UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

ELECTRONIC COMMUNICATIONS CODE – TEMPORARY CODE RIGHTS – transitional provisions – tenancy at will or periodic tenancy after the expiry of a fixed term lease - scope of paragraph 20 of the Code – operator on site without Code rights – relationship between paragraphs 20 and 27 of the Code

BETWEEN:

ARQIVA SERVICES LTD **Claimant**

and

AP WIRELESS II (UK) LTD **Respondent**

Re: Land at Queens Oak Farm,
Pottersbury Lodge,
Towcester,
Northamptonshire,
NN12 7LL

Judge Elizabeth Cooke

30 April 2020 – 1 May 2020 by Skype for Business

Mr Justin Kitson for the claimant, instructed by Pinsent Masons LLP
Mr Wayne Clark and Mr Jonathan Wills for the respondent, instructed by Eversheds Sutherland

The following cases are referred to in this decision:

Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd [2014] 2 P&CR 4, [2014] EWCA Civ 303, CA

Cornerstone Telecommunications Infrastructure Limited v Ashloch Limited and AP Wireless II (UK) Limited [2019] UKUT 338 (LC)

Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2019] EWCA Civ 1755

EE Limited & Hutchison 3G UK Limited v Trustees of the Meyrick 1968 Combined Trust [2019] UKUT 614

Roe d. Jordan v Ward (1789) 126 ER 58

University of London v Cornerstone Telecommunications Infrastructure Limited [2019] EWCA Civ 2075

Introduction

1. This is the Tribunal's decision on preliminary issues in a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code"). The Code regulates the legal relationship between those who own and occupy land, and those who require rights over land in order to provide mobile telephone networks or the infrastructure (masts, cabinets and so on) through which those networks are operated.

2. The claimant, Arqiva Services Limited, is in the business of providing infrastructure for the use of network operators; pursuant to directions given by Ofcom it is one of the "code operators" who can acquire rights under the Code ("Code rights"). The respondent, AP Wireless II (UK) Limited, is not a code operator. It is a wholly-owned subsidiary of AP Wireless UK Limited which owns and manages over 3,000 mast sites in the UK, and many more worldwide. The respondent is the freehold owner of land at Queens Oak Farm, Towcester ("the site"), over which the claimant wishes to acquire Code rights.

3. The claimant is in occupation of the site. Until October 2016 it had rights under the Code's statutory predecessor, Schedule 2 to the Telecommunications Act 1984 ("the old Code"). The preliminary issues, in summary, are whether the claimant now has Code rights and, if not, how if at all it can acquire them.

4. The hearing of the preliminary issues took place using a video conference platform on 30 April 2020 and 1 May 2020. I am most grateful to all who made that remote hearing possible and to all the participants, and to Mr Justin Kitson for the claimant and Mr Wayne Clark and Mr Jonathan Wills for the respondent, all of counsel, for their helpful arguments.

5. As I shall explain the Tribunal ordered a hearing of two preliminary issues, but it is helpful to break those issues down into further questions. In the paragraphs that follow I begin by explaining what the preliminary issues are and the sub-issues that I have to decide, before going through them one by one.

The preliminary issues

6. Here I set out enough of the factual background and the law to explain the issues; more detailed consideration of the facts and the law will follow in the context of each issue.

The factual background in summary

7. The site has been in use for electronic communications equipment since 1996 or so. The respondent acquired the freehold in 2014. The claimant had a twenty-year lease of the site granted on 14 January 1997 that expired in October 2016; that lease was varied in 2000 and there were two supplemental leases. I refer to all the leases together as "the 1997 lease". The 1997 lease was contracted out of the protection of Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act"). The claimant remained in occupation and made

payments of rent and other sums, and its own customers continued to operate from the site under licence agreements. It is not in dispute that for some months there were negotiations between the claimant and the respondent about a new lease and a travelling draft was circulated. No agreement was reached. The Code came into force on 28 December 2017. On 2 July 2019 the claimant gave the respondent notices seeking orders under paragraphs 20 and 27 of the Code, and a reference was made to the Tribunal on 20 August 2019.

8. Paragraphs 20 and 27 are within Part 4 of the Code; it will be useful to look at Parts 2, 4 and 5 and consider their different functions, and it is also necessary to look at the transitional provisions enacted in connection with the coming into force of the Code.

Part 2 of the Code

9. Part 2 of the Code makes provision about the conferral of Code rights; paragraph 9 says that Code rights in respect of land can only be conferred on an operator by agreement between the occupier of the land and the operator.

Part 4 of the Code

10. Part 4 of the Code gives the court power to impose an agreement by which a person confers, or is bound by, Code rights. The powers of the court are exercised by the Tribunal.

11. Paragraphs 20 and 21 enable the Tribunal to impose an agreement on an operator and a "relevant person", and to make an order that a relevant person with an interest in the land be bound by Code rights.

12. Paragraph 22 reads as follows:

> "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."

13. Paragraph 27 enables the Tribunal to impose temporary Code rights when an operator has electronic communications apparatus on land in circumstances where another person has the right to require its removal. The operator must give notice to that person seeking temporary Code rights and must also give a notice under paragraph 20 setting out the Code rights that it seeks. The Tribunal may order temporary Code rights for so long as appears reasonably necessary to secure the objective in paragraph 27(3), which is that:

> "… until the proceedings under paragraph 20 and any proceedings under paragraph 40 are determined, the service provided by the operator's network is maintained and the apparatus is properly adjusted."

14. Also within Part 4 is paragraph 26 which enables the Tribunal to impose an agreement on an interim basis, for a specified period or until the occurring of a specified event.

Part 5 of the Code

15. Part 5 of the Code provides at paragraph 30 that even if an agreement conferring Code rights provides for them to come to an end, or can itself be brought to an end, the agreement continues so that the Code rights continue to be exercisable and the site provider continues to be bound by them. Paragraph 30 does not apply to interim or temporary Code rights.

16. Paragraphs 31 to 33 enable a "site provider" nevertheless to bring the agreement to an end in certain circumstances, and an operator to apply to modify the agreement or to have a new one imposed on the site provider. Paragraph 34 sets out the orders that the Tribunal may make in those circumstances if the parties fail to reach agreement.

The transitional provisions

17. Schedule 2 to the Digital Economy Act 2017 sets out transitional provisions relating to operators who had rights under the old Code at the point when the Code came into force. Paragraphs 1 and 2 of Schedule 2 provide that an agreement conferring rights under the old Code, or an order creating them under the old Code, are defined as "subsisting agreements" and are treated, after the coming into force of the Code, as agreements under Part 2 of the Code, subject to modifications.

18. An agreement that conferred rights under the old Code could also be protected by Part 2 of the 1954 Act, in the absence of an agreement contracting out of that protection. Paragraph 6 of the transitional provisions states that if the subsisting agreement is a lease to which Part 2 of the 1954 Act applies then Part 5 of the Code does not apply to it. The Tribunal in its decision in *Cornerstone Telecommunications Infrastructure Limited v Ashloch Limited and AP Wireless II (UK) Limited* [2019] UKUT 338 (LC) ("*Ashloch*") held that the operator in those circumstances cannot apply for Code rights under paragraph 20 of the Code but must seek a new tenancy in the county court, whether in response to a notice under section 25 of the 1954 Act or by serving a notice under section 26.

19. Where the county court orders a new tenancy following the expiry of an old Code agreement that was protected by Part 2 of the 1954 Act, that new tenancy will not have the protection of Part 2 of the 1954 Act. It will be deemed to be an agreement under Part 2 of the Code and will fall squarely within the Code for all future purposes once it has been granted (*Ashloch* paragraph 108, following the reasoning of the Court of Appeal in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755 ("*Compton Beauchamp*")).

20. The Code provides that where the primary purpose of an agreement is the conferral of Code rights it will not be protected by Part 2 of the 1954 Act. Accordingly the overlap in protection that was possible under the old Code no longer arises under the new one.

The Tribunal's directions and the preliminary issues

21. On 22 August 2019 the Tribunal gave directions for a case management hearing to be held on 18 October 2019, and in accordance with its usual practice directed that the Tribunal would if possible decide the application for temporary rights at that hearing. However, the hearing was vacated because the parties agreed a stay of the paragraph 27 application and directions for the final hearing of the reference.

22. Those directions were superseded because, in response to correspondence from the parties, on 13 December 2019 the Tribunal gave directions for the hearing of two preliminary issues.

23. By that date two important decisions had been handed down.

24. First, the Court of Appeal in *Compton Beauchamp* had upheld the Tribunal's decision at [2019] UKUT 107(LC), in which the Deputy President held that the Tribunal cannot impose an agreement on a landowner under paragraph 20 where a third party – neither the landowner nor the operator – was in occupation of the site. However, the Court of Appeal took a rather different approach to the provisions and structure of the Code from that taken by the Tribunal in the same case at first instance, as I shall explain in due course.

25. Second, the Tribunal had given its decision in *Ashloch*; as noted above that decision related to an operator with the protection of Part 2 of the 1954 Act, but in his decision the Deputy President applied the Court of Appeal's decision in *Compton Beauchamp*.

26. In the light of those two decisions it was important to determine precisely the claimant's status, and in particular whether it was in occupation of the site under a subsisting agreement under the transitional provisions and whether it was now protected by Part 2 of the 1954 Act. The preliminary issues ordered to be determined were:

    1) Does the Claimant occupy the site under a subsisting agreement within the meaning of paragraph 1(4) of Schedule 2 to the Digital Economy Act 2017?

    2) Does the Tribunal have jurisdiction to impose an agreement on the parties under paragraph 20 of Schedule 3A to the Communications Act 2003?

27. The first preliminary issue is about the status of the claimant, and in argument it was divided into a number of sub-issues which I shall look at separately. Accordingly this decision addresses four questions:

28. *The first question* is whether the claimant held over, after 16 October 2016, as a tenant at will, as a periodic tenant or as a contractual licensee. It is common ground that if it was a periodic tenant then it had security of tenure under the 1954 Act, and that if it was a tenant at will or a contractual licensee it did not.

29. *The second question* is whether – whatever the answer to the first question – the claimant had a subsisting agreement within the meaning of the transitional provisions.

30. *The third question* is what was the effect of correspondence between the claimant's and respondent's representatives on 15 to 17 October 2019. The respondent says that the parties agreed that the claimant was to occupy the land as a contractual licensee for five years and that that agreement conferred Code rights on the claimant.

31. *The fourth question* arises only if the claimant did not have a subsisting agreement in December 2017 and has not acquired Code rights by agreement since then; in those circumstances I have to decide whether the Tribunal has jurisdiction to impose an agreement on the parties under paragraph 20 of the Code. So the fourth question is the second preliminary issue.

32. The claimant's case is that after the expiry of the 1997 lease it had a tenancy at will, and that that was not a subsisting agreement. It says that correspondence in October 2019 did not change its status. It says that the Tribunal has jurisdiction to impose an agreement upon it and the respondent under paragraph 20 of the Code.

33. The respondent's case is that the claimant was a tenant at will after the 1997 lease ended and during the negotiations for a new lease, but that negotiations came to an end and the claimant then had a periodic tenancy. It says that the claimant had a subsisting agreement when the Code came into force, but that correspondence between 15 and 17 October 2019 created a five year contractual licence which conferred Code rights on the claimant. The respondent says that accordingly there is no jurisdiction for the Tribunal to make an order under paragraphs 27 or 20 but that the claimant can instead make use of Part 5 of the Code.

34. The respondent also argues that there is no jurisdiction to impose an agreement under paragraph 20 even if I am against it on the other points, so that the claimant has neither a subsisting agreement created before the Code came into force nor a new five year licence created in October 2019. Mr Clark argues that in those circumstances, where a code operator is in occupation of land without Code rights, it cannot have Code rights conferred upon it in respect of that land by an agreement imposed under paragraph 20. Its current occupation debars it from ever benefiting from such an order, although it can acquire Code rights by agreement with the site provider or by doing a deal with a third party (as discussed later).

35. I now turn to the questions I have to decide.

The first question: did the claimant have a tenancy at will, a periodic tenancy or a contractual licence after 16 October 2016?

36. The 1997 lease was granted for a term of 20 years and expired on 16 October 2016. The first question to be determined is what was the claimant's status after that.

The law

37. The law on this point is well-established and is not in dispute. It is tempting to assume that when a fixed term lease expires and a tenant holds over, paying the same rent, it does so under a periodic tenancy on the same terms as those of the expired lease. But that is not necessarily the case and there is no presumption of a periodic tenancy. Rather, the parties' conduct has to be considered objectively so as to ascertain their intentions. The law is summed up by Patten LJ in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] 2 P&CR 4, CA:

> "23. When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in *Javad v Aqil*, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."

38. The parties agree that a tenancy at will came into existence in October 2016. The claimant says that that remains the case today; the respondent says that at some point after 5 September 2017, and at the latest in October 2018, the tenancy at will became a periodic tenancy, or perhaps a contractual licence, because negotiations for a new lease had ended.

39. It is common ground that a periodic tenancy would have had the protection of Part 2 of the 1954 Act (it will be recalled that the 1997 lease did not), and that neither a tenancy at will nor a contractual licence would attract that protection.

40. I bear in mind that in determining the status of the claimant after the expiry of the 1997 lease I must consider the evidence objectively; the subjective intentions of the parties are not relevant.

The relevant facts

41. Because the evidence has to be considered objectively, I regard the evidence of witnesses of fact with some caution.

42. I heard evidence from the following for the claimant:

1) Mr Adam Sims, a chartered surveyor employed by Needham Hadrell in Bristol since 2006. He has acted for the claimant in connection with a range of matters including site acquisition and lease renewals. He was able to give evidence about what happened in the course of negotiations for a new lease of the site; his evidence of fact is not in dispute, and I take care to disregard his evidence insofar as it relates to his subjective intention.

2) Mr Alexander Barnes, a Portfolio Manager for the claimant. He took on the management of sites leased from the respondent in November 2018. Accordingly he had no involvement in the period from September 2017 to October 2018. His evidence is that from the time when he became involved he was endeavouring to negotiate with the respondent a framework agreement that would apply to all sites leased from the respondent.

3) Mr Timothy Holloway, an Estates Surveyor employed by the claimant since 2000. He manages lease renewals and rent reviews. He was able to give evidence about the payment of rent for the site, and about KEEP, the claimant's computerised rental payment system to which instructions were given for ongoing payments of rent whenever the claimant was holding over on sites after the expiration of a lease. There was some dispute about the significance of the KEEP records and I revert to that later.

43. For the respondent I heard evidence from Mr Peter Thacker, a solicitor employed as its Legal Director. He was not involved in the site at the time when negotiations were admittedly taking place, but has been able to check emails sent by his colleagues during that period. He gave opinion evidence about the claimant's status, which I have disregarded; his evidence of fact was a useful confirmation of what was said by email and paid by way of rent.

44. I accept the evidence of fact given by all the witnesses. As will be seen, the dispute is not about what happened but about what those events meant in terms of the parties' objective intentions about the claimant's status.

45. It is common ground that the following events took place:

1) On 10 September 2016 Ms Rebecca Claricoats of Telemaster Ltd, the respondent's agents, sent an email to Mr Paul Williams of the claimant to say that "lease renewal is required."

2) On 23 January 2017 Ms Claricoats sent draft Heads of Terms to Mr Sims. It was clear from those terms that the new lease was to be contracted out of Part 2 of the 1954 Act.

3) Further emails were exchanged and the Heads of Terms passed back and forth; correspondence was headed "subject to contract" and "without prejudice". By May 2017 agreement had not been reached and on 26 May 2017 Mr Sims emailed Ms Claricoats, and said "If your client continues to insist on further amendments I will advise Arqiva to hold over."

4) There was no reply until 5 September 2017 when Ms Claricoats responded to the email of 26 May by requesting further amendments. Mr Sims did not reply.

46. Mr Sims in his witness statement said:

> "Around this time period Arqiva gave a generic instruction not to progress Code renewal instructions given the legal process would often likely take at least 3 months to conclude and rents were expected to reduce significantly once the new Code arrived. I was also mindful that Heads of Terms were not fully concluded. I subsequently ceased day to day negotiations in relation to this site."

47. That generic instruction has been disclosed; two emails dated 19 September 2017 were sent by Mr Frederick Ansell, the claimant's Estate Manager, to Mr Holloway, Mr Williams and others. The first said:

> "Just a heads up that I will shortly be writing to our external solicitors instructing them to deal with our renewal instructions on a reactive rather than proactive basis while Arqiva considers its options and strategy regarding the new Code for sites currently in the legal pipeline."

48. The second one said:

> "With immediate effect please do not complete any further renewals without my written approval. This is a temporary measure whilst we agree what our Code strategy is regarding renewals being progressed 'pre-Code'."

49. The narrative then passes to Mr Barnes. He became involved from November 2018 with the negotiation of a framework agreement for all the claimant's sites leased from the respondent. His evidence is that the Queens Oak site caught his attention because it was contracted out of the 1954 Act, but he was not involved in any correspondence specific to that site. The framework agreement has still not been concluded.

50. So far as payments of rent were concerned, I believe the following is not in dispute:

1) On 19 May 2017, rent was paid in the sum that would have been due under the 1997 lease for the year from October 2016. The payment was made after chasing by the respondent in January, March and April 2017 addressed to the claimant's "Property Payables" department. On 21 April 2017 Mr Holloway told one of his colleagues that according to the "KEEP" system the site was in holdover and an instruction had been given to continue paying rent. It turned out that the

commencement date for that continuing payment had been set to October 2017 in error, and that was corrected.

2) Mr Barnes' witness statement exhibited screenshots from KEEP which indicate that the instruction given in January 2017 was accompanied by the comment "Please continue to pay the passing rent set out above for a period of 5 years or until advised otherwise via PI or new agreement SPs." "PI" means payment instruction, and "SPs" means short particulars. Alongside the corrected instruction given on 28 April 2017 was the comment "The period of holdover is unchanged at 5 years".

3) In October 2017, rent was paid for the year from October 2017, and a site share payment as would have been required under the 1997 lease.

4) In October 2018, rent was paid for the year from October 2018 and a site share payment.

51. Further payments were made in October 2019, after the reference was made in August, and I agree with Mr Clark that that last payment cannot shed any light on the parties' intentions during the period before the reference was made.

The arguments

52. As I said above, at the hearing Mr Clark helpfully conceded that a tenancy at will arose on the expiry of the 1997 lease, because negotiations for the grant of a new lease then took place. However, whereas the claimant says that the tenancy at will continued, and is still in effect, it is the respondent's position that negotiations came to an end at the earliest immediately after the email from Ms Claricoats on 5 September 2017 and at the latest when rent was paid in October 2018. The respondent says that once negotiations came to an end a periodic tenancy came into being in accordance with the parties' intentions.

53. Mr Kitson says, first, that negotiations did not come to an end. Site specific negotiations did indeed cease, as a result of the instruction given by Mr Ansell in September 2017. Instead, the parties were engaged in the negotiation of a framework agreement, which would apply to all the many sites owned by the respondent and leased by the claimant. That being the case there was no point in carrying out site-specific negotiations. Nevertheless it remained the parties' intention that there would in due course be a new lease for the site. Accordingly there was a hiatus, but negotiations had not ceased.

54. It is common ground that a periodic tenancy would be protected by the 1954 Act, and that a tenancy at will cannot have that protection. Mr Kitson argues that it would have been contrary to the intentions of either party to allow a contracted-out lease, as was the 1997 lease, to be replaced by a 1954 Act-protected tenancy. A tenancy at will accorded with the parties' intentions throughout.

55. Mr Clark says that as a matter of law if the only things happening after the ending of a fixed term agreement are occupation and the payment of rent, there is a periodic tenancy. That would appear to be correct, if that really is all that is happening. It is argued that after September 2017 there is no evidence that any site-specific negotiations took place. The claimant had given instructions that there were to be no further negotiations because of the need for the claimant to consider its options and strategy in the light of the new Code. This, says Mr Clark, is not a hiatus in the negotiations but an ending. Other cases where there was a break in negotiations involve a gap of a few months, as in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] 2 P&CR 4, CA. Here they stopped. The involvement of the external agents Needham Hadrell gave way to the claimant's own personnel department and rent was paid, as well as amounts in relation to the sharing and installation of equipment. The communications about rent were not headed "subject to contract" or "without prejudice".

56. Accordingly it is argued that there was a change of status at the point when negotiations ended, which took place in September 2017 (after Ms Claricoats' email and the instruction to stop negotiating) or at the latest in October 2018 when rent was paid for the coming year, together with site share payments for the year from October 2017.

57. Mr Clark would have liked to have further details from the claimant's KEEP system. He argued that the comment on the record indicated that the claimant regarded itself as having a five year agreement. I take the view that that would not have assisted the Tribunal, since it would have been an indication of subjective intention. In any event I accept the evidence of Mr Holloway that the instruction was simply a means of keeping payments going annually rather than giving a fresh instruction each year; there is no basis upon which the claimant could have regarded itself as having a fixed term at that time.

58. Mr Clark would also have liked to see the claimant's licence agreements with its customers. The evidence for the claimant was that the licences were for fixed terms (which would come to an end if at any point the claimant had to leave the site), but it was not willing to disclose these commercially sensitive and confidential documents. Mr Clark argued that the terms of the licences would shed light on whether the claimant regarded itself as being in the secure position of having a periodic tenancy rather than in the precarious position of a tenant at will. He made an application for the disclosure of those documents, at the start of the hearing, and which I refused on the basis that it was made too late, and – again – that it would not assist the Tribunal. I take the view that terms of the claimant's agreements for its customers are likely to have been dictated by its usual business practices rather than by its view of its precise legal status on this particular site. Even if they did, again this is a matter of subjective intention.

59. Mr Clark argues that the fact that a periodic tenancy would have been protected under the 1954 Act was not in anyone's mind and would not have been a matter for concern; it was known that the new Code was going to eliminate the overlap between the two different forms of protection (as recommended in the Law Commission report) and so the respondent would not have been troubled by that protection arising for a periodic tenancy.

60. Failing that, and in what he describes as a "sort of fall-back position", Mr Clark argues that the parties entered into a contractual licence agreement when negotiations ceased. Such an agreement would not have been protected under the 1954 Act and therefore meets the objection that such protection would not have been intended.

Discussion

61. I find that work on the travelling draft ceased in September 2017, not because the parties had stopped negotiating, nor because their intentions about the Queens Oak site had changed, but because the Code was about to come into force and a new approach was needed. To that end negotiations specific to this and other sites were paused pending the negotiation of a framework agreement that would apply to all of them. Only then would terms specific to the individual sites be settled. But the intention remained to agree a new lease for the Queens Oak site. Had there been no intention to agree new leases for the individual sites then there was no point negotiating a framework agreement. And while the framework agreement was being discussed there was no point in site-specific negotiations.

62. I accept Mr Clark's argument that the protection of the 1954 Act was probably not much of a concern to either party during this period, because it was expected that the 1954 Act would become irrelevant to Code agreements once the Code came into force (as we have seen, the Tribunal found in *Ashloch* that that is not so; but no-one knew at the time under discussion).

63. Nevertheless I see no evidence that the parties' intentions about the claimant's status changed during 2017 or 2018. The fact that payments of rent were managed in-house and that negotiation was done by outside agents does not have any bearing on the parties' intentions; the division of labour would have been the same whatever the intentions of the parties about the tenancy. Nor is the presence or absence of the motto "without prejudice" or "subject to contract" on correspondence – as Mr Sims said, there is a tendency to use those terms unthinkingly and I do not take their presence or absence to indicate anything of significance in this case.

64. There was a payment of rent on 19 May 2017, and correspondence about rent before that date, all of which took place before September 2017 and therefore before the respondent says that the change of status took place; it cannot therefore be evidence for that change. The payment made in October 2018 followed from the instruction on the KEEP system and is not evidence for a change in either party's intentions.

65. In the absence of any evidence for a change of status there is no possibility of success for the "fall-back" argument that the claimant had a contractual licence.

66. Accordingly I find that the tenancy at will, which the parties agree came into being on the expiry of the 1997 lease, continued and remained in existence at the point the reference to the Tribunal was made.

The second question: was there a "subsisting agreement" when the Code came into force?

67. The respondent says that when the Code came into force on 28 December 2017 the claimant had a "subsisting agreement" as defined in the transitional provisions (see paragraph 17 above), whether that agreement was a tenancy at will or a periodic tenancy. I have found that the claimant had a tenancy at will; the arguments made by the parties on the second question are the same whichever form of tenancy the claimant had at that point, although the consequences of a finding that there is a subsisting agreement differ depending upon the form of the tenancy.[1] That is because the form of the tenancy determines whether it is protected by Part 2 of the 1954 Act.

68. Had I found that the claimant had a periodic tenancy, it would have been protected by Part 2 of the 1954 Act, and the consequence of the decision in *Ashloch* would be that neither Part 4 nor Part 5 of the Code would be available to it. As it is, I have found that there was a tenancy at will. If it is a subsisting agreement then the Tribunal would have jurisdiction to make an order under Part 5 of the Code.

69. It is common ground that the tenancy at will was a new tenancy arising after the expiry of the 1997 lease, on terms identical to those of the 1997 lease so far as relevant to it and consistent with it. So the obligation to pay rent, to make additional payments as a result of the sharing of the site, to keep the site safe and so on all became terms of the new and unwritten agreement between the parties.

70. The transitional provisions define a subsisting agreement, in paragraph 1(4), as:

> "(a) an agreement for the purposes of paragraph 2 or 3 of the existing code, or
>
> (b) an order under paragraph 5 of the existing code."

71. Paragraph 1(4)(b) is not relevant as no order was made under the old Code; nor is the reference to paragraph 3 of the old Code. The respondent argues that the tenancy at will was an agreement made under paragraph 2 of the old Code which reads as follows:

> "(1) The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—
>
> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
>
> (b) to keep electronic communications apparatus installed on, under or over that land; or
>
> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network."

[1] I make no further mention of the respondent's fall-back position that the claimant had a contractual licence.

72. Accordingly the tenancy at will could only be a subsisting agreement if the claimant had the respondent's written agreement to its keeping apparatus on the land (and the other Code rights conferred by the tenancy).

73. That is a less stringent requirement than that of paragraph 11 of the Code, which requires an agreement conferring Code rights to be made in writing and signed by or on behalf of the parties to it. The old Code by contrast required only the written permission of the occupier of the land and says nothing about a signature. Nevertheless, that requirement puts the respondent in something of a difficulty because the tenancy at will was unwritten.

74. Mr Clark for the respondent had two answers to that difficulty.

75. The first was that the 1997 lease provided that permission. Mr Clark relies on the fact that the tenancy at will, although a new tenancy, takes effect on the same terms as the 1997 lease. He refers to *Woodfall, Landlord and Tenant*, Vol 1, para 6.068:

> "A tenant who at the end of his lease becomes a tenant at will holds under such of the terms of the expired lease as are applicable to a tenancy at will. An arbitration clause contained in the old lease is not inconsistent with a tenancy at will. In this case there was an express agreement for a tenancy at will, but the same principle would appear to apply where a tenancy at will is to be implied."

76. The 1997 lease gave the written permission required by paragraph 2 of old Code to the claimant as tenant under that lease; Mr Clark argues that that permission remained "in force" just as do the other terms of the 1997 lease. He cites *Roe d. Jordan v Ward* (1789) 126 ER 58, where it was said that if a lessee holding over after the expiry of a lease were to breach one of the covenants in that lease, the landlord could have "stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease."

77. I am unpersuaded by that argument.

78. I agree that the claimant has the respondent's permission to occupy the land and keep apparatus there; if it had no permission it would be a tenant at sufferance only (see paragraph 37 and the words of Patten LJ quoted there), but as it is the respondent's conduct has made clear that the continued occupation of the claimant is acceptable to it. But the permission given to the claimant so far as the tenancy at will is concerned is unwritten. The respondent cannot point to a written permission that refers to the time after the expiry of the 1997 lease. The permission in that lease is an express permission for a term of twenty years. It cannot be read as permission for occupation under a tenancy at will commencing after October 2016, any more than it can be read as permission for occupation for a fixed term commencing after October 2016. Moreover, the 1997 lease contained a requirement for the claimant to remove its equipment and give vacant possession when the lease came to an end, so it is implausible to read the 1997 lease as giving permission for continued occupation.

79. The fact that the covenants in the 1997 lease can be read across into the tenancy at will insofar as they are consistent with it, and that the respondent could bring an action against the claimant for breach of one of those covenants, does not change matters. In such an action the respondent would certainly set out the covenants in the 1997 lease; but its cause of action is the breach of the terms of the tenancy at will, which match those of the 1997 lease. It is not an action for breach of a covenant in the 1997 lease, and *Roe d. Jordan v Ward* (1789) 126 ER 58 does not say that it would be. The terms of the 1997 lease are operative as terms of the tenancy at will, but the written permission given in 1997 was for a term of 20 years and has now expired.

80. Mr Clark's second argument is that I should adopt a purposive construction of the transitional provisions. The tenancy at will does not arise from a new entry on land. It is an informal arrangement that has its genesis in a written permission and is the sort of agreement that should be included and was intended by Parliament to be included within the category of subsisting agreements.

81. Mr Clark's argument here is closely connected with his argument on the fourth question I have to consider, namely whether the claimant is in a position to make an application under paragraph 20 of the Code. He argues that an operator in occupation of a site without Code rights is not able to benefit from an order under paragraph 20. Therefore, to avoid a situation where the claimant cannot stay on the site with Code rights under the Code (save perhaps on a temporary or interim basis), I should construe the transitional provisions purposively so as to include agreements of the present kind within the concept of a "subsisting agreement". Operators in the claimant's position will therefore be able to use Part 5 of the Code; the purposive construction will prevent the creation of a black hole where an operator is unable to have Code rights at all except on a temporary or interim basis.

82. As I shall explain below, I do not believe that Parliament intended a black hole; if such a chasm has opened up, either it is the result of a drafting error, or the Code has been misconstrued. Even if the black hole were deliberate, I would not regard it as legitimate to do violence to the words of the transitional provisions in the way that Mr Clark suggests. Those provisions designate agreements under the old Code as subsisting agreements; there is no hint that the requirements of the old Code are to be relaxed for this purpose. Had that been the intention of Parliament it could have said so, and the transitional provisions would have made clear exactly which operators were being rescued in this way. Would the category of subsisting agreements have included all agreements that would have conferred rights under the old Code had the requirements of paragraph 2 of the old Code been met? Or only those that had arisen on the expiry of an old Code agreement? Or some other category? In the absence of such provisions, it is not open to the Tribunal to make them up.

83. Indeed, that would have been inconsistent with the policy of the Code which, it is well-established, did not have retrospective effect. At paragraph 91 of *Ashloch* the Deputy President explained that it was not the purpose of the Code to confer additional rights on operators pending the expiry or renewal of their agreements. Where an operator had the benefit of an agreement conferring rights under the old Code, the agreement is transformed by the transitional provision into one that benefits, to a carefully limited extent only, from the Code. Rights under the old Code do not become full-blown Code rights under the

Code; in the absence of that form of retrospectivity it is implausible to suppose that the Code or the transitional provisions might have a much more dramatic retrospective effect by conferring Code rights upon operators who in fact had none at all under the old Code.

84. I find that the tenancy at will did not confer rights under the old Code and was not a subsisting agreement. If I am wrong about the tenancy at will, then the same is true of a periodic tenancy.

The third question: did the claimant's status change as a result of correspondence on 15 to 17 October 2019?

85. I have found that the claimant had a tenancy at will after the expiry of the 1997 lease, and that that tenancy was not a "subsisting agreement" as defined in the transitional provisions. Accordingly the claimant remains in occupation of the site without Code rights, unless something has happened since August 2019 to change the claimant's status.

86. The respondent says that that has indeed happened.

87. It will be recalled from paragraph 21 above that the Tribunal listed a case management hearing on 18 October 2019 in order both to give directions for the final hearing of the reference and to determine, if possible, the claim for temporary Code rights under paragraph 27 of the Code.

88. However, the parties were able to agree directions, and also agreed to a stay of the application for temporary rights so that the case management hearing was not needed. It is not suggested that the agreement for a stay of the paragraph 27 application had any effect upon the claimant's status or the Tribunal's jurisdiction. But Mr Clark says that in the course of the correspondence that led to the agreement to stay that application, something else happened to change the claimant's status and that the consequence is that the reference must be struck out.

89. On 15 October 2019, three days before the case management hearing, Mr Thacker wrote to Mr Barnes. The letter related for the most part to the terms of the new agreement sought by the claimant, but one paragraph was about temporary rights:

> "During our previous discussions with Arqiva, no mention was made of the need to secure temporary rights. APW have hundreds of sites where they are landlord to Arqiva. APW have never terminated a single agreement with Arqiva, the contrary is true where Arqiva have terminated agreements with APW. In light of that, there doesn't appear to be a risk that a termination of either of the existing agreements for Queen's Oak or Lower Eden[2] would occur. In the extremely unlikely event that APW did serve notice on Arqiva then Arqiva could rely on Part 6 of the Code at that juncture. Notwithstanding that, I am happy to confirm on behalf of APW that we are happy for Arqiva to remain in occupation under

[2] Lower Eden is another telecommunications site and the subject of a different reference.

the existing arrangements for another five years. I would hope that this gives Arqiva some comfort to negotiate a consensual solution on both matters."

90. On 17 October 2019 Mr Ian Morgan of Pinsent Masons, the claimant's solicitor, wrote to Ms Melissa Duddy of Eversheds Sutherland, acting for the respondent. He said:

> "Please see below our client's suggested directions in this matter. If these can be agreed, we hope tomorrow need not go ahead. …
>
> …
>
> 5. In view of the confirmation by Peter Thacker of the Respondent dated 15 October 2019 timed 12:21 that "*… on behalf of APW … we are happy for Arqiva to remain in occupation under the existing arrangements for another five years"* the Applicant's application under paragraph 27 of the Code is stayed."

91. Ms Duddy replied some 45 minutes later:

> "Adopting the numeration as contained within your email of 14:18 our client responds as follows:
>
> …
>
> 5. Our client agrees to a stay of the Applicants' para 27 application for a period of six months. The para 20 application itself will continue and our client has agreed to an extension of the existing arrangement for up to five years if needs be to allow discussions to take place with your client. It makes sense to agree a stay to allow those discussions to take place to reach a consensual arrangement."

92. Paragraph 5 of the Tribunal's directions dated 18 October 2019 read:

> "The parties having agreed to an extension of the existing occupational arrangements for up to 5 years if needed, the Applicant's application pursuant to paragraph 27 of the Code be stayed for 6 months."

93. The wording of that paragraph was agreed by the parties. When it gave directions by consent the Tribunal did not know about, let alone decide the effect of, the correspondence of 15 to 17 October. And it was not suggested to the claimant by the respondent at that time that the wording of the agreed direction would be relied upon later to argue that its status had just changed to that of a contractual licensee. The respondent seeks to rely upon it now, but I take the view that it cannot do so. The Tribunal's order was not a finding about the effect of the correspondence of 15 to 17 October.

94. In analysing the correspondence I remind myself that I have to determine what happened on an objective basis and that what Mr Thacker says in his witness statement or in cross-

examination that he intended is not relevant. And although he is a solicitor he is a witness of fact; I disregard his opinion evidence as to the legal effect of the correspondence.

95. The respondent's case is that the correspondence created a contractual arrangement, but did not create a lease (because a legal lease for more than three years can be created only by deed (sections 52 and 54 of the Law of Property Act 1925), and for an equitable lease there would have to be an agreement signed by both parties in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. The respondent says that the existence of this five year contractual licence prevents the grant of temporary rights under paragraph 27 of the Code, because the respondent does not have the right to remove the apparatus as required by paragraph 27(3). Moreover the respondent says that the contractual licence conferred Code rights with the result that the claimant cannot pursue a paragraph 20 claim.

96. The claimant's case is that the correspondence did not give rise to a contractual right to occupy for five years; Mr Kitson argues that what Mr Thacker, and then Ms Duddy, were offering was simply reassurance to the claimant that there was no need for an immediate order of temporary rights, so that the paragraph 27 claim could safely be stayed.

97. I agree with the claimant that its status did not change as a result of the correspondence above.

98. A contract requires a sufficiently clear offer, and an acceptance. There are two offers, one by Mr Thacker and one by Ms Duddy, in different terms. It is not clear what Ms Duddy's "up to five years if needs be" means nor to what extent she meant something different from what Mr Thacker said. Nothing else was said, and if a fixed term licence was intended the claimant would have needed to know, for example, whether it had any right to terminate early. Above all, there is no mention of whether or not the proposed arrangement would give the claimant Code rights, which would have been a crucial matter for both parties.

99. Mr Holloway's evidence, which I accept, was that no new instruction was entered in the KEEP system following the correspondence of 15 – 17 October 2019.

100. In my judgement neither Mr Thacker nor Ms Duddy said anything clear enough to amount to a contractual offer. Mr Thacker was reminding Mr Barnes of the commercial reality that although the respondent was in a position to bring the current arrangements to an end it was unlikely to do so. It is in the business of providing telecommunications sites and it is in the respondent's interests for the site to be occupied in the long term. What Mr Thacker offered, as he said, was comfort.

101. There is certainly no sign that the claimant took what either Mr Thacker or Ms Duddy said as an offer; there is no hint of an acceptance of an arrangement lasting five years. Nor did the respondent give any hint that it thought a new contractual arrangement had come into being. Had it taken that view, the logical consequence would have been to agree a much longer stay of the paragraph 27 application, or to suggest the withdrawal of the reference. But what we see is exactly what Mr Thacker indicated in his email that the comfort was

intended to elicit, namely an agreement to a stay of the paragraph 27 application and the vacation of the case management hearing.

102. So I find that the claimant's status did not change as a result of the correspondence of 15 to 17 October 2019.

103. That being the case I do not have to decide whether Code rights were conferred by the five year contractual licence, as Mr Clark argued, but I will do so because the argument relates to paragraph 34(8) of the Code which is important when I come to consider the fourth question.

104. Mr Clark accepts that the arrangement which he says was made by the correspondence did not comply with the requirements of paragraph 11 of the Code, since there is no agreement in writing signed by both parties, but he says that the deeming provision in paragraph 34(8) of the Code means that that requirement need not be complied with.

105. Paragraph 34 of the Code is about the orders the Tribunal may make on an application by the operator or the site provider where they cannot reach agreement about bringing a Code agreement to an end or about the conferral of new Code rights. Sub-paragraphs (6) to (8) reads as follows:

> "(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—
>
> (a) confers a code right on the operator, or
>
> (b) provides for a code right to bind the site provider.
>
> (7) The existing code agreement continues until the new agreement takes effect.
>
> (8) This code applies to the new agreement as if it were an agreement under Part 2 of this code."

106. Lewison LJ in the Court of Appeal's decision in *Compton Beauchamp* said at paragraph 60:

> " … the renewal of rights by an operator *in situ* is not primarily governed by Parts 2 and 4. Rather, it is governed (at least principally) by Part 5.

107. He went on to discuss the use of Part 5 by an operator who "seeks to vary or renew Code rights" by serving notice on the site provider, and seeking to agree that code rights be varied or to make a new agreement. He said:

> “61. In the case of an operator who seeks to renew or vary code rights, the Code introduces a new concept in paragraph 30, which is part of Part 5 of the Code. The concept is that of a "site provider". A "site provider" is a person who conferred a code right, or is otherwise bound by it. Where the code right was originally conferred by the occupier in accordance with paragraph 9, that person remains a "site provider" whether or not he remains in occupation following the conferral of the code rights. An operator is entitled to serve notice on a site provider under paragraph 33 requiring the site provider to agree that the code rights be varied or to agree to a new agreement between the parties which confers a code right on the operator. In the event of failure to agree or disagreement the operator may apply to the UT under paragraph 34 of the Code. Accordingly, in many cases an application by an operator *in situ* need not be made under paragraph 20; but may be made under paragraph 34. On such an application the UT has power under paragraph 34 (6):
>
> "… [to] order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—
>
> (a) confers a code right on the operator, or
>
> (b) provides for a code right to bind the site provider."
>
> 62. Paragraph 34 (8) provides:
>
> "This code applies to the new agreement as if it were an agreement under Part 2 of this code"
>
> 63. This is clearly a deeming provision. If (as stated in paragraph 34 (8)) the Code applies to the new agreement "as if" it were an agreement under Part 2, it must follow that the Code applies "as if" it were made between the operator and the occupier in accordance with paragraph 9; that being the only way in which such an agreement may be made. Although paragraph 34 (8) is part of the paragraph dealing with orders that the UT may make, it is not on its face restricted to a new agreement ordered by the UT. It would fit the scheme of the Code if paragraph 34 (8) also applied to a new agreement made between an operator and a site provider; and in my judgment it should be so interpreted.”

108. It will be recalled that paragraph 9 of the Code says that Code rights can only be conferred on an operator by agreement between the operator and the occupier of the land. Paragraph 34(8) deems an agreement imposed by the Tribunal on an operator and a site provider, in circumstances where the operator already has Code rights but wants new ones, to be an agreement under Part 2 of the Code, even though the site provider is not the occupier of the land as paragraph 9 requires. Lewison LJ in *Compton Beauchamp* said that it will do the same when the occupier and the site provider make an agreement themselves, even though the term “the agreement” in paragraph 34(8) is a reference to the agreement imposed by the Tribunal in paragraph 34(6).

109. In the light of that, Mr Clark seeks to make a further use of paragraph 34(8) to absolve an agreement reached between an operator and a site provider, in circumstances where Part 5 of the Code appears to have no application (because the claimant was a tenant at will without Code rights) from the requirement of paragraph 11 that the agreement conferring Code rights be in writing and signed by or on behalf of them both.

110. Neither in the Code nor in Lewison LJ's discussion is there the slightest hint that paragraph 34(8) absolves the parties to an agreement from the requirements of paragraph 11 of the Code. There is no foundation for the suggestion that it does so even in the context of Part 5, let alone in the present context where the claimant does not have Code rights and has not made a reference under paragraph 34.

111. I see no possible justification for the extension of paragraph 34(8) in this way and so I reject Mr Clark's argument.

112. There will be more to say about paragraph 34(8), and the limits of its elasticity, below.

The fourth question: Does the Tribunal have jurisdiction to impose an agreement on the parties under paragraph 20 of the Code?

113. The outcome of the first three questions is that the claimant remained in occupation of the site without rights under the old Code after October 2016, and remains there still without Code rights. Accordingly I have to decide the second preliminary issue of the two that I ordered to be heard, being the fourth of the questions I set out in paragraphs 28 to 31 above. It is the most important of those questions; it comes down to the question how, if at all, an operator that is occupying a site and has electronic communications apparatus there, without Code rights (and therefore without recourse to Part 5 of the Code), can obtain Code rights.

The claimant's case

114. The claimant's argument is, at first sight, straightforward. It has no Code rights. It cannot make use of Part 5 of the Code. It follows that it should be able to use Part 4, and it asks the Tribunal to impose an agreement on the parties under paragraph 20 of the Code.

115. Paragraph 20 reads as follows:

> "20(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—
>
> (a) to confer a code right on the operator, or
>
> (b) to be otherwise bound by a code right which is exercisable by the operator.

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

(a) setting out the code right, and all of the other terms of the agreement that the operator seeks, and

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

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

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

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

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

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

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

116. Paragraph 21 provides that the Tribunal may make an order under paragraph 20 if certain conditions (not in issue in this hearing of preliminary issues) are satisfied.

117. The claimant has also applied for temporary rights under paragraph 27, which reads so far as relevant:

"27(1) This paragraph applies where—

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

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

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

> (2) The court may, on the application of the operator, impose on the operator and the person an agreement between them which confers on the operator, or provides for the person to be bound by, such temporary code rights as appear to the court reasonably necessary for securing the objective in sub-paragraph (3).
>
> (3) That objective is that, until the proceedings under paragraph 20 and any proceedings under paragraph 40 are determined, the service provided by the operator's network is maintained and the apparatus is properly adjusted and kept in repair.
>
> (4) Subject to sub-paragraphs (5) and (6), the following provisions apply in relation to an order under this paragraph and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it—
>
> …
>
> (b) paragraph 22 (effect of agreement imposed under paragraph 20);
>
> …"

118. Paragraph 27 refers to paragraph 20. An application can only be made under paragraph 27 if a notice under paragraph 20 has been served, requiring the imposition of an agreement under paragraph 20; and the objective of the imposition of Code rights on a temporary basis is to keep the equipment on the land running pending the determination of the paragraph 20 proceedings and any proceedings under paragraph 40 (for the removal of the equipment). It has been said that paragraphs 20 and 27 are "inextricably linked" (Lewison LJ in *The University of London v Cornerstone Telecommunications Infrastructure* Limited [2019] EWCA Civ 2075 at paragraph 72).

119. The Explanatory Note to paragraph 27 (which of course does not have statutory force is a useful pointer to the intentions of those who drafted it) says:

> "This right is different from an interim code right in that it arises where there is existing apparatus already on the land, but the operator has no right to keep it installed and accordingly requires temporary code rights to maintain the apparatus and the network service while they seek permanent rights."

120. The claimant argues primarily that the Tribunal has jurisdiction to impose an agreement under paragraph 20 because it has also applied for temporary rights under paragraph 27; but in the alternative, in case it is found that the claimant is not entitled to apply for temporary rights, it says that there is jurisdiction to make an order under paragraph 20 in any event.

The respondent's case

121. I begin by explaining the respondent's position as regards paragraph 27, which is straightforward. The claimant satisfies paragraph 27(1)(a) and (b) because it has served a notice under paragraph 20 and the notice also requires the respondent's agreement to the grant of Code rights on a temporary basis. Paragraph 27(1)(c) requires that the respondent has the right to require the removal of the apparatus in accordance with paragraph 37.

122. Paragraph 37 states that a landowner has the right to require the removal of apparatus if one or more of five conditions are met. Paragraph 37(2) says:

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

123. Mr Clark helpfully conceded that if the claimant does not have Code rights then that first condition is met. Therefore in the light of the findings I have made so far, the Tribunal has jurisdiction to make an order under paragraph 27.

124. However, it is the respondent's case that nevertheless the Tribunal does not have jurisdiction to make an order under paragraph 20.

125. To understand why that is said we have to take a closer look at a number of decisions of the Tribunal and the Court of Appeal, to which reference has already been made. Before I do so it is worth reiterating the following central provisions of the Code: paragraph 9 says that Code rights "may only be conferred on an operator by an agreement between the occupier and the operator" (paragraph 9). Paragraph 20 enables the Tribunal to impose an agreement upon the operator and the "relevant person", and paragraph 22 provides that the agreement so imposed shall take effect for all purposes as an agreement under Part 2 of the Code between the operator and the relevant person.

126. The Court of Appeal in *Compton Beauchamp* approved, at paragraph 3, the explanation given by the Deputy President in the same case:

> "… Paragraph 20 refers to a "relevant person" not because an agreement to confer Code rights can be imposed on someone who is not an occupier but because two different types of order may be made by the Tribunal. The relevant person will either be an occupier who is to be compelled to confer rights, or will be a person who is to be bound by rights conferred by another."

127. In *Compton Beauchamp* the claimant, Cornerstone Telecommunications Infrastructure Ltd, ("CTIL") was not in occupation of the site in question. A "friendly" operator, Vodafone, was. Vodafone would have given vacant possession to CTIL once CTIL had had rights conferred on it. But it was held that CTIL could not obtain Code rights; there was no jurisdiction under paragraph 20 because CTIL sought to have an agreement imposed on a landowner that was not occupying the land and so could not confer Code rights.

128. The Court of Appeal upheld the Tribunal's decision, but its approach to the structure of the Code and in particular paragraph 9 was different from that of the Tribunal. The Deputy President at paragraph 82 had said this:

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

129. The Tribunal in *Compton Beauchamp* found that where a third party is in occupation of the site, the landowner cannot confer Code rights upon an operator; but if the operator itself is in occupation, the Tribunal did not see any difficulty in the operator and the site provider making an agreement under Part 2, or in the Tribunal imposing an agreement upon them.

130. However, the Court of Appeal in *Compton Beauchamp* interpreted the Code more narrowly. It found – or at least has been understood to have found - that there is no jurisdiction, in any circumstances, to impose an agreement under paragraph 20 upon an operator in occupation of the site.

131. In *Ashloch* the operator was itself in occupation of the land. It had Code rights. The agreement conferring those rights had been made under the old Code and was protected by Part 2 of the 1954 Act; the transitional provisions prevent operators with 1954 Act protection from making use of Part 5 of the Code. The Deputy President found that the consequence of the Court of Appeal's decision in *Compton Beauchamp* was that the operator with 1954 Act protection, being in occupation of the site, could not use Part 4 either. That meant that the operator in *Ashloch* had to apply to the county court for the renewal of its lease, as the 1954 Act requires.

132. By contrast, the operator in occupation of the site with Code rights, and without the protection of the 1954 Act can use Part 5. Part 5 does not require that the person conferring Code rights be in occupation of the site; this is the context for the use of paragraph 34(8) to deem it to be in occupation, as discussed above at paragraph 107 where I quoted paragraphs 61 to 63 of *Compton Beauchamp*.

133. But that did not help CTIL in *Compton Beauchamp* because the occupier of the site was Vodafone, and Vodafone had not made an application for Code rights. It does not help the claimant because it is in occupation without Code rights.

134. That situation was considered, hypothetically and, of course, *obiter*, by Lewison LJ who continued as follows:

> **Interim and temporary code rights**
>
> 67. Ms Tozer drew our attention to paragraph 26 of the Code, which deals with interim code rights; and to paragraph 27 which deals with temporary code rights.
>
> 68. It is a precondition to the application of either of these paragraphs that the operator has already given notice under paragraph 20: paragraph 26 (3) and paragraph 27 (1) (a).[3] These paragraphs therefore apply where either:
>
> > i) The operator seeks the conferral of a code right having failed to reach agreement with the occupier under paragraph 9 or
> >
> > ii) The operator has secured the conferral of code rights by the occupier but has failed to reach agreement under paragraph 10 (4) with another person that that other person is to be bound by those rights.
>
> 69. I do not see in these paragraphs anything that undermines the essential principle that code rights can only be conferred by agreement with the occupier. The general scheme of the Code seems to me to be such that one would expect interim or temporary rights to be conferred on an operator new to the site, whereas the case of an operator *in situ* is principally dealt with by Part 5 of the Code.
>
> 70. Nevertheless, Ms Tozer postulated an example which, she said, ran counter to this analysis. Paragraph 37 of the Code entitles a person with an interest in the land (a "landowner") to require the removal of electronic communications apparatus if certain conditions are met. That person may or may not be the occupier. But an occupier without an interest in land cannot be a landowner. The right of removal is only exercisable in accordance with paragraph 40. That paragraph enables the UT to make an order for the operator to remove his apparatus or for the landowner to sell it. However, under paragraph 40 (8) the UT cannot make such an order if an application under paragraph 20 (3) has been made in relation to the apparatus and has not been determined. It therefore, follows, so the argument goes, that an operator *in situ*, with apparatus on site, must be able to make an application under paragraph 20 (3).

[3] What is said here, *obiter*, about paragraph 26 preceded the decision on this point in *University of London v Cornerstone Telecommunications Infrastructure Limited* [2019] EWCA Civ 2075, where the Court of Appeal held that there is jurisdiction to grant interim Code rights even if there is no application under paragraph 20.

135. Mr Clark, who represented the respondent in *Compton Beauchamp,* told me that Ms Tozer's example was of an operator granted Code rights by a person who occupies the site as a licensee. The licensee has brought those Code rights to an end. The licensee cannot make use of paragraph 40 to get the apparatus removed because it has no interest in the land. But the freeholder can. Paragraph 71 recounts Ms Tozer's reasoning about this situation:

> 71. It is in this situation that the UT may impose temporary code rights under paragraph 27 on the person requiring the removal of the apparatus. That person must be a landowner (whether or not he is also the occupier). If those temporary code rights amounted to occupation by the operator, it could not be plausibly suggested that the grant of those temporary rights deprived the UT of substantive jurisdiction under paragraph 20 to impose on the relevant person an agreement conferring code rights. It therefore follows, Ms Tozer says, that an application under paragraph 20 for the conferring of code rights can be made against a person other than the occupier (or, alternatively, that the operator's occupation does not count as occupation for the purposes of the Code).
>
> 72. If the application is made by an operator *in situ*, I am inclined to agree with Mr Clark that the factual scenario underpinning the example is highly unlikely. The operator would have failed to seek renewal of its code rights under paragraph 33 of the Code. The original agreement would have been terminated under the limited rights given by paragraph 31; and the operator would have failed to give counter-notice or to have applied to the UT under paragraphs 32 and 34.
>
> 73. But in my judgment the answer to the point lies in another deeming provision. If the UT imposes an agreement for interim rights under paragraph 26, paragraph 26 (4) (b) applies to the agreement. If the UT imposes an agreement for temporary rights under paragraph 27, paragraph 27 (4) (b) applies to it. Both these paragraphs state that paragraph 22 of the Code applies as it applies in relation to an order under paragraph 20. Paragraph 22, as we have seen, provides:
>
> > "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."
>
> 74. Thus, an agreement imposed either under paragraph 26 or under paragraph 27 takes effect for all purposes as an agreement between the operator and the occupier. In other words, for this purpose only, the landowner upon whom the agreement is imposed is treated as if he were the occupier, whether or not he is in fact the occupier. So in this example the circle is squared.

136. Lewison LJ said at his paragraph 69, paragraph 27 will work for an operator who is new to the site and not occupying it (for example where it wishes to take over equipment that it has purchased from another operator); but he also took the view that paragraph 27 may also be used by an operator who is on site without Code rights – as is the claimant here. Lewison LJ's explanation of how that works, in his paragraphs 72 to 74, is that the

deeming provision in paragraph 22 applies to an agreement imposed under paragraph 27, so that the landowner is deemed to be the occupier for this purpose.

137. But, says Mr Clark, that works "for this purpose only", meaning (he argues) only for the purpose of paragraph 27 (and 26, which is not relevant here). All that the operator can do is to seek temporary rights pending removal. That works because of the deeming provision in paragraph 22. But there is no jurisdiction under paragraph 20 and no new Code rights can be conferred.

138. Mr Clark points out that the Deputy President in *Ashloch* at paragraph 28 says this:

> "For the purpose of the arguments in this reference, there is an important distinction between a request for Code rights under paragraph 20 and a request for the more limited interim or temporary Code rights under paragraphs 26 or 27. A notice under paragraph 20 may only be given to a "relevant person" (i.e. either an occupier of the site or a person who is to be bound by rights conferred by another), whereas a notice under paragraphs 26 or 27 may be given simply to "a person". An operator who is already in occupation of land may therefore make an application for interim or temporary rights. As Lewison LJ explained in *Compton Beauchamp* this represents an exception to the essential principle reflected in paragraph 9 that Code rights can only be conferred on an operator by agreement with the occupier. The exception is accommodated within the scheme of the Code, without disturbing the essential principle, by means of a statutory deeming provision. By paragraphs 26(4)(b) and 27(4)(b) paragraph 22 applies to orders imposing interim and temporary rights so that they take effect for all purposes as agreements under Part 2 of the Code between the operator and the relevant person (see *Compton Beauchamp* at [73])."

139. Accordingly, says Mr Clark, an operator who is on site without Code rights can indeed obtain the benefit of temporary Code rights; but in these circumstances the Tribunal has no jurisdiction to impose an agreement under paragraph 20. The deeming provision legitimises the agreement that confers temporary Code rights; but the deemed occupation operates "for this purpose only", that is, only to confer jurisdiction under paragraphs 26 and 27. That construction, says Mr Clark, is reinforced by the decision in *Ashloch*, because although the claimant in that case was an operator with Code rights, the operator's argument was that all operators *in* situ can use paragraph 20, and the Tribunal rejected that.

140. It is not clear to me, and Lewison LJ did not explain, why paragraph 22 does not in these circumstances also legitimise an order made under paragraph 20, since paragraph 22 applies primarily to paragraph 20. Mr Clark says that paragraph 22 cannot act as a deeming provision for paragraph 20, because paragraph 20 is subject to the central principle that only an occupier can confer Code rights; that seems to me to assume what the respondent sets out to prove.

141. However, I agree that the Deputy President in *Ashloch* took the same view as does Mr Clark of what Lewison LJ said, and in his decision in *Ashloch* adopted the same narrower view of the requirements of the Code.

142. Mr Kitson relies on paragraph 82 of the Tribunal's decision in *Compton Beauchamp*. But at paragraph 78 of his decision in *Ashloch* the Deputy President said:

> "to the extent that paragraph 82 [in *Compton Beauchamp* at first instance] might appear to differ from the analysis of the Court of Appeal, it is because it overlooked the importance of paragraph 34(8) and its general application to agreements between operators and site providers."

143. Mr Clark says that paragraph 82 therefore cannot be relied upon insofar as it is inconsistent with the Court of Appeal's reasoning in *Compton Beauchamp,* and the narrower approach to occupation that was set out there.

144. Mr Kitson has two further arguments. One is that the Tribunal imposed an agreement upon a site provider and an operator in occupation of the site in *EE Limited & Hutchison 3G UK Limited v Trustees of the Meyrick 1968 Combined Trust* [2019] UKUT 0614 ("*Meyrick*"). So it did. The operator in that case had had an old Code agreement which had expired. Whether there was a tenancy at will or a periodic tenancy, and whether or not that agreement was a subsisting agreement, was not discussed in *Meyrick* and it is not known whether the facts were on all fours with those of the present case. So it is not possible to derive any assistance from the Tribunal's decision in *Meyrick.*

145. The other is that paragraph 27 itself gives the Tribunal jurisdiction under paragraph 20. I agree that that is a reasonable conclusion to draw from the wording of paragraph 27, which presupposes proceedings under paragraph 20 (see paragraph 27(3)). Yet the Court of Appeal in paragraphs 70 to 74 of *Compton Beauchamp* appears to say that in the example there discussed there was jurisdiction under paragraph 27 but not under paragraph 20.

146. I conclude that the consequence of the Court of Appeal's interpretation of the Code in paragraphs 70 to 74 is that the operator in occupation of a site without Code rights, providing a network or providing infrastructure so that other operators can do so, cannot succeed in an application under paragraph 20, whether or not an application is also made under paragraph 27.

147. That conclusion – I will call it the provisional conclusion - seems to me to be inconsistent with the policy of the Code, as well as doing violence to the provisions of paragraph 27. It derives from the Court of Appeal's view of the structure of the Code, but that view appears to generate results in the context of agreements protected by Part 2 of the 1954 Act that are, again, inconsistent with the policy of the Code. I explain these points in the discussion that follows, and then consider what should be the Tribunal's conclusion in this case.

Discussion of the fourth question

The policy of the Code

148. Mr Clark argued that the provisional conclusion is consistent with the policy of the Code. His argument is based on two propositions. The first is that the Code was not intended to

be retrospective. The second is that an operator gets a better deal under Part 4 than it does under Part 5.

149. Mr Clark says that it was not Parliament's intention to place Code operators in a better position when the Code came into force. The Law Commission's recommendation, and the government's conclusion, about retrospectivity was that operators with rights under the old Code should not immediately take on the benefits of the Code when it came into force. As the Deputy President put it in *Ashloch* at paragraph 46:

> "[The Law Commission's] recommendation that the Code should not apply retrospectively to existing agreements was the subject of Government consultation. In its response to the views expressed during that consultation, published in May 2016, the Department for Digital, Culture, Media & Sport set out the arguments it had heard in favour of the Code having immediate effect before stating that it had "not been sufficiently convinced the public benefits of retrospective application are such that they outweigh interference with carefully negotiated arrangements under the existing Code". It foresaw "a steady phasing in of Code rights, while preserving better investment incentives on new sites from day one" and promised "a clear and robust set of transitional provisions"."

150. The transitional provisions put that policy into effect by providing that subsisting agreements should take effect as agreements under the Code but subject to modifications – in particular, such operators do not benefit from the provisions about assignment, sharing and upgrading in the Code. Moreover they may use Part 5, and not Part 4, to renew or change their Code rights, unless the subsisting agreement is protected by the Landlord and Tenant Act 1954, in which case the operator must apply to the County Court for a new lease on its expiry and cannot use Part 5. That last point was established by *Ashloch*.

151. In the light of the policy on retrospectivity, Mr Clark argues, it cannot be the case that an operator with no Code rights at all at the point when the Code came into operation can make an application under Part 4, whereas an operator in occupation with Code rights under a subsisting agreement at that point is confined to Part 5. That runs contrary to the principle that the Code does not have retrospective effect; and it generates the paradox that the worse the claimant's position the moment before the Code came into force the better its position immediately afterwards.

152. Mr Clark argues that the claimant's real quarrel is with the transitional provisions; if the claimant is without Code rights it is because the transitional provisions do not treat it as having a subsisting agreement, which would give it the ability to make use of Part 5. What the claimant cannot do, he says, is to use the fact that the transitional provisions leave it unprotected to argue that it is in the enviable position of being able to make use of Part 4.

153. Mr Kitson points out that it is by no means obvious that Part 4 puts operators into a better position than does Part 5. An operator who seeks the imposition of an agreement under paragraph 20 has to start from square one to meet the test in paragraph 21, whereas under Part 5 the burden of proof is reversed and rights will be renewed unless the site provider can show that the test in paragraph 21 is not met.

154. Therefore it is not clear that the respondent is correct to argue on the basis that the operator who had rights under the old Code will not be in so favourable a position under Part 5 as it would if it started again in Part 4.

155. Be that as it may, where I part company with Mr Clark is that I see no reference in the policy statements about retrospectivity to operators without Code rights and I do not believe that the policy on retrospectivity is relevant to such operators.

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

157. Obviously great care must be taken in deducing any principles of policy from the Law Commission's report, because what the Law Commission recommended was a radically different scheme in which landowners continued to be paid a market rate of consideration in return for Code rights. The rejection of a central plank of the Law Commission's policy means that what we now have is a Code built on a different premise, namely the no-network basis of consideration. But there is no evidence that in changing the economic basis of the scheme the government intended also to restrict its availability to certain categories of operator, or for certain operators on certain sites. The idea that an operator should be debarred from obtaining Code rights in relation to a particular site precisely because it is in occupation, has apparatus there, and is providing a service from the site is baffling and I do not understand why such a policy would be adopted.

158. Mr Clark says that his construction of the Code does not prevent the claimant from obtaining Code rights. It can, as the occupier, confer Code rights on another operator, which could then seek an order under paragraph 20 to have the landowner bound by them. Certainly that is possible – an operator without Code rights can grant to another operator, valid only between the two parties, a 20 year term and whatever Code rights it wishes to confer. But the existence of such a contrived workaround seems to me to make it far less likely that Parliament actually intended to prevent the operator from using paragraph 20. If that was Parliament's intention it would also have blocked the workaround. The idea that Parliament prevented the operator on site from using paragraph 20 but permitted the artificial workaround just described is hard to understand.

159. Mr Clark says that another alternative is for the operator to reach agreement with the landowner. The landowner is not the occupier, and perhaps the idea is to pray in aid paragraph 34(8) to rescue the agreement. But I fail to see how paragraph 34(8) could achieve that. It has already been stretched to legitimise an agreement made when an operator has Code rights and could use Part 5, which is where paragraph 34(8) belongs; the idea that paragraph 34(8) can be used outside Part 5 is odd and does not appear to be what it was designed to do.

160. I would add that, if the provisional conclusion is correct, the operator could presumably make an application under paragraph 20 in relation to an immediately adjacent site in the same ownership, and move its apparatus a few yards sideways. Or it could shut down its equipment and the service it provides – or, in the claimant's case, require its licencees to do so – and move out of occupation, so as to be in a position to start afresh with the landowner back in occupation. Why such a waste of time and effort and such an interruption in services is a good idea is beyond me.

161. So I am not convinced that the alternatives available to a Code operator, even if they really are available, make the provisional conclusion acceptable or consistent with policy. It appears to be directly contrary to the policy of the Code.

162. Further, Mr Clark argues, the claimant's case leads to the conclusion that Code rights can never be terminated, because the operator without Code rights can always make an application under paragraph 20 when the landowner seeks to remove its equipment. Why should it be able to do so if it failed to protect itself by allowing Code rights to lapse by failing to respond to a notice bringing them to an end under paragraph 31? How many chances is it to have?

163. The answer to that seems to me that the Code contemplates, in paragraph 40(8), that an application to remove apparatus may be trumped by an application for Code rights under paragraph 20. Paragraph 40(8) does not itself confer jurisdiction; but there is nothing contrary to the policy of the Code in allowing the operator to resist removal by proving its case under paragraph 21 (bearing in mind the centrality of the public interest in that test). There is nothing in the Code about punishing operators for allowing rights to lapse.

The effect of the provisional conclusion on paragraph 27

164. Moreover, the construction for which Mr Clark argues makes nonsense of the provisions of paragraph 27.

165. It will be recalled that the objective of paragraph 27 is (and it bears repeating):

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

166. Paragraph 27 therefore requires a notice seeking rights under paragraph 20. It presupposes, a reference to the Tribunal seeking the imposition of an agreement under paragraph 20; note that the objective in paragraph 27(3) refers to proceedings under paragraph 20 "and" (not "or") any proceedings under paragraph 40.

167. So the purpose of paragraph 27 is to safeguard the operator's apparatus while the operator seeks permanent rights (which, because it has no rights at present, it can only do under paragraph 20). Yet the consequence of the provisional conclusion – that paragraph 20 is not available to an operator in occupation of the site – is that paragraph 27 is pointless for

such an operator. Mr Clark says that such an operator can use paragraph 27 when what it seeks is for the other party to be bound by Code rights, rather than to confer them. I find it difficult to make sense of that example; if the operator is on site and has Code rights it does not need paragraph 27 but can make an application under paragraph 20 for a relevant person to be bound. The operator in Ms Tozer's example in *Compton Beauchamp*, if I have understood correctly, does not have Code rights and wants an agreement to be imposed under paragraph 20.

168. That means that the subject of Ms Tozer's example, in paragraph 70 of *Compton Beauchamp*, can indeed apply under paragraphs 27 and 20; but its application under paragraph 20 would (as Mr Clark concedes) immediately be struck out. And that leaves paragraph 27 with only the very limited objective of perhaps regularising the position until the date of removal. The squaring of the circle at paragraph 74 of *Compton Beauchamp* is therefore of no comfort to the operator in the example given by Ms Tozer. That operator, and this claimant, remains a square peg, without Code rights, unable to fit itself into the round hole of paragraph 20.

169. And in a situation, as here, where there are in fact no proceedings under paragraph 40, paragraph 27 itself is without objective and it is difficult to see how or why temporary rights could be conferred. For the occupier on site paragraph 27 will almost always be useless. That would not appear to accord with the intentions of the authors of the Explanatory Notes, quoted above at paragraph 119.

170. It is not known how widespread will be the problems thereby caused. In *Compton Beauchamp* the scenario of an operator in situ without Code rights was said to be unlikely. Mr Kitson tells me that it is commonplace, since many operators remain on sites following the expiration of old Code agreements before 28 December 2017 as tenants at will. Considerable cost and wasted effort will be incurred if they all have to move out and start again, or find a friendly operator, confer Code rights upon it, and then apply for the landowner to be bound. As I said above it is not at all clear that they can obtain rights by agreement, because it is not clear that paragraph 34(8) will stretch that far.

Consequences for the operator protected by Part 2 of the 1954 Act

171. Mr Clark makes two further points against the claimant's argument. If Mr Kitson is correct, he says – and, by implication, if the Tribunal's approach in paragraph 82 of *Compton Beauchamp* were correct – then an operator with a lease granted under the old Code, protected by Part 2 of the 1954 Act, when served with a section 25 notice by the landlord, could simply fail to respond and allow the lease to come to an end. It would then have no Code rights and could apply under paragraph 20. That would make the decision in *Ashloch* of no effect.

172. Mr Kitson on the other hand says that the consequence of the respondent's argument – and, by implication, of the Court of Appeal's approach in *Compton Beauchamp* – is that an operator with a periodic tenancy protected by the 1954 Act, who (it is agreed) cannot give notice under section 26 of the 1954 Act, can never obtain rights under the Code. Part 5, Part 4 and the county court are closed to it.

173. Both those points are correct.

174. The result pointed out by Mr Kitson appears to me to be contrary to the policy of the Code, which is for a gradual introduction of agreements under the new dispensation without any operator being shut out from them. So the Court of Appeal's narrow approach is problematic in that context.

175. On the other hand, the result pointed out by Mr Clark may be entirely consistent with the policy of the Code. He says that the claimant's case would make it impossible to prevent operators with leases protected by the 1954 Act from finding their way into the new Code, unless (if they have a fixed term lease) they choose to serve a section 26 notice and choose to resort to the county court. But as Mr Kitson points out a tenant protected by the 1954 Act cannot be forced to accept a new lease within that regime. And despite the decision in *Ashloch* I wonder if it was Parliament's intention to prevent the 1954 Act protected tenant from using Part 4. True, such tenants cannot use Part 5. Is the point of that to make them use the county court, and the renewal provisions of the 1954 Act, or is it to help them make their way into the new Code by allowing them to use Part 4 and making it clear that this is a fresh start and not a 1954 Act renewal?

Conclusions

176. The authors of the Explanatory Notes to the Code envisaged paragraph 20 being available to an operator in occupation of the site; see paragraph 82 of *Ashloch*, referring to paragraph 498 of the Explanatory Notes. The Deputy President concluded there that that note was not an accurate description of the effect of Part 4 of the Code. But the Explanatory Notes will have been drafted by the departmental Bill Team working Parliamentary Counsel, and it may be that the Code was drafted on the basis there expressed, that an operator in occupation of a site can make use of paragraph 20. That paragraph of the Explanatory Notes was not, I believe, drawn to the attention of the Court of Appeal in *Compton Beauchamp*, and it may be that the Court of Appeal – unaware of the clear intention demonstrated in the Explanatory Notes - has misunderstood the structure of the Code and drawn the lines around paragraph 20 too tightly.

177. I suggest, with great respect to the Court of Appeal, that a wrong turn may have been taken, and that the narrow interpretation of the requirement of occupation in the Code leads to results that are unacceptable in terms of the policy of the Code. It may be that the less prescriptive approach of the Tribunal at first instance in *Compton Beauchamp* would have meant that paragraph 27 could retain a meaningful function for operators in occupation, that operators with 1954 Act-protected periodic tenancies were not shut out from the Code, and that there is no need to stretch paragraph 34(8) outside its obvious context whenever a new context is found that requires a deemed occupation.

178. That suggestion does not assist me in this case.

179. The provisional conclusion, that the operator in occupation of a site without Code rights cannot resort to paragraph 20 of the Code, follows from the Court of Appeal's narrow view of the structure of the Code in *Compton Beauchamp*. What was said by the Court of

Appeal in that case about operators in situ without Code rights was *obiter*. Is it open to me to distinguish *Compton Beauchamp* in the Court of Appeal, and follow the principle set out in paragraph 82 of the Upper Tribunal's decision in that case (thereby subverting the Tribunal's decision in *Ashloch*)? I think not. The provisional conclusion is drawn not only from the Court of Appeal's *obiter dicta* but also from the much more general principle which underpinned the Court of Appeal's decision in that case, which is authoritative. I take the view that it is not appropriate for me to depart from the Court of Appeal's view.

180. Therefore I have to conclude that on the basis of the authority of *Compton Beauchamp* the Tribunal has no jurisdiction to impose an agreement under paragraph 20 on the parties, and the reference must therefore be struck out. Where that leaves the paragraph 27 application is unknown; there is no application to remove the equipment under paragraph 40, and it seems clear that far from wanting the apparatus removed the respondent wants the claimant to keep it there and carry on paying rent for it. But without proceedings under either paragraph 20 or paragraph 40 the paragraph 27 application is pointless and must also be struck out.

181. It may be that the claimant would wish to appeal this decision. On receipt of an application I will grant leave to appeal to the Court of Appeal on the second preliminary issue, being the fourth of the questions addressed in this decision, and the striking out of the references under paragraphs 20 and 27 is postponed until either the expiry of time to make an application for permission without an application being filed, or if an application is made the determination of the appeal and the exhaustion of all appeal routes. I note that the Court of Appeal has given permission to appeal the Tribunal's decision in *Ashloch*, but has declined to expedite that appeal. If an appeal is pursued in the present reference, the Court of Appeal may wish to consider hearing it together with *Ashloch*, and may wish to reconsider expedition in light of the fact that a considerable number of references to the Tribunal are stayed pending the appeal in *Ashloch*.

Judge Elizabeth Cooke

19 June 2020