

“IF NOT NOW, THEN WHEN?”

WHEN DOES A SITE PROVIDER HAVE TO MAKE GOOD HIS INTENTION UNDER THE CODE AND WHAT DOES IT TAKE TO DO SO?

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*If not now, then when?
If now today, then
Why make your promises?
A love declared for days to come
Is as good as none.
You can wait 'til morning comes
You can wait for the new day;
You can wait and lose this heart
You can wait and soon be sorry.*

*Tracy Chapman
"If Not Now..."*

INTRODUCTION - IF NOT NOW, THEN WHEN?

1. In an irony which appears to have been lost on the draftsman, the Code¹ confers upon Upper Chamber, Lands Tribunal, a power to “impose an agreement” on an unwilling “Site Provider” at the behest of an “Operator”.² A limitation on that power arises under paragraph 21 of the Code, where the Site Provider intends to redevelop the land over which the Operator seeks to impose an agreement.
2. An almost identical provision in paragraph 31(4)(c) may also be relied upon by a Site Provider who seeks to terminate an existing code agreement, so as to remove Operator from his land.

¹ All references to the Code are to the Communications Act 2003, Schedule 3A. Where I need to refer to the Telecommunications Act 1984, Schedule 2, I shall refer to that as the “Old Code”.

² I shall use “Operator” in the usual sense, meaning a person who has the benefit of a Direction from OFCOM under the Communication Act 2003, section 106, to provide an electronic communications network and/or an infrastructure system. Strictly speaking, a “Site Provider” is defined by paragraph 30 of the Code as a person seeking to terminate or modify a Code Agreement, but I shall use it more broadly as a shorthand for any person against whom a Code right is being asserted or who is trying to use the Code to remove an Operator from land.

3. One might have expected the draftsman of such an obviously important provision in the imposition of agreements and in the defeating of Operator's existing rights to have been closely thought through and tightly drafted. This being the Code - even though this might be called "Code 2.0" - the draftsman has, obviously, done no such thing. Why spell out something that important when you can leave it to the parties engaged in expensive and speculative litigation to get a court or Tribunal to determine that for you?

4. In this paper, I am going to examine three interlinked questions, which arise on both paragraphs 21(5) and 32(4)(c) of the Code:
 - 4.1 To what standard of proof must a Site Provider demonstrate that he has an intention to redevelop?
 - 4.2 What works must a Site Provider undertake?
 - 4.3 When does a Site Provider have to show that he will make good this intention?

WHAT DO PARAGRAPHS 21 AND 31 SAY?

5. The Tribunal's power to "impose an agreement" for the conferral of Code rights is vested in it by paragraph 20(4) of the Code.³
 - (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.

6. Paragraph 21 sets out the circumstances in which the Tribunal can make such an Order. For present purposes, I am interested in only one ground on which the Tribunal is prevented from making such an order: that in subparagraph 21(5):

³ In the Code, for "court", now read "Tribunal", by reason of the *Digital Economy Act 2017 (Jurisdiction) Regulations 2017* (SI N°. 2017/1284)

The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

7. *Almost* the exact same test is deployed by the Tribunal when terminating a Code Agreement that has previously been entered into, willingly or otherwise.⁴ Here, one has to see a few more provisions, starting with the notice procedure set out in paragraph 31:

- (1) A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement.
- (2) The notice must-
 - ...
 - (c) state the ground on which the site provider proposes to bring the code agreement to an end.
- (4) The ground stated under sub-paragraph (2)(c) must be one of the following-
 - ...
 - (c) that the site provider intends to develop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the agreement comes to an end;
 - (d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met.

So, under paragraph 31(4), the notice the Site Provider gives to terminate an extant Code Agreement can include *either* the proposition that:

- 7.1 an intended "development" of the land could not reasonably proceed without an extant agreement being terminated; or
- 7.2 an intended "redevelopment" would now stop an agreement being imposed, by reason of paragraph 21(5), if the Operator were to be applying for a fresh Code Agreement.

⁴ I will explain the "almost" below in paragraph 28 and following.

That is an oddity I shall return to below.⁵ To help unpick why the draftsman might have included (c) and (d), I am going to consider some other aspects of the Code first.

WHAT DOES THE TRIBUNAL NEED TO "THINK"?

8. The next curiosity to examine might illuminate why there is a difference between 31(4)(c) and (d). What is the meaning of the phrase, "if [*the Tribunal*] thinks", as used in paragraph 21(5)?

The court may not make an order under paragraph 20 *if it thinks that* the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

Usually, courts and tribunals do not "think" something is going to happen: they might be "satisfied that" or "determine" or "decide" that, on the balance of probabilities, something will happen. Is this draftsman trying to state the application of the usual burden of proof in modern or "accessible English"? Or is he communicating that the Tribunal can apply a *lower* standard of proof being imposed here? Maybe the Site Provider does not have to prove that, "on the balance of probabilities", he will redevelop the land; maybe he just has to show the land is "ripe for redevelopment" or that redevelopment is "on the cards"?⁶

9. Just as an ordinary matter of English, to "think" something is true can indicate a lower degree of certainty than having determined that something is true: much depends on the way that the word is intoned when spoken: a rising intonation usually indicates

⁵ If you cannot curb your enthusiasm, my suggested solution that that riddle is in my paragraph 36 below.
⁶ When assessing whether to impose a redevelopment break clause into a renewal lease under the Landlord and Tenant Act 1954, the court considers whether a redevelopment is "on the cards" (*Adams v. Green* [1978] 2 EGLR 46 (CA) *per* Stamp LJ) or whether the premises are "ripe for redevelopment" (*Becker v. Hill Street Properties Ltd.* [1990] 2 EGLR 78, 80 (CA) *per* Dillon LJ). The two phrases probably mean the same, which is why Lewison J used them interchangeably in *Davy's of London (Wine Merchants) Ltd. v. City of London Corporation* [2004] 3 EGLR 39, [14], [31] and [64] (Lewison J).

uncertainty and a falling intonation indicates certainty.⁷ The introduction of the word "thinks" certainly could indicate that the Tribunal needs attain a lower degree of conviction than would have been indicated if the draftsman had required a finding of a primary fact. This can be demonstrated within paragraph 21(5) itself. Had the draftsman said:

The court may not make an order under paragraph 20 if ~~it thinks that~~ the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

he would be indicating the need to make a finding of fact, in the time-honoured way.

10. That last proposition can be tested by comparison with the Landlord and Tenant Act 1954, section 30(1)(f):

that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding ...

These words need to be read together with the termination provision in section 31(1):

If the landlord opposes an application under subsection (1) of section 24 of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and **establishes any of those grounds to the satisfaction of the court**, the court shall not make an order for the grant of a new tenancy.

My emphasis. In conjunction, those two provisions require the Court to have a higher degree of certainty than that indicated by the word "thinks", as used in paragraph 21(5) of the Code.

11. Are there any other markers as to whether this language indicates a lower level of certainty is needed? The language of paragraph 21 itself is internally consistent, but

⁷ Try saying "I think so" with the intonation of "think" rising, then again with it falling. Just not out loud if you are reading this on the Tube.

does not otherwise help. In the same way that the Tribunal cannot impose an agreement on a Site Provider if it "thinks" the Site Provider is intending to redevelop under subparagraph 21(5), it only needs to "think" that the rest of the test for imposing an agreement is met:

- (1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 *if (and only if) the court thinks* that both of the following conditions are met. ...
- (2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.
- (3) The second condition is that the public benefit *likely* to result from the making of the order outweighs the prejudice to the relevant person.

These paragraphs do not tell us what the degree of certainty is required by "if the Tribunal thinks", although we can see that:

11.1 there is an express reference to a degree of "probability" in paragraph 21(3), "the public benefit *likely* to result"; but

11.2 there is no equivalent reference to any degree of probability in paragraph 21(2), where the question of compensation in money is expressed in binary terms: the harm is either capable of being adequately compensated by money or it is not.

12. The formulation used in paragraph 21 can be readily contrasted with the test for terminating an agreement contained in paragraph 32(4). Here a higher degree of certainty in the outcome is mandated by the references to "decide" and "establish":⁸

If, on an application under sub-paragraph (1)(b), the court *decides* that the site provider has *established* any of the grounds stated in the site provider's notice under paragraph 31, the court must order that the code agreement comes to an end in accordance with the order.

⁸ There is no reference to what the Tribunal "thinks" in paragraph 31(4)(c) as the requirement for the Tribunal to reach a decision is in paragraph 32, to which I shall return.

Contrast the ordinary meaning of "it is decided", "it is established" and "it is thought". Indeed, if the draftsman had intended "if the Tribunal thinks" and "the Tribunal decides" to mean the same thing, one might have expected him to use the same phrase. Using a different phrase clearly suggests that a different meaning is intended.

13. It might be dangerous to look at the comparable provisions of the Old Code, but a change in the language used in the new Code might indicate a change in the meaning intended. The Old Code equivalent of paragraph 21(1)-(3), the test for imposing an agreement, was contained in paragraph 5(3):

- (3) The court shall make an order under this paragraph if, but only if, it **is satisfied** that any prejudice caused by the order-
- (a) is capable of being adequately compensated for by money; or
 - (b) is outweighed by the benefit accruing from the order to the persons whose access to a telecommunication system [an electronic communications network or to electronic communications services] will be secured by the order;
- and in **determining** the extent of the prejudice, and the weight of that benefit, the court shall *have regard* to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

My emphasis. The equivalent provision in the Old Code used language which indicates the usual high degree of certainty: if the court is "satisfied" it makes a "determination". Contrast this with the lesser degree of certainty imposed by the direction to "have regard" to the principle of access to a network or services.

14. The Old Code did not have a direct equivalent of paragraph 21(5), which prevents an Operator from obtaining an agreement where the Site Provider intends to redevelop. It did, however, contain a power for a Site Provider to remove the Operator from a site if there was a proposed redevelopment. Does the language of that power help us with construing "if the Tribunal thinks"? Here are the material subparagraphs of the Old Code, paragraph 20:

- (1) Where any electronic communications apparatus is kept installed on, under or over any land for the purposes of the operator's network, any person with an interest in that land or adjacent land may ... by notice given to the operator require the alteration of the apparatus on the ground that the alteration is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest. ...
- (4) The court shall make an order under this paragraph for an alteration to be made only if, having regard to all the circumstances and the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services, it is **satisfied**-
 - (a) that the alteration is necessary as mentioned in sub-paragraph (1) above;...
- (5) The court shall not make an order under this paragraph for the alteration of any apparatus unless it is **satisfied** either-
 - (a) that the operator has all such rights as it *appears* to the court appropriate that he should have for the purpose of making the alteration, or

There is an interesting variation in the language there, too: the court can only make an order under paragraph 20(4) or (5) if it is "satisfied" that the conditions are met, but it only has to consider the *appearance* of there being appropriate rights. The reference to "appears" directs a lower level of certainty than the requirement to be "satisfied".

15. Here is something else which may be significant. The Old Code's subparagraphs 20(4) and (5) have been replicated exactly in the new Code paragraph 81(2), which empowers the Tribunal to direct an Operator to make an "alteration" to facilitate a "proposed development" of tidal water under Part 12 of the Code.⁹ Thus, the draftsman has chosen to preserve and replicate the exact language of the Old Code paragraph 20 in paragraph 81, but has used a different form of words in paragraphs 21(5), which is aimed at the same conceptual target. Once again, does the choice of different words in the new paragraph 21(5) direct us to an intended difference in result?

⁹ See also paragraph 53 of the new Code, which empowers the Tribunal to make alterations of apparatus which is on "Transport Land". Although this paragraph does not mirror the Old paragraph 20 as closely, it also requires the court to be "satisfied" before it can make an order. Interestingly, paragraph 53(8) gives the Tribunal a discretion to impose such conditions as it "thinks necessary" on such an order.

16. Looking more widely, there are relatively few other uses of the formulation “the court thinks” on the statute book. The formulation has become more popular within the last three years, and all uses in that period indicate an element of subjectivity or discretion, rather than a decision on the balance of probabilities that it is likely that something will happen. For instance, the Criminal Finances Act 2017, section 362R,¹⁰ tells us what happens if a court decides to revoke a freezing order:

- (3) The court may order compensation to be paid to the applicant only if **satisfied** that -
 - (a) the applicant has suffered loss as a result of the making of the interim freezing order,...

- (4) Where the court orders the payment of compensation -
 - ...
 - (b) the amount of compensation to be paid is the amount that *the court thinks reasonable*, having regard to the loss suffered and any other relevant circumstances.

One can see the contrast between the binary requirement that the court is “satisfied”, in subsection (3) with the less-stringent requirement that the court “thinks” that the compensation is “reasonable”. There is a wider margin of appreciation with the latter. Is that the same difference the draftsman of the Code is communicating when he distinguishes “thinks” in paragraph 21(5) with “decides” and “established” in paragraph 32(4)?

17. In other states, the phrase “the court thinks” is plainly used to indicate a discretion, which, in turn, indicates that a range of outcomes might be appropriate. Here is the Ivory Act 2018, section 30, which deals with an appeal against a decision to confiscate an item made from ivory:¹¹

- (5) Subject to subsections (6) and (7), the court hearing the appeal may make any order *the court thinks appropriate*.

¹⁰ “R” for “really”?

¹¹ The Psychoactive Substances Act 2016, section 52, uses exactly the same mechanism as the Ivory Act 2018, which is kinda, like, really *heavy*, man.

- (6) If an appeal against an order for the return of an item is allowed -
 - (a) the court **must** order the item to be forfeited, and...

- (7) If an appeal against an order forfeiting an item is allowed -
 - (a) the court **must** order the item to be returned to a person entitled to it, ...

There is a contrast between the court making any order it “thinks appropriate”, which is then subject to two situations in which the court “must” make certain orders. This same dichotomy between a discretionary “thinks” and a mandatory “must” appears in the Armed Forces Act 2016, section 12, which adds a new section 304F(3) to the Armed Forces Act 2006:

If the court *thinks that* it would not be in the public interest to disclose that the sentence is a discounted sentence -

- ...
- (b) the court **must** give written notice of the matters specified ...

18. Another example of the “court thinks” being used to introduce a nonbinary discretion is the Data Protection Act 2018, section 168(3), which deals with compensation for breach of the GDPR:

- (3) The court **may** make an order providing for the compensation to be paid on behalf of the person to -
 - ...
 - (b) such other person as the court *thinks fit*.

See also the Immigration Act 2016, Schedule 6, paragraph 12(2):

Notice of an application under this paragraph must be given to ... whatever immigration officer the court *thinks appropriate*;

19. It would probably be unwise to come to a conclusion on what the draftsman might have meant by “if the court thinks” without re-immersing those words back into their context: what other variables might there be in the language of paragraph 21(5)?

HOW CERTAIN DOES THE SITE PROVIDER'S "INTENTION" NEED TO BE?

20. A Site Provider wishing to rely on paragraph 21(5), to prevent an Operator coming onto his land, needs to have a certain "intention". Here is the subparagraph again:

The court may not make an order under paragraph 20 if it thinks that the relevant person **intends** to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.

The same is true if a Site Provider wishes to remove an Operator under paragraph 32(4)(c):

that the site provider **intends** to develop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the agreement comes to an end;

So, what does "intention" mean?

21. In the legal lexicon, "intention" has a well-established meaning, which derives from Asquith LJ's famous judgment in *Cunliffe v. Goodman*:¹²

An "intention" to my mind connotes a state of affairs which the party "intending" -I will call him X- does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. ...

Not merely is the "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the payment will be commercially worthwhile.

In the case of neither scheme did [*the landlord*] form a settled intention to proceed. Neither project moved out of the zone of contemplation -out of the sphere of the tentative, the provisional and the exploratory- into the valley of decision.

¹² [1950] 2 KB 237, 253 (CA). The case was concerned with the Landlord and Tenant Act 1927, but has been widely used as a definition of intention following its approval in the "Ground (f)" case of *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* [1959] AC 20 (HL), *per* Viscount Simonds at page 34. This element of "intention" has been approved in

The test of intention therefore breaks down into two parts:¹³

21.1 subjectively, does the person intending actually have a "desire" or "wish" to carry out the specified actions; and

21.2 objectively, does the person intending have the means, sufficiently within his own control, to achieve the specified actions? As has been said in the context of the Landlord and Tenant Act 1954, section 30(1)(f), "The landlord has to show that he is not only ready but in all respects *able* to carry out the redevelopment".¹⁴

22. Elsewhere in his judgment, Asquith LJ neatly encapsulated the distinction between the two shades of meaning very neatly, when he said:¹⁵

X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will.

23. Of course, the decision of the Supreme Court in *S Franses Ltd. v. Cavendish Hotel (London) Ltd.* has glossed "intention" yet further. For present purposes, it suffices to say that the Court confirmed that all the existing jurisprudence on "intention" remains good law, just with the added twist as to what the landlord is permitted to intend in the context of Ground (f).¹⁶

24. Because *Cunliffe* remains good law, the very meaning of the word "intention" carries with it the concept of the person intending being able to bring about a desired result "by

¹³ *Cunliffe v. Goodman, loc.cit.*; *Betty's Cafés Ltd.*, per Lord Morton at page 42; *Capocci v. Goble* [1987] 2 EGLR 102 (CA).

¹⁴ *Capocci v. Goble* at 102 per May LJ. See also *DAF Motoring Centre (Gosport) Ltd. v. Hutfield & Wheeler Ltd.* [1982] 2 EGLR 59, 60 per Slade LJ (CA).

¹⁵ Also page 253.

¹⁶ [2019] AC 249 (UKSC), particularly Lord Briggs at [25].

his own act of volition" and it also requires that this person is "in the valley of decision". I consider that this tells you the degree of certainty required by the Site Provider who has an "intention" under the Code is very high. Accordingly, it would be illogical for the relatively strict meaning of "intends", as imposed by *Cunliffe's* case, to become diluted to something akin to "proposes" by the Tribunal only having to "think" that the Site Provider "intends"..

25. In my view, this analysis tells us that the reference to "the Tribunal thinks" in paragraph 21(5) probably means the same as "finds on the balance of probabilities". The use of the imprecise word "thinks" is no more than an attempt to use accessible language which, as is often the case, simply created an unwelcome inexactitude in meaning that could have been avoided.
26. It therefore follows that, in my view, the Site Provider has to *prove*, on the balance of probabilities, that he has an "intention" to redevelop the Site in the strict sense of the word, as defined in *Cunliffe v. Goodman*, so proving both a subjective desire and objective ability to deliver on that desire by acts of his own volition.
27. One last observation. In the Ground (f) case of *Franses*, the Supreme Court held the landlord's intention to demolish or reconstruct must be obstructed by the tenant's occupation, which show that the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a renewal tenancy. Accordingly, the landlord may not rely on works it would not undertake if the tenant left voluntarily.¹⁷ Under the 1954 Act, the tenant is always seeking a renewal of a right to occupy which was originally granted to him or his predecessors consensually and without the tenancy being "contracted out". One wonders if the same gloss on the meaning of "intention" would be applied to the Code, where the Operator may have

¹⁷ Lord Sumption at [19].

been imposed on the Site Provider from the outset, without any actual (as opposed to imposed) consent.

WHAT MUST THE SITE PROVIDER INTEND TO DO?

28. The works which a Site Provider wishing to rely on paragraph 21 must do are prescribed by subparagraph 21(5). For convenience, here is it again:

The court may not make an order under paragraph 20 if it thinks that the relevant person intends to **redevelop all or part of the land** to which the code right would relate, or any neighbouring land, and could not *reasonably* do so if the order were made.

My emphases. The words I have emphasised here are not quite the same as those used in paragraph 31(4)(c):

that the site provider intends to **develop** all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the agreement comes to an end

"Redevelop" in paragraph 21(5) but develop" in paragraph 31(4)(c): what the?

"Redevelop" and "Develop":

29. Starting with "redevelop", what sort of work does that word require the Site Provider to do? It is not a word defined in the Code or the 2003 Act. It is not used in the 1954 Act, which describes the required works as "demolish", "reconstruct" and "carry out substantial work of construction" in Ground (f). The Old Code did not quite use it, either: the broadly parallel provision in old paragraph 20 used "improvement", which it defined in paragraph 20(9) as "development or change of use".
30. Once again, the change of language is interesting: "development" and "redevelopment" are not synonyms: just as a matter of ordinary English, the prefix "re-" connotes

repetition.¹⁸ So, a development is something that can be happening for the first time, but a "redevelopment" has an element of repetition. Thus, "redevelopment" means:¹⁹

- The action or process of developing something again or differently.
- Construction of new buildings in an urban area, typically after demolishing the existing buildings.

31. What is the draftsman of the Code telling us? On the face of it:

31.1 a Site Provider who is seeking to oppose an Operator coming onto his land under paragraph 21(5) can only rely on an intention to "redevelop"; but

31.2 a Site Provider who is seeking to remove an Operator from his land can rely on:

31.2.1 an intention to "develop" that land, under paragraph 34(4)(c);
and/or

31.2.2 an intention to "redevelop" that land, under paragraph 34(4)(d),
because that paragraph imports paragraph 21(5).²⁰

32. If that is the right analysis, a Site Provider who wants to stop an Operator imposing an agreement over a "green field site", perhaps the corner of a cultivated field or just a bit of back-land, cannot rely on an intention to "redevelop": the land has never been "developed", so it cannot be "redeveloped"?

33. Instinctively, one almost recoils at the thought of an expropriatory statute which permits the power of the state to be used to appropriate private property and then prevents the landowner from opposing that acquisition on the grounds that he has not previously "developed" that land, but now wishes to. The owner of a greenfield site is put at a

¹⁸ *Shorter Oxford English Dictionary* (6th edn, 2007).

¹⁹ *Ibid.*

²⁰ "that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met".

material disadvantage to the owner of a building, or perhaps even a now-cleared "brown-field" site. Why might that be?

34. Perhaps the answer that a balance has been struck between rights of Operators and Site Providers is genuinely intended to disadvantage rural Site Providers. A Site Provider with a greenfield site which is, as yet, undeveloped cannot use paragraph 21(5) to oppose an Operator coming on to the land by reason of a proposed future "development", because this facilitates the roll-out of "superfast broadband" into rural areas. If the Site Provider has not already developed his land, his future desire to do so is subordinated to the Operator's requirement to use it for telecommunications purposes which are for the greater public good.²¹ If this disadvantages some rural Site Providers, this is the quid pro quo for the roll out of improved electronic communications in those areas.²²
35. By contrast, a Site Provider using paragraph 31(4) to be rid of an Operator can rely on a proposal to redevelop an existing building or to develop a greenfield site, as the case may be, because the retention of electronic communications apparatus should not be allowed to permanently blight the land, preventing it from being put to more productive economic use in the future than the paltry "consideration" that an Operator pays. From the Operators' perspective, they have the benefit of easy access to greenfield sites in the shorter term, but cannot insist on the land remaining undeveloped in the longer term by reason of their occupation.

²¹ To impose an agreement, the Operator will, of course, have to satisfy the Tribunal under paragraph 21 that, "the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person", having "the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person".

²² The Government's White Paper of May 2016, *A New Electronic Communications Code*, illustrates the Government's view that Site Providers are the enemies of Britain's progress to a digital Nirvana and that getting the internet to rural communities is a key policy objective..

36. I confess that I have been in two minds about the proper meaning of paragraphs 21(5) and 31(4), but I have come to the conclusion that the foregoing analysis is probably right. The difference in language between "develop" and "redevelop" might have been written off as an error, had paragraph 21(5) referred to "redevelop" and 31(4) referred to "develop". However, the convincer is that paragraph 31(4)(c) refers to "develop" and paragraph 31(4)(d) then refers to "redevelop" by importing the full test in paragraph 21. Has the draftsman intended paragraph 31(4) to be as narrow as paragraph 21(5), he need not have included the reference to "develop" in paragraph 31(4)(c).

37. Therefore:

37.1 a Site Provider opposing the imposition of a Code Agreement needs to prove an intention to undertake a scheme of "redevelopment", which means he cannot rely on paragraph 21(5) to stop an Operator from obtaining an imposed agreement over land which has *not* already been developed; but

37.2 a Site Provider wishing to terminate a Code Agreement can do so under paragraph 31(4) by proving either

37.2.1 an intention to undertake a "development" (where the land has not already been developed) or

37.2.2 an intention to undertake a "redevelopment" (where the land has already been developed).

38. Here are a few additional thoughts. As a matter of ordinary English, let alone the multifaceted meaning that the law gives it, "repair" does not mean the same as "redevelopment" or "development". "Repair" is not limited to an exact like-for-like replacement, but redevelopment indicates the complete replacement of a building or

structure with something wholly different.²³ Site Providers might like to note that it might be very hard for them to gain access to a rooftop site to repair the roof if there is an Operator on it, as a Code Agreement cannot be terminated for "repair".

39. Lastly, two thoughts on "development":

39.1 demolition without reconstruction is *not* "development" for the purposes of the Town and Country Planning Act 1990, section 55; but it is "development" for the purposes of the Land Compensation Act 1973, section 29.²⁴ This further illustrates how wise the draftsman of the Code was to use this, of all the words he could have chosen, to define the scope of the Site Provider's proposals.

39.2 If one follows the analogy of the Town and Country Planning Act, whether a scheme of works constitutes a "development" must be judged by considering the scheme as a whole, not by looking at the individual component parts in isolation. This is in apparent contrast with the approach taken under Ground (f).²⁵

"*Could not reasonably do*":

40. I now move on to the reference to the proposed redevelopment being something the Site Provider "could not reasonably do so if the order were made" or "could not reasonably do unless the code agreement comes to an end". Those words limit the Site

²³ There are buckets of authority on this, but *Lurcott v. Wakely* [1911] 1 KB 905 (CA), *Brew Bros. Ltd. v. Snax (Ross) Ltd.* [1970] 1 KB 612 (CA); and *Stent v. Monmouth District Council* (1987) 54 P&CR 193 (CA) would be a round up some of the usual suspects.

²⁴ Compare *R. on the application of Save Britain's Heritage v. Secretary of State for Communities & Local Government* [2011] Env LR 6 (HH Judge Pelling QC, sitting as a Judge of the High Court); this point not affected by the appeal at [2011] EWCA Civ 334; and *R. Corby District Council ex parte McLean* [1975] 1 WLR 735 (QBDC).

²⁵ Compare *R. on the application of Prudential Assurance Co.Ltd. v. Sunderland City Council* [2011] JPL 322 (Wyn Williams J) and *S Franeses Ltd. v. Cavendish Hotel (London) Ltd.* [2018] 1 P&CR 6 (Jay J). The Court of Appeal gave permission to appeal the latter, but the appeal was rendered academic by the success of the leapfrog appeal to the Supreme Court.

Provider's freedom of action, in that it requires him to prove that there is no reasonable way to undertake his proposed redevelopment without the Operator having rights over the land.

41. There is an obvious analogy here with the Landlord and Tenant Act 1954, Ground (f), and section 31A. The latter section is more illuminating here. It provides:

Grant of new tenancy in some cases where section 30(1)(f) applies

Where the landlord opposes an application under section 24(1) of this Act on the ground specified in paragraph (f) of section 30(1) of this Act or makes an application under section 29(2) of this Act on that ground *the Court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if -*

- (a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and **without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant**; or...

The analogy only goes so far. The reasonableness requirement shown indicated in italics can be gauged by reference to asking whether they will "to a substantial extent *[and]*²⁶ for a substantial time with the use of the holding for the purposes of the business carried on by the tenant". There is no consistency in the case law as to what constitutes interference for a "substantial time", as each case turns on its own facts.²⁷

42. Because the draftsman has given the Tribunal no yardstick to measure what is reasonable in the context of paragraphs 21(5) and 31(4)(c), it is difficult to know how this requirement will play out in practice. Does the Site Provider have to undertake his proposed redevelopment in a way which is more time-consuming and/or expensive if

²⁶ In this section, "or" is to be read as meaning "and": *Cerex Jewels Ltd. v. Peachey Property Corporation plc* (1986) 52 P&CR 127 (CA).

²⁷ "One to two months" was enough in *Redfern v. Reeves* (1978) 37 P & CR 364, 373 (CA), but eight weeks was not enough in *Blackburn v. Hussain* [1988] 1 EGLR 77 (CA). Obvious, really....

so doing will accommodate the Operator? If the Site Provider does have to go that far, how does one measure the reasonableness of the additional costs against the Operator's enjoyment of the site? If the answer is that the Site Provider has to bear increased costs to accommodate the Operator, can he recover those costs by way of an application for compensation under paragraphs 25 and/or 84?

43. To my mind, having regard to section 31A of the 1954 Act, the Site Provider does have to make *reasonable* adjustments to his the way in which he implements his proposed redevelopment to accommodate the Operator's future or continuing occupation of the site, as the case may be. If the Site Provider has to bear increased costs (including delays to the programme of works) in order to reasonably accommodate the Operator, can he recover such of those costs as he can prove as compensation under paragraphs 25 and/or 84.
44. Does the Code go even further, giving the Tribunal jurisdiction to direct that the Site Provider must, if it is reasonable to do so, adjust the design or scope of the proposed development or redevelopment, in order to accommodate the Operator's rights or claimed rights? This would go further than the comparable jurisprudence under Ground (f), which leaves the landlord the sole arbiter of the scheme of works,²⁸ even if he may have to make reasonable adjustments to the programme of works under section 31A. I think clearly not: in both paragraphs of the Code, the word "reasonably" qualifies the verb "do", not the noun "redevelopment", so the Site Provider may have to make reasonable adjustments to his methodology, but not his design.

WHEN DOES THE SITE PROVIDER'S "INTENTION" NEED TO BE IMPLEMENTED?

45. It seems quite obvious that a Site Provider wishing to rely on the Code's paragraphs 21(5) or 31(4)(c) has to prove his case at the hearing of his defence to the Operator's

²⁸ *Decca Navigator Co.Ltd. v. Greater London Council* [1974] 1 WLR 748 (CA).

claim for the imposition of Code Rights, or his claim to terminate the existing agreement, as the case may be.²⁹ What is rather less clear is the date he has to prove that he intends to implement his proposed scheme of works. On that, the Code is silent.

46. It is possible that the draftsman of the Code lifted the concept of redevelopment in paragraph 21(5) from Ground (f), without noticing the temporal window set by that section. "Ground (f)" provides:

that **on the termination of the current tenancy** the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

My emphasis. Section 64 of that Act tells us that, "on the termination of the current tenancy" is the day which falls three months and 21 days after the order which dismisses the tenant's claim for a new tenancy or grants the landlord's claim for termination, as the case may be.³⁰ On the language of the Act, the landlord has to be ready to start work on a readily identifiable, if variable, date. There is nothing in the Code which is comparable.

47. There is some machinery which is broadly comparable to Ground (f) in the Leasehold Reform, Housing and Urban Development Act 1993, section 23 and 47. The landlord can defeat a claim for collective enfranchisement or an individual lease extension by proving that he intends to develop within a period of five years of an application for

²⁹ The issue was once open to debate under the 1954 Act because of the particular formulation of words used therein: see *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* (N^o. 1) [1959] AC 20 (HL) and *Hough v. Greathall Ltd.* [2015] 1 WLR 4920 (CA).

³⁰ But see paragraph 62 below. The extra 21 days is time to lodge an appeal. If there is an appeal, the three months run from when it is dismissed or withdrawn.

collective enfranchisement or five years of the individual lease termination. In both cases, the time frame is specified by the Act.³¹

48. In the absence of an express temporal target to aim at, what date for implementation must the Site Provider under the Code prove?
49. There is a clue in the adoption of the word "intention" to describe the Site Provider's subjective desire to undertake a scheme of works *and* his objective ability to deliver it.³² Applying the *Cunliffe* definition of "intention" the Site Provider must prove at trial that he is "in the valley of decision" and can bring about a desired result "by his own act of volition".³³ Forensically, the further away from the date of trial the stated intention is to be put into effect, the harder it will be for the Site Provider to prove that he is no longer "feeling his way and reserving his decision until he shall be in possession of ... sufficient *[data]*". It will also be harder for him to prove that he does not have "too many hurdles to overcome, or too little control of events".³⁴
50. That might supply a practical limit on how far into the future the Site Provider's execution of his intention can be deferred, but it seems difficult to imagine that the Code leaves the duration of the period wholly to the mercies of what can be proved.
51. Perhaps the Code provides a more reliable guide by requiring that, whatever the relevant period is, it has to work when the Operator is seeking to impose an agreement under paragraph 21(5) *and* when the Site Provider is seeking to terminate an existing agreement under paragraph 31(4)(c). As the material words here are identical in both

³¹ To be fair, the five year period is rather more clearly specified in section 47(2) than it is in section 23(2)(a).

³² See my paragraphs 21 to 24 above.

³³ All the quotations in this paragraph are taken from Asquith LJ's judgment in *Cunliffe* which I set out in my paragraph 21 above.

³⁴ Having been involved in more Ground (f) trials than I care to remember, I am surprised that the 1993 Act defers the date for the redevelopment as much as five years. To prove now what you are going to be able to do in five years is challenging.

paragraphs, the temporal target ought to be conceptually the same, no matter which provision is being applied.

52. That observation helps to knock out one possibility, which would be an analogy with the jurisprudence which has grown up surrounding the inclusion of redevelopment break clauses into renewal leases under the 1954 Act. A landlord who is not ready to oppose the grant of a renewal lease under Ground (f) (or has tried and failed) may seek to include a redevelopment break-clause in the renewal lease. To succeed, the landlord must prove that a redevelopment is "likely" (not "probable") within the period of the term of the renewal lease.³⁵ In other words, the longer the new term sought by the tenant, the longer the period within which the landlord has to show that it is likely that a redevelopment will occur.

53. If this intention to redevelop was operative only as a paragraph 21(5) defence to an Operator seeking to impose an agreement, the redevelopment break-clauses cases might provide a useful analogy. If the Operator asks for, say, a ten-year agreement, the Site Provider should be able to try to counter that by proving an intention to redevelop within that period. However, I think the analogy is to be discarded, for three reasons:

53.1 First, the analogy works (albeit superficially) where the Operator is seeking to impose a new agreement for a fixed period, but it does not work where the Site Provider is seeking to terminate an agreement which has already passed its contractual end date and is being continued by paragraph 30 of the Code. In the latter case, there is no "new term" to use as a yardstick.

³⁵ *Adams v. Green* [1978] 2 EGLR 46 (CA); *National Car Parks Ltd. v. Paternoster Consortium Ltd.* [1990] 1 EGLR 99 (Sir Nicolas Browne-Wilkinson V-C), *Becker v. Hill Street Properties Ltd.* [1990] 2 EGLR 78 (CA) and *Davy's of London (Wine Merchants) Ltd. v. City of London Corporation* [2004] 3 EGLR 39 (Lewison J).

53.2 Secondly, the wording of the statutes is too different. The provision in the 1954 Act which permits the inclusion of a break-clause contains no reference to "intention", which justifies the imposition of a much lower test for the insertion of a break clause than that which is applicable in Ground (f) cases.³⁶ As I have already discussed, the Code requires the Site Provider to prove he is "in the valley of decision" and able to implement his plan "by acts of his own volition".

53.3 Thirdly, the effect of a break clause is different and discloses a different policy. If a landlord proves he might redevelop during the term of the renewal tenancy, the tenant is granted a tenancy for the full term, subject to the landlord exercising the break clause *and then* proving a claim under Ground (f) to terminate the renewal lease. This balances the competing interests of the parties.³⁷ Under the Code, the effect of a finding that the Site Provider has an intention to redevelop has the immediate effect of preventing the Operator getting a new set of Code Rights, no matter how temporally remote the intention is.

54. Going back to the point that the temporal target has to work when the Operator is seeking to impose an agreement under paragraph 21(5) *and* when the Site Provider is seeking to terminate an existing agreement under paragraph 31(4)(c), it is important to note that paragraph 31(4)(c) dictates that there has to be significant flexibility in the temporal target. This is because a Site Provider who succeeds in terminating an

³⁶ There is a debate in the cases as to whether a break-clause is inserted into a renewal lease under section 33 or under section 35: see *Davy's of London (Wine Merchants) Ltd. v. The City of London Corporation* [2004] 3 EGLR 39, [21] (Lewison J). As neither section refers to "intention", this is a debate for another day.

³⁷ In *JH Edwards & Sons v. Central London Commercial Estates Ltd.* [1984] 2 EGLR 103 (CA), Fox LJ identified two predominant considerations. First, in so far as it is reasonable, the lease should not prevent the landlord from using the premises for the purposes of development. Secondly, that it was necessary to afford to the tenant a reasonable degree of security of tenure. As Fox LJ concluded, "The function of the court is to strike a reasonable balance between them in all circumstances of the case". Although the landlord had no formulated development plans, the Court of Appeal held that the break clause should be exercisable after the first five years of the new lease.

existing agreement by proving that he intends to redevelop does *not* get an immediate order for possession. All he gets under paragraph 32(4) is an order that the existing agreement shall come to an end on the terms set out in the order:

If, on an application under sub-paragraph (1)(b), the court decides that the site provider has established any of the grounds stated in the site provider's notice under paragraph 31, the court must order that the code agreement comes to an end in accordance with the order.

"Whooo-hoooo", as a Site Provider might say; "oh happy day, but when do I get possession, so that I can start to implement my redevelopment?" Good question.

55. When the Site Provider is proving his intention to develop or redevelop (as the case may be), he has no way of knowing whether the Operator will just go within a few weeks of the order under paragraph 32(4) or will the Operator insist on being removed by an order made under Part 6 of the Code. This fact alone tells us that the answer to the question of when does the Site Provider's intention needs to be implemented cannot be on the making of the order under paragraph 32 for the termination of the current agreement. The Operator might, as a matter of fact, still be there impeding the development when the agreement ends.
56. Moreover, if the Operator has to be removed by way of an order made under Part 6, the Site Provider has first to serve a notice upon him under paragraph 40(2), requiring him to vacate. By reason of paragraph 40(4), the Site Provider must give the Operator "a reasonable period" to remove its apparatus. Quite how the Site Provider is supposed to know what that period might be is unclear. Paragraph 40(5) further mandates that the Site Provider and the Operator have 28 days to reach agreement as to the "time at which or period within which the apparatus will be removed", so the "reasonable period" has to be at least 28 days.

57. In fact, it may well be much longer. The draftsman evidently envisages that the parties have something to discuss within that 28-day period, he must be anticipating that there is no hard-edged deadline by which the Operator must vacate. If there was an obvious deadline by which the Operator must vacate, there would be nothing to negotiate. That suggests that one is thrown back to the reference to the "reasonable period" in the notice provision, because there is no other yardstick. How long is that, though? Time enough for the Operator to actually bother engaging with the Site Provider? Time enough for the Operator to find a new site, perhaps? Long enough for the Operator to start a claim for fresh rights because changing circumstances have rendered the original intention no longer capable of delivery....?

58. You may think that is an exaggeration, but, if the Operator does not agree to comply with that notice within the 28-day period for negotiations, the Site Provider has to make an application to the Tribunal under paragraph 40(6) for a *further* order under paragraph 44, compelling the Operator to remove its apparatus. Even if the Site Provider waits however long it takes to get a hearing and then succeeds in obtaining an order that the Operator must go, there is yet a further period of uncertainty: paragraph 44(1) gives the Tribunal an *unfettered* discretion as to when to make an order to vacate effective:

An order under this sub-paragraph is an order that the operator must, within the period specified in the order-

- (a) remove the electronic communications apparatus, and
- (b) restore the land to its condition before the apparatus was placed on, under or over the land

To add insults to injury, the Site Provider cannot even seek an order permitting him to remove the apparatus himself unless and until the Operator has failed to comply with the first order under paragraph 44: paragraph 40(7) so provides.

59. It follows that the target date for the implementation of the relevant intention where paragraph 31(4) is in play has to take into account not only the period of the original claim but, potentially two sets of enforcement proceedings, neither of which operates by reference to date which can be predicted in advance.
60. Coming back to my starting proposition, because the operative words are the same, paragraph 21(5) ought to operate in the same way where an Operator is seeking rights as paragraph 32 operates when the Site Provider is trying to terminate an agreement. The fact that the effect of an order under paragraph 21(5) leaves the site as ready for redevelopment as it was before the claim started needs to work with the same temporal target as paragraph 31(4), where there is great uncertainty as to when the works may be commenced.
61. It follows from that analysis that there is only one conceptual target date which is capable of accommodating both paragraph 21(5) *and* paragraph 31(4): that is the ultimate cop-out of "within a reasonable time" after the trial of the paragraph 21(5) defence or the paragraph 31(4) claim, as the case may be.
62. There is some pedigree for such a wishy-washy answer. As I have explained, the Ground (f) gives rise to a relatively fixed date, of three months and 21 days after the order refusing the grant of a new tenancy.³⁸ However, the courts have recognised that it will often be impractical for the landlord to start work, literally, on the day, particularly if the works are substantial and genuinely require a long lead-in time. Thus, the words "on the termination of the current tenancy" have been construed as meaning "and within a reasonable time thereafter".³⁹

³⁸ See paragraph 46 above.

³⁹ *Method Development Ltd. v. Jones* [1971] 1 WLR 168 (CA), *London Hilton Jewellers Ltd. v. Hilton International Hotels Ltd.* [1990] 1 EGLR 112 (CA) and *Edwards v. Thompson* (1990) 60 P&CR 222 (CA). In the High Court decision in the *Franses* [2017] L&TR 34, Jay J held that this reasonable period could not exceed twelve months. That was, however, something he derived from the construction of the Act. The

63. What is a reasonable time is fact-sensitive:

63.1 In *Method Development Ltd. v. Jones*, the landlord succeeded on Ground (g) because he would move in within "a reasonable time" of the order refusing a new tenancy; on the facts, this was "within the next twelve months".⁴⁰ Fenton Atkinson LJ described what amount of time might be "a reasonable time" as "very much a matter of impression".

63.2 Contrast *Edwards v. Thompson*, a Ground (f) case where the landlord had a detailed specification, proof of funding and a builder ready to commence the works, but the landlord could only practically implement the scheme if a neighbour developed their land by putting in an estate road. As there was no evidence that this would happen "within a matter of months", the landlord failed in her opposition to the new grant.⁴¹

63.3 At the far end of the scale is *London Hilton Jewellers Ltd. v. Hilton International Hotels Ltd.* where the Court of Appeal refused to interfere with the trial judge's ruling that the landlord had succeeded under Ground (f), because "a month or so" would be enough to get possession of another shop under the Hilton Hotel, presently the subject of its own Ground (f) claim, and knock the two units into one to make an extended bar area.⁴²

paradigm case will arise when the landlord's scheme is so large and complex that twelve months is not enough to get started.

⁴⁰ This was a Ground (g) case, but the principle must be the same because the wording of both paragraphs is the same. If this is the test, the requirement would have to be start the works within a reasonable time.

⁴¹ At 227 *per* Nourse LJ (CA).

⁴² [1990] 1 EGLR 112, 114 *per* Lloyd LJ (CA).

64. So, "within a reasonable time" is hardly the clearest and most exact test to determine when the Site Provider's intention has to be implemented, but it the best I can come up with.

Conclusion - What and When:

65. For all of the above reasons, to succeed either in defeating an Operator's claim for the imposition of Code Rights or in obtaining an order for the termination of an existing Code Agreement, the Site Provider must:

65.1 prove, on the balance of probabilities

65.2 that he has an intention in the *Cunliffe v. Goodman* sense, namely that he is

65.2.1 subjectively "in the valley of decision" and

65.2.2 objectively able, "by his own act of volition",

65.3 to undertake a scheme of

65.3.1 "redevelopment" where he is opposing the imposition of an agreement under paragraph 21(5) or

65.3.2 either "development" or "redevelopment" where he is seeking to terminate an existing Cod Agreement

65.4 which scheme can only be reasonably implemented in a way which would be obstructed the Operator's actual or proposed electronic communications apparatus and

65.5 which scheme will be commenced within a reasonable time after the relevant hearing for the Tribunal and where the determination of what constitutes a "reasonable time" is always a matter of fact for the Tribunal on the evidence before it.

IF NOW WHEN?

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30th April 2019

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