

Telecoms New Code Supreme Court smooths operators' conundrum

June 2022



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Since its implementation, the New Code has raised issues for operators whose Old Code agreements have expired but who have remained in occupation of sites and wish to renew or vary those rights under the New Code.

Paragraph 9 of the New Code says that any new rights can only be conferred on the operator by the occupier (where there is one). Following the Court of Appeal decision in ***Compton Beauchamp***, if the occupier is in fact the operator, no new rights can be granted, as a party cannot confer rights on itself.

This decision has created the conundrum of how an operator can renew its rights in this situation, without having to go to the considerable expense of moving its apparatus off site so that it ceases to be an occupier and becomes entitled to seek New Code rights. The situation had reached such a stage that the Government was proposing to legislate to remove it.

The long-awaited decision of the Supreme Court¹ this week has provided a solution which should please everyone.

The appellants in the three joined appeals are operators of mobile telecoms networks. Their electronic communications apparatus had been installed under the Old Code several years before the implementation of the New Code. At the time of their respective applications for new rights, their contractual agreements had come to an end.

The main issue before the Supreme Court was whether paragraph 9 should be interpreted quite so literally or whether it was possible to ignore the operator's occupation, so as to give effect to the Government's intention of a smooth transition between Codes.

The Supreme Court unanimously held that "occupier" should not include the operator seeking new code rights, although it could include any other operator in occupation, who would need to grant the rights.

Driving the respondent landowners' defence of the appeals was a concern that, if an operator in occupation could apply for code rights, there was nothing to prevent operators making numerous applications during the term of a code agreement to modify and "improve" terms that it had previously negotiated or had imposed on it by a tribunal. The judges made it clear that an operator could not seek to modify its existing rights before the contractual expiry of the previous agreement (whether a protected 1954 Act lease or otherwise).

However, this would not prevent an occupier from applying for additional rights which are absent from its existing agreement, where circumstances change and such rights become necessary. The Supreme Court expressed the hope that this would avoid operators seeking the entire gamut of Code rights from the outset and encourage them simply to seek the rights that they actually required. They accepted, however, that there may be disputes over whether an operator is asking for an additional right or simply a modification.

On the face of the judgment, the operators have won the interpretation battle, but in reality, the decision has a positive outcome for landowners as well. It provides much-needed clarity as well as comfort for landowners regarding modifications.

This interpretation will not save every operator and much will depend on its own facts. Cornerstone lost its appeal against Compton Beauchamp as it had requested code rights from the landowner and not the actual occupier, which was Vodafone. By contrast, the On Tower appeal was successful because rights had been sought from the correct party. The story is not yet over for Cornerstone's appeal against Ashloch, where it held over under a 1954 Act tenancy. The outcome was deferred until Cornerstone made further submissions as to whether it was seeking renewal or additional rights. Renewal could only be dealt with via the 1954 Act renewal route but additional rights could be conferred under the New Code.

The decision is a welcome clarification of the New Code provisions in this area. However, it leaves open the intriguing issue of what is construed as a modification of existing rights and what is an additional right. This may well become the new area of dispute between landowners and operators going forwards.

¹ Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd
Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd and AP Wireless II (U) Ltd
On Tower UK Ltd v AP Wireless II (UK) Ltd