deals only with the termination, modification and renewal of agreements between the original parties to the agreement and their successors in title. It does not apply where the operator and the occupier of the land in respect of which rights are sought are not both parties to the agreement or their successors. There seems to me to be no obstacle in those circumstances to an operator making use of Part 4. It could not do so during the contractual term of the agreement, for the same reasons as were given in *Compton Beauchamp*: because in principle parties should be kept to their own bargains (or those made by their predecessors) and because the elaborate provisions of Part 5 would be redundant if an operator could apply at any time under Part 4. But it is clear that Part 4 is not entirely off limits to an operator simply because it already has code rights in respect of the same land. The Supreme Court identified one exception when it held that an operator who was already in occupation of land could seek additional code rights in respect of that land under Part 4 without having to wait for the opportunity to make use of Part 5 at the end of the term.

119. The practical differences between Part 4 and Part 5, apart from the time when they may be used, include that the minimum period of notice under paragraph 20(3) is only 28 days, whereas under paragraph 33(3) it is six months, and that under paragraph 21 it is for the operator to prove that the test for making an order is met, whereas under paragraph 32(4) it is for the site provider to establish any ground of opposition it relies on (including that the test under paragraph 21 is not satisfied). Those small differences do not seem to me to provide reasons for refusing to recognise a further use which may be made of Part 4, to enable an operator which already has code rights to renew or vary those rights by obtaining an order of the Tribunal against a site provider which was not a party to the agreement by which the rights were originally conferred and which is not to be treated as if it were.

120. What Part 4 cannot do is to fill the gap in the legislation which appears to exist and which prevents a site provider which was not a party to the agreement by which code rights were

originally conferred, or its successor in title, from taking steps to bring the agreement to an end. Only a site provider who is a party to a code agreement may bring it to an end by giving notice under paragraph 31(1). Part 4 is about the imposition of new agreements, not about the termination of existing agreements, and it contains nothing which would assist a site provider barred from using Part 5. It is not difficult to see why in general Part 5 rights should not be available to all site providers (who include anyone who is bound by the code rights in respect of the land) since that would permit superior landlords or others with remote interests to "intermeddle", as Mr Read QC put it, in the relationship between the operator and the occupier of the land which is of no concern of theirs. But that explanation does not apply where the person who is excluded from Part 5 is the occupier of the land themselves, who may be able to establish the grounds of termination in paragraph 31(4) but who cannot give a notice under paragraph 31(1). I do not see a solution to that small but potentially important structural defect, but nor do I think it provides a reason for refusing to extend the use of Part 4 to operators in situ wishing to obtain a renewal or modification by an agreement imposed between it and a concurrent lessee.

121. I would add, however, that for so long as this gap in the structure of the Code remains, a concurrent lessee who wishes to redevelop a building over which code rights have been granted by a superior landlord will find themselves in difficulty, and with no obvious means of bringing the code rights to an end. A person contemplating taking a concurrent lease with a view to redevelopment would therefore be well advised either to adopt a different structure or to ensure that any code agreement which may interfere with their proposals has been terminated before they acquire their interest.

122. The answer I would give to the second preliminary issue is therefore that the Tribunal has jurisdiction to impose an agreement on Vodafone and APW conferring Code rights under paragraph 20 of the Code, but it has no jurisdiction to order any of the parties to enter into a conferring agreement under paragraph 34. The answer to the third preliminary issue is that no order may be made under paragraph 34 for the purpose of conferring a new agreement on Vodafone but an order could be made making code rights conferred on Vodafone by APW binding on Gencomp.

Issue 4 - Does the Tribunal have jurisdiction to order or impose a new tripartite Code agreement?

123. This is a non-issue. It is not APW's pleaded case that the Tribunal has no jurisdiction to impose an agreement for code rights on A and B and to make those rights binding on C in a single tripartite agreement. In its statement of case it pleaded only that there is no need for the new code agreement sought by Vodafone to be tripartite, and suggested that there were reasons why it should not be. Despite that being APW's position, the parties agreed a preliminary issue focussing on the Tribunal's jurisdiction. In his oral submissions Mr Clark agreed with Mr Read that the Tribunal had jurisdiction to order all three parties to enter into a single agreement but he suggested that such an arrangement was undesirable for practical reasons and would require very careful drafting.

124. I agree with the parties on this issue, and I answer it in the affirmative: the Tribunal does have jurisdiction to order a tripartite agreement by which rights are conferred by one party

on another and made binding on a third party. Whether that is convenient in this case is for consideration, if necessary, at the final hearing of the reference. I would, however, urge the parties to reach a consensus on the form which the agreement or agreements should take. The only reason this point seems to have become contentious is because the form of agreement proposed by Vodafone was tripartite. But I suspect that form was chosen simply for convenience, because Vodafone did not at that stage know which of Gencomp or APW was to be the conferring party and which the bound party. The agreement is in very general terms and provides that each site provider is to confer such rights as it is able to confer and otherwise to be bound by such rights as the other is able to confer. Now that issues 2 and 3 have been resolved it may be easier for the agreements to be structured bilaterally if that is what the parties would prefer.

Martin Rodger QC,

Deputy Chamber President

17 August 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.