Electronic Communications Code

The Court of Appeal's restrictive interpretation of the Code continues to hamper Operators' ability to improve digital connectivity at this critical time

Cornerstone v (1) Ashloch and (2) AP Wireless [2021]

In this article ***Carlos Pierce*** and ***Jacinta Conway*** review how the Court of Appeal took a restrictive approach to deciding whether an operator has the ability to renew a telecommunications lease protected by Part II of the Landlord and Tenant Act 1954 ("**1954 Act**") under the Electronic Communications Code (**"the Code"**) in *Cornerstone Telecommunications Infrastructure Limited and (1) Ashloch Limited and (2) AP Wireless II (UK) Limited [2021] EWCA Civ 90* ("**Ashloch**").

The significance of this case

This was the long-awaited appeal of the decision in November 2019 of Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) ("**Deputy President**").

This case is likely to have a significant impact on how parties approach the renewal of a 1954 lease that is protected by Part II of the 1954 Act ("**Protected Lease**") and how new Code rights are obtained in term.

Summary – What was decided

- An operator with a Protected Lease is not able to access Part 4 of the Code to obtain code terms on renewal at the expiry of that Protected Lease;
- An operator is not able to obtain new Code rights during the term of the Code agreement if it needs additional rights to effectively operate a site;
- An operator with a Protected Lease must renew that lease using the County Court procedure on first renewal which (a) does not guarantee the grant of Code terms which are potentially critical to the upkeep of the network, (b) potentially takes much longer to resolve and (c) excludes renewals from the specialist forum (i.e. Upper Tribunal) which is tasked under the Code to deal with agreements granting code rights;
- The decision is disappointing for operators. It highlights the disconnect between Parliament's desire for the UK to be a global leader in digital connectivity against the restrictive way the Code is being interpreted. We believe it is contrary to the policy behind the Code and risks undermining operators' ability to keep their end of the bargain.

The Facts

Cornerstone had a Protected Lease which had contractually expired in 2012 and was continuing by virtue of the 1954 Act. The lease is deemed to be a subsisting agreement under paragraph 1(4) of the transitional provisions contained in Schedule 2 of the Digital Economy Act 2017 ("**the Transitional Provisions**") and therefore has effect as a Code Agreement (paragraph 2(1) of the Transitional Provisions).

The renewal of Code agreements is principally governed by Part 5 of the Code, but Part 5 is not available to operators with a Protected Lease as it is expressly excluded by paragraph 6 of the Transitional Provisions.

The question arose whether an operator with a Protected Lease can renew under Part 4 of the Code or whether the only option available to it is to renew pursuant to the 1954 Act.

In November 2019, the Upper Tribunal ruled against Cornerstone; closely following the decision in *Cornerstone v Compton Beauchamp*. Cornerstone appealed the decision and, in January 2021, the appeal was dismissed by the Court of Appeal; the lead judgment being given by Lord Justice Lewison.

The Decision

The Court of Appeal confirmed the Upper Tribunal's earlier decision that an operator is not able to use Part 4 to obtain a new code agreement when it is in occupation under a Protected Lease. Disappointingly, several arguments put forward by Cornerstone were not dealt with in detail.

In particular, both the Deputy President in the Upper Tribunal and Lord Justice Lewison in the Court of Appeal had previously suggested in *Cornerstone v Compton Beauchamp* that interim and temporary rights were available to an operator who is in situ. The reasoning was that the deeming provision at paragraph 22 of the Code served to deem such an agreement into existence as a code agreement.

However, as noted by Judge Elizabeth Cook in *Arqiva Services Limited v AP Wireless II (UK) Limited [2020]* [paragraph 140] if the deeming provision in paragraph 22 applies for interim rights (paragraph 26) and temporary rights (paragraph 27), it is not clear why it does not also apply for permanent rights (paragraph 20).

Although this was pointed out, the Court failed to use this opportunity to explain why the deeming provision operates to rescue some forms of agreement in Part 4, (e.g. paragraphs 26 and 27) but not others (e.g. paragraph 20).

Instead, the Court elected to follow the Court of Appeal's decision in *Cornerstone v Compton Beauchamp* (where Lord Justice Lewison was also the lead Justice).

Commentary – a bizarre interpretation by the Courts?

The courts have held that Operators are excluded from the Code when they are 'in-situ' and operating from a site…

Since the Court of Appeal's decision in *Cornerstone v Compton Beauchamp [2019]*, in situ operators have been unable to access the Code via Part 4 to obtain a new Code agreement.

Why? The grant of Code rights must be by the occupier

This is mainly down to the way that the courts have decided who can grant Code rights - they can only be granted by an occupier. The word 'occupier' (carried over from the Old Code) is primarily used as a term to identify a 'person' – not necessarily a freeholder – with whom an operator contracts to get new Code rights. In other words, that 'person' is not necessarily a person with an interest in land.

When an operator is already on site however – because an operator might be deemed to be the 'occupier' and because a party cannot grant rights to itself - the courts have decided that operators are apparently locked out of the Code, save for in a few exceptions.

Court of Appeal reinforces Compton

In this decision the Court of Appeal has reinforced that position and effectively determined that operators in situ may have to wait many years before they can access code terms.

This seemingly convoluted route provides no guarantee that an operator will be able to obtain Code rights when renewing in the County Court, may seriously hamper operators' ability to upgrade to future technologies – such as 5G – and may also preclude operators from sharing their sites, encouraging mast proliferation.

Leases not agreements?

The consequence of the County Court imposing leases on operators appears to go against the fabric of the Code. Some operators do not want leases; they want Code agreements and it is to be remembered that statutory Code agreements are intended to get rid of the need for leases (and associated historic landlord and tenant connotations) to create a regime of speed and simplicity.

Contrary to Parliament's Intention?

The courts seem intent in interpreting the Code so as to exclude those very operators which might need it most i.e. when they are in situ and operating and need to update equipment

in order to future proof the site; an outcome which Judge Cooke considered to be 'baffling' in Arqiva v APW.

This outcome appears to be in direct contrast to Parliament's intention that the purpose of the Code is to facilitate the roll out of telecommunications services and bring the UK in line with other countries in terms of its ability to provide future technologies such as 5G and beyond.

In practice - What does this decision mean?

Protected Leases must be renewed in the County Court

Operator tenants with protected leases must renew their leases in the County Court using the 1954 Act regime. The County Court, however, is not a specialised court for the purposes of the Code. At the end of the renewed term, the operator can renew the code agreement using Part 5 of the Code.

Lease Terms

In the hearing, AP Wireless asserted that changes to the terms of an existing lease on renewal in the County Court will be possible if they amount to the "reasonable modernisation" of the existing terms. They agreed that reasonable modernisation accommodates updates to legislation and that it would, therefore, be reasonable to take the Code (and the parties' requirements) into account when considering the terms of a new code agreement.

One would think that this should enable a fair degree of modernisation – but it remains to be seen how realistic this might be. A cynical operator would be forgiven for anticipating that its site provider will take a volte face approach in response to such a renewal.

Rent

Rent will be determined in accordance with section 34 of the 1954 Act. In *Vodafone v Hanover* [2020], the County Court agreed that the starting point for assessing rent was a Code valuation. However, a higher rent in that case was determined due to the presence on site of four sharer operators. It is expected that a rent closer to a Code valuation will be decided where there is no perceived 'competition' for the site as "*negotiations would be conducted against the background of the Code's no network assumption*" [Hanover [113].

No new rights when in situ

Operators cannot obtain Code rights when they are in situ - delaying access to the benefits for which the Code was enacted and denying them the 'fresh start' referred to by Judge Cooke in Arqiva v APW case.

The Final Word – Code Consultation

Interestingly, DCMS published its consultation on potential legislative changes to the Code two days before this decision was handed down. This timing ironically underscored the urgent need for law reform to ensure that operators are not hampered in implementing the world class digital infrastructure the UK needs.

It appears that DCMS has indicated its willingness to amend the Code in order to facilitate its policy objective, whilst also balancing the interests of the landowner community by saying in the consultation, ***"it is critical that fixed and mobile network operators are able to deploy, install and maintain their apparatus on public and private land as easily and as cheaply as possible***."

The Supreme Court will shortly, and for the first time, have the opportunity to consider this area of law in the appeal of *Cornerstone v Compton Beauchamp*. Hence, there is the possibility that much needed clarity will come from the Courts. If not, we hope that the necessary clarity will come from Parliament.

Either way, changes must be made if the UK is to compete with other countries in the provision of world-class telecommunications services – the need for which has only been further heightened by the global pandemic.

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