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CHAMBERS

Code operators as occupiers under the Electronic Communications Code

Solving the conundrum of Compton Beauchamp

The decision of the Court of Appeal in Cornerstone Telecommunications Infrastructure v Compton Beauchamp Estates (2019) has met with a sustained challenge by some code operators. That may in part have been aimed at securing wider rights than were intended, but at least in some circumstances it seems to lead to a genuine 'black hole' for sitting operators. With the case now heading to the Supreme Court, is there a sensible solution?

Given that the Electronic Communications Code was intended to form "*a key pillar of the Government's Digital Strategy*", the early case law might be something of an embarrassment. Perhaps fortunately for the Department for Digital, Culture, Media and Sport ("DCMS"), other issues are more pressing at the moment, and this is rather a niche issue for the mainstream media. For landowners and code operators, though, it really matters, even though it might be said that the issues are as much about bargaining power and money as they are about the working of the Code.

There are still many contentious points on the meaning and effect of the Code, which only time and expense are likely to resolve. My focus here is on just one current conundrum: the position of code operators who already occupy a site.

At the heart of the conundrum is the question of who can agree to confer Code rights on a code operator. Some have approached this from a property law perspective, and either assumed or argued that it must be an owner of the property over which rights are sought; but the Code indicates otherwise, and that has been reinforced by the key decisions so far. It has proved challenging, though, for the Upper Tribunal ("UT") and the Court of Appeal to interpret the Code on a basis which is both coherent and comprehensive.

Does this reveal contradictions and poor drafting at the heart of the Code itself? Or do the problems have a different source?

The requirement to deal with "the occupier"

The starting point is the Court of Appeal decision in Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755, handed down on 22 October 2019.

An existing code operator (V) was in occupation of a site pursuant to rights granted under the old Code. Another code operator (CTIL) wanted new rights under the new Code. CTIL gave notice to the landowner (Compton) under new Code paragraph 20 seeking new rights. The court had to decide whether CTIL could obtain new rights in this way. Answer: it could not. The main reasoning was as follows.

The conferral of rights by agreement is dealt with in Part 2 of the Code. In particular, Code paragraph 9 says that:

> "*A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator.*"

As a result, code rights can be granted only by someone who is in occupation of the relevant land, unless there is no-one in occupation (in which case the grantor must be "*the person who exercises powers of management of control*" or, failing that, it must be a joint endeavour by all affected property owners: Code paragraph 105(6))[1].

The Code makes clear that the occupier can grant code rights even if it has no interest in the land. Indeed, it is clear that only the occupier can do that: a landowner cannot. A landowner can only be bound into an agreement between the code operator and the occupier.

This emphasises that a code rights agreement is first and foremost a contract. Whether it takes the form of a grant of property rights (where appropriate) or has proprietary consequences (e.g. whether it is a lease[2]), and whether someone else can become bound by it (e.g. one or more landowners), must be looked at as separate matters (and, indeed, secondary ones).

As Lewison LJ pointed out, the focus on the occupier was a feature of the previous code, quoting from the judgment of Morritt C in Bridgewater Canal Co Ltd v GEO Networks Ltd [2010] EWCA Civ 1348 at [26]: "*The general regime concentrated at the outset on the occupier no doubt because he was primarily affected but also most easily identified.*" One might question whether, with ever more extensive land registration and the nature of modern apparatus, this is as sensible an approach as it was in 1984, but it seems nevertheless to have been the model adopted in the new Code too. Indeed, in their original consultation paper, the Law Commission said (at para.3.30):

> "*We do not doubt that the occupier must remain the Code Operator's point of contact on the land, the person who can create code rights by giving agreement, and the person to whom an application to the appropriate body for the grant of code rights should be addressed. Any other arrangement would be impracticable.*"

Nothing in the final recommendations departed from this basic proposition.[3]

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[1] Leaving aside the specific provisions applying to streets. The affected property owners are "every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land."

[2] Which may, apparently, be imposed – see EE Ltd v Islington LBC [2019] UKUT 53 (LC).

[3] I note that CTIL's recently published (17 July 2020) inhouse legal analysis here appears to complain about this: "*The "occupier" test formulated by the Court of Appeal in Compton Beauchamp will make it more difficult for the parties to determine who should confer and be bound by code rights. A detailed factual enquiry may need to be undertaken to determine who is both (i) physically present on the land and (ii) has factual control of that land. This also means that potentially more of precious Tribunal resource may be needed to determine this issue and*

If agreement cannot be reached, Part 4 of the Code lays down a procedure for *imposing* an agreement[4]. Code paragraph 20(1) says:

> "*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 his exercisable by the operator.*"

The Court of Appeal decided that the same approach had to be taken in Parts 2 and 4. If a code operator cannot reach an agreement with the occupier, then it must make an application *against the occupier* to have an agreement imposed by the UT. The position of landowners is secondary: they can be forced to be bound by an agreement only if one has been made or imposed as between the code operator and the occupier.

The result in Compton Beauchamp was that CTIL was seeking new Code rights from the wrong person – the landowner rather than the occupier. The occupier was V, the existing code operator on site.

On the facts, Lewison LJ concluded that the practical answer was for CTIL to reach agreement with V (as occupier), and then seek Compton's agreement (as landowner) to be bound by that agreement. He made suggestions about how prejudice to the landowner from collusion and abuse between two 'friendly' code operators might be avoided.

That might have been the right answer in Compton Beauchamp, but it has not proved so easy in other situations, as will become clear.

There is force in Lewison LJ's analysis of the main point, and the result in Compton Beauchamp itself is not obviously an unintended one. Neither the old Code nor the new Code seems to have been designed to enable one code operator to seek entirely new rights over a site where another code operator already has such rights, and it is not easy to see why this would be necessary as a matter of public policy.

What is less straightforward is the effect of this decision in other situations.

The implications for code operators in occupation ("sitting operators")

Lewison LJ recognised the implications of the decision for sitting operators, at [57]-[59]:

> *"There is … one possible difficulty that must be confronted: where the operator is already in situ and wishes to renew or vary his Code rights. What is the position if … the operator is the occupier? The Code clearly envisages that a sitting operator may enter into an agreement conferring new or varied Code rights. It also clearly contemplates that a sitting operator may apply to the UT for interim or temporary Code rights under either para.26 or 27.*
>
> *"It cannot be the case that under para.9 he may confer a Code right on himself. Paragraph 9 contemplates an "agreement between the occupier of the land and the operator". It is legally*

that only leads to one thing – more costs for the parties involved." The authors do not explain how this differs from the position under the old Code, or from what the Law Commission intended.

[4] This is done by the order itself, and not by the tribunal or court ordering the parties to *make* an agreement: see Code paragraphs 20(4) and 22, and EE Ltd v Islington LBC [2019] UKUT 53 (LC) at [148]-[151].

impossible to enter into a contract with oneself. There must be (at least) two parties to an agreement.

[CTIL's] solution to this conundrum is that the operator can never be an occupier, whether it is itself seeking a fresh right or another operator is seeking the right. That solution seems to me to be impossible to square with the language of the Code. If the operator is not the occupier, who is? …"

Having rejected that possibility, Lewison LJ went on to consider other arguments. Two aspects, in particular, have led to much debate in other cases.

Renewal rights for sitting operators

Part 5 of the Code provides for the continuation of Code Agreements after they have come to an end in accordance with their terms, subject to a statutory termination notice procedure.

Lewison LJ concluded that the rights of a code operator in occupation to renew its rights are "*governed (at least principally) by Part 5*" of the Code, rather than Part 4: Compton Beauchamp at [60].

Under Part 5, a termination notice may be given by a "site provider", who is either the occupier who originally conferred the Code rights (whether or not still in occupation) or a person on whom those rights are otherwise binding. That may lead to a renewal agreement between the code operator and the site provider (Code paragraph 32(2)), and the same persons can also agree to vary or substitute a code agreement (Code paragraph 33(5)).

The Code does not say this expressly, but it is likely to be interpreted in such a way that a renewal agreement and a varied or substituted code agreement are deemed to be agreements under Part 2 even if not made with "the occupier" (as indicated by Lewison LJ in Compton Beauchamp at [63], relying on the deeming provisions for agreements of those types imposed by the UT[5]).

In this way, a sitting operator can seek new rights even though it is an occupier. In the meantime, Part 5 provides for interim continuation.

This part of the judgment is difficult to fault. It is also consistent in general terms with the position under the old Code, as we shall see.

Sitting operators under continuation tenancies – exactly what was intended?

This issue was picked up – and picked over in more detail – by the UT in Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd [2019] UKUT 338 (LC), another decision on the Code made by the Chamber Deputy President, Martin Rodger QC, handed down shortly afterwards, on 8 November 2019.

[5] Although note that, in Arqiva (below), the UT held that any such agreement must satisfy the formalities in Code paragraph 11.

Ashloch concerned a lease granted to a code operator (V again) under the old Code which was protected by Part 2 of the Landlord and Tenant Act 1954. The lease had expired and was being continued under the 1954 Act. Another code operator (CTIL again) initially gave Code paragraph 20 notices seeking new rights under Part 2 of the new Code. As a result of Compton Beauchamp, V assigned the lease to CTIL, which then gave a fresh notice seeking new rights under Part 2. In response, the recipient of the notice took two jurisdiction points:

1) The recipient was not in occupation – CTIL was – so the UT had no jurisdiction under Code paragraph 20.
2) CTIL was a tenant under a pre-Code lease protected by the 1954 Act, so the only way it could obtain new rights over the site was by applying to the county court for a new lease.

This required the UT to consider the transitional provisions in Schedule 2 to the Digital Economy Act 2017. In simple terms, the transitional provisions apply the Code in a modified form to pre-existing agreements which satisfy the definition of 'subsisting agreement'. There are some exceptions to this, one of which is a contractual tenancy which is within Part 2 of the 1954 Act and has not been excluded from the security of tenure under that 1954 Act. That was the case with the lease in Ashloch, which was continuing pursuant to the 1954 Act.

CTIL made the bold submission that a sitting operator *always* has the option of applying for new rights under Part 4, and could apply under Part 4 even while it had the benefit of a continuing agreement. That was rejected. The UT analysed Compton Beauchamp in some detail and considered that it was an insurmountable obstacle to CTIL's argument. The UT also held that there was nothing in the Code to support CTIL's submission, and that it sought to undermine the principle that once an agreement has been made or imposed under the Code, the terms are settled for the duration of that agreement.[6]

The result in Ashloch was that CTIL's only route to a new agreement was through the 1954 Act. It was recognised, though, that any new tenancy would be excluded from 1954 Act protection if it was entered into for Code purposes (see [108], based on Compton Beauchamp at [63] – see above), with the result that Part 5 would apply on expiry of the new tenancy. Presumably CTIL will be asking the county court for a short new term, and the landlord a long one.

An appeal in Ashloch is outstanding, so the Court of Appeal will have another opportunity to review this. Should it reach a different conclusion? This probably depends on your point of view, but I respectfully suggest that the reasoning is sound, for the following reasons:

- There is nothing inherently wrong with the Code in requiring renewals to proceed under Part 5 rather than Part 4.
- The reasons put forward by CTIL as to why Parts 4 and 5 should be alternatives were questionable, and were roundly rejected by the UT.

[6] For example, under Part 5, any renewal, modification or replacement can take place only after the earliest point at which the existing agreement can be brought to an end (see, in particular, Code paragraph 33(3)(b)). This has the potential to cause difficulties for operators, but it is questionable whether this issue justifies a wider interpretation of Part 4, given the specific provisions of Part 5. The answer may be to seek shorter agreements, or more flexibility in the terms of any agreement itself. Whether upgrading and sharing rights more flexible than those in Code paragraph 17 can be included in an *imposed* agreement has yet to be resolved, as have any implications for the consideration payable.

- An option always to apply under Part 4 rather than Part 5 would undermine the purpose of Part 5.
- The real issue in Ashloch was a transitional one. Paragraph 6(2) of the transitional provisions (the paragraph which excludes Part 5 in relation to 1954 Act protected tenancies) reflects a policy choice. CTIL's aim in Ashloch seems to have been to bypass that policy choice, so as to be able to take advantage of the more beneficial regime under the new Code sooner than the Government intended.

Sitting operators with precarious rights – a problem?

Building on Compton Beauchamp and Ashloch, the consequences for sitting operators have been developed further in the recent decision of Judge Elizabeth Cooke in Arqiva Services Ltd v AP Wireless II (UK) Ltd [2020] UKUT 0195 (LC), decided on 19 June 2020. Here, the code operator was Arqiva.

This case concerned rights originally granted under the old code in 1997, in the form of a lease. The difference between this case and Ashloch was that the lease was contracted out of statutory protection under Part 2 of the Landlord and Tenant Act 1954. The lease had expired, and the Judge accepted Arqiva's submission that it had been replaced by a tenancy at will and not by a new periodic tenancy, although in the end this would not have made any difference.

Of greater interest are the answers to the further questions:

1) Was that tenancy at will a "subsisting agreement" within the meaning of the transitional provisions?[7] If it was, then Part 5 applied to it.

   Answer: No. The judge held that it was not an agreement for the purposes of the old Code and that, as a result, it was not a subsisting agreement within the meaning of the transitional provisions. This was because there was no permission in writing: the expired lease did not provide this.[8] She also rejected an argument that she should stretch the wording of the new Code to cover an oral tenancy which follows a written permission.

   According to the judge, that left Arqiva with no subsisting rights under either Code: only a tenancy at will.[9]

2) Could Arqiva apply for rights under the new Code?

   Answer: No: see Compton Beauchamp.

Is there a problem here? The judge clearly thought so. In a lengthy passage at [148]-[181] she discussed various aspects of the Code and its underlying policy, and concluded that "*a wrong turn may have been taken*" by the Court of Appeal in Compton Beauchamp.

[7] I note that it was Arqiva who was arguing this, presumably with the aim of seeking new rights under Part 4, and thereby overcoming the restrictions on the breadth of new Code rights pursuant to the transitional provisions.
[8] It is not clear whether it was argued that any permission was also not that of "*the occupier for the time being of [the] land*".
[9] She was clearly struck by this, but an appreciation of the old Code might make it less remarkable: see below.

I would respectfully agree with the Judge in Arqiva that there is a problem, but in order to identify it reliably, it is necessary first to go back to the old Code; and, in particular, to the provisions for protecting code operators after expiry of agreements.

There were no provisions in the old Code for the renewal of rights. Rather, apparatus could simply be kept on land[10] after the expiry of an agreement unless and until someone with the right to remove the apparatus sought to have it removed under paragraph 21 of the old Code.

It appears to have been understood that if that happened, a sitting operator could seek new rights under the general provisions of the old Code, even though it was in occupation. Indeed, it is difficult to see how the old Code could have operated so as to deal effectively with sitting operators with expired rights if this had *not* been possible, and it is implicit in paragraphs 21(4)-(6) and in paragraph 7(3)[11] that it was. How that result would have been reached is debatable: see below.

The Law Commission consultation paper makes no mention of any issue about this under the old Code, and it did not comment on it. Nevertheless, the Commission also assumed that new rights could be sought:

> "*Paragraph 21 is often referred to as a security provision. It ensures that apparatus installed under code rights cannot simply be removed when code rights come to an end or when the Code Operator no longer uses it. It may result in fresh code rights being created.*"

The Commission noted in paragraph 1.43 of its Report that "*considerable thought [will need to be] given to transitional provisions*", as mentioned in Ashloch at [45]. What was *not* referred to in either Ashloch or Arqiva, however, was footnote 36 to paragraph 1.44 of the Report, regarding the gradual change from the new Code to the old Code:

> *"… apparatus installed before enactment of the revised Code will eventually be the subject either of removal, or of consensual new rights under the revised Code, or of an application to remove it under the 2003 Code. If such an application results in the acquisition of new rights, those rights should be conferred under the revised Code."*

That footnote gives rise to three points:

1) First, the Law Commission had in mind that the position of a code operator after expiry of its rights would carry on as it was under the old Code unless and until an attempt was made by the landowner to remove apparatus (seemingly under paragraph 21 of the old Code).

2) Second, the Law Commission envisaged that if an application was made to remove the operator's apparatus[12], then a sitting operator would *at least at that point* be entitled in response to apply for code rights, and to do so under the new Code.

3) Third, it is not clear whether the Law Commission considered the possibility that a sitting operator might wish to apply for rights under the new Code *before* it was threatened with removal of its apparatus. However, the reference to "*consensual new rights under the*

[10] With no statutory obligation to continue paying.
[11] Which refers specifically to "*an application made in connection with proceedings under paragraph 21 below*".
[12] Which it seems to have envisaged being made under the old Code.

revised Code" (which could be agreed at any time) and to the conferral of new rights compulsorily only if an application is made under paragraph 21 of the old Code, suggests that it may have considered this, and that it may have intended that a code operator could *not* seek new rights compulsorily under the new Code at a time of its own choosing (as one aspect of its recommendation that the new Code should not be applied retrospectively).

It may be that only the second element is the true problem: or, at least, the relevant problem in Arqiva. If so, then that may lead to a different solution from that which some code operators have been pursuing so far.

How has this difficulty for sitting operators come about? Arguably, it is not the result of Compton Beauchamp, but of other factors. A few suggestions may give food for thought:

- The entitlement of a sitting operator to apply for new rights is implicit in the old Code, but how would that result have been reached if a court had been asked to consider it (or were asked now to do so)? This is unclear:

    - It is possible that this was a result of old Code paragraph 21(5). This might have been how the Law Commission understood it, albeit without analysis[13]. If so, then either the omission of any equivalent provision in the new Code has created an unintended problem, or the transitional provisions were defective (see below).

    - There might have been an implicit or implied right for a sitting operator to apply for new rights when paragraph 21 was triggered, despite the references to the "occupier" in paragraph 5. The basis for this might have been found in the structure of the old Code, and in a combination of paragraphs 21(4)-(6) and 7(3) (see above). If so, then the change in structure in the new Code may have had an unintended consequence. However, that might yet be avoidable in a similar way, by reference to different provisions of the new Code[14]. If so, then that may not require the main issue in Compton Beauchamp to be revisited.

    - It is possible that old Code paragraph 5 – the equivalent of new Code paragraph 20 – would have been interpreted as applying generally to a sitting operator. If so, then Compton Beauchamp has interpreted the equivalent provisions in new Code in a different way. A different interpretation of similar concepts does not seem to have been intended.

    - It is also possible that there was simply a gap in the old Code which has been carried over to the new Code: a gap that needed before, and needs now, to be filled. Compton Beauchamp did not do that.

- Perhaps importantly, paragraph 27(2) of the old Code provided that "*The provisions of this code, except paragraphs 8(5) and 21 … shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.*" That might have had the effect of

[13] See paragraph 6.17 in the Law Commission Report, text and footnote 16.

[14] This may have been what the UT had in mind at first instance in Compton Beauchamp ([2019] UKUT 107 (LC) at [82]), although it did not explain its thinking in detail. See also Arqiva at [128]-[129] and [142]-[143], together with the suggestion at [140] that new Code paragraph 22 might be the key to this.

preventing an application being made for rights under paragraph 5 that would have affected an existing code rights agreement[15]. If so, this is could have ameliorated the effect of a wider interpretation of paragraph 5. There is an equivalent provision in the new Code – paragraph 100(1) – but now it "*does not apply in relation to [Part 4]*" (see paragraph 100(2)). The effect of paragraph 100 was discussed by the UT in Ashloch[16], where the *operator* sought to rely on it to support its case for a wide interpretation of Part 4. The UT's approach in Ashloch still leaves open the contrary possibility that it might have the same effect as the old Code paragraph 27(2), but that may require a rather creative interpretation of paragraph 100(2)[17].

- In order to avoid the 'black hole' between the old and new Codes identified in Arqiva[18], what was arguably needed in the new Code was just a *specific* provision giving a sitting operator the right to seek new rights under new Code paragraph 20 if, *but only if*, (1) it has no subsisting right to keep apparatus on a site, and perhaps also (2) it is under a threat of having its apparatus removed (as under old Code paragraph 21).

- That could have been done under the transitional provisions, by catering for situations following expired agreements where apparatus on site was protected under paragraph 21 of the Old Code. Arqiva decides that the transitional provisions did not do this. Arguably they should have done, for these reasons:

    - The security for code operators provided under paragraph 21 of the old Code has become a different form of security under Part 5. The former gave security *despite* Code rights having come to an end. Part 5 gives it by *continuing* Code rights.

    - The transitional provisions could have recognised that paragraph 21 of the old Code gave a form of security of tenure to those who did *not* have the benefit of a "subsisting agreement", and have brought them into the new Part 5 regime. There are likely to be many cases in which code operators were depending on paragraph 21 where rights had expired[19].

    - This would be a narrower solution than a broad interpretation of "occupier" – and would not have helped CTIL in Compton Beauchamp – but arguably it would deal with the true problem.

- However, this omission from the transitional provisions may have been deliberate. Paragraph 20(3) of the transitional provisions indicates that it was thought that a sitting operator would be entitled to apply for new rights under the new Code in the same way that it could do so under the old Code[20]. Paragraph 20(3) applies only where a notice had

[15] See Law Commission Report, paragraph 6.9.
[16] See [79]-[87].
[17] This might be assisted by the Explanatory Notes, but the relationship between these and the wording actually adopted in the Code is far from straightforward.
[18] See Arqiva at [82].
[19] As confirmed in Arqiva at [170], although on the basis that these would usually involve tenancies at will.
[20] It provides that: "*For the purposes of applying [old Code paragraph 21(2)] after the repeal comes into force, steps specified in a counter-notice under sub-paragraph (4)(b) of that paragraph as steps which the operator proposes to take under the existing code are to be read as including any corresponding steps that the operator could take under the new code or by virtue of this Schedule.*"

already been given under old Code paragraph 21(2), so it is of limited direct application, but it implies that it was believed that an application could be made under the new Code both in that situation *and* if an attempt was made to have apparatus removed under Part 6 of the new Code[21]. If that belief had been right, then apparatus owned by sitting operators whose rights had already come to an end, but who were not already subject to a removal process under old Code paragraph 21, would be protected under the new Code without transitional provisions being needed. This is in substance (if not in form) what the Law Commission seems to have envisaged[22].

- Arqiva says that they have lost this right. If Arqiva is correct, then this specific problem might be remediable by DCMS under the delegated power to make transitional provisions in s.5 of the Digital Economy Act 2017, perhaps by expanding the scope of Schedule 2. Questions of retrospectivity would need to be considered, but if this is an available solution, would it be right for the court to stretch Part 4 of the Code in order to cover this situation, with the result of opening up Part 4 to much wider application? Should it not leave it to DCMS to provide the remedy?

Before reaching a tentative conclusion on the true extent of the problem and the possible solutions, it is necessary to consider one other aspect of the new Code which was considered in both Compton Beauchamp and Arqiva.

Interim and temporary rights

Another part of Lewison LJ's reasoning in Compton Beauchamp concerns new Code paragraphs 26 and 27. These are to be found within Part 4.

CTIL gave an example of a situation in which Lewison LJ's approach to paragraph 20 did not fit with other provisions in the new Code. In particular, it was suggested that paragraphs 26, 27 and 40 implied that a sitting operator could obtain rights from a landowner as well as from an occupier. Lewison LJ rejected the argument, on the basis that the sitting operator could acquire interim or temporary rights under paragraphs 26 and 27, without also being entitled to seek permanent rights under paragraph 20. He did so in the following passages:

> *"67. [CTIL] 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). 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.*

[21] Probably under new Code paragraph 37(2), given that "code right" in the new Code would seem not to cover the status of a sitting operator under the old Code whose rights had expired.

[22] The Law Commission seems to have envisaged that the old Code would continue in relation to the removal of the apparatus of sitting operators, rather than the new Code be applied, but in fairness this is based only on a footnote and would not doubt have been seen by the Commission as one of the areas needing careful consideration.

> *73. … 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."*

His comment on paragraph 40 (at [80]) was briefer:

> "*… para.40(8) prevents the making of an order if an application under para.20 has been made and has not been determined. In my judgment para.40(8) presents a barrier to the contention that Compton is currently entitled to require [V] to remove its apparatus.*"

These passages are not easy to follow and are problematic. Apparently, the former, at least, "*came as a surprise*" to CTIL[23]. They have also been undermined by subsequent decisions.

For those who follow the detail of the Code, these are some of the key points:

1) Lewison LJ started by commenting that, "*It is a precondition to the application of either of these paragraphs that the operator has already given notice under paragraph 20*". However, if a sitting operator cannot apply for the grant of new rights under paragraph 20, then how can it serve a notice under paragraph 20 that has any legal effect? The judgment appears to assume that a notice can be served anyway, for the sole purpose of supporting an application under paragraph 26 or 27. That is at least a little odd. It is also unexplained.

2) There is a related oddity. When Lewison LJ concluded that the rights of a code operator in occupation to renew its rights are "*governed (at least principally) by Part 5*" he nevertheless seems to have had in mind that an application might be made by a sitting operator under paragraph 20. At [61] he observed: "*Accordingly, in many cases an application by an operator in situ need not be made under para.20: it may be made under para.34.*" That suggests that Lewison LJ did not interpret Part 2 as being *inapplicable* to code operators with existing agreements: merely that Part 5 is also available, thereby enabling them to overcome the difficulty under Part 4 that they are the ones in occupation. The UT has since interpreted the words "*at least principally*" as referring only to the scope for a sitting code operator to seek interim and temporary rights under paragraphs 26 and 27 (in Part 4), not to the potential application of the remainder of Part 4 (Ashloch at [73] – see below) – but it is not clear that this is what Lewison LJ really meant, and there was no comment on the sentence I have quoted from [61]. Nevertheless, Compton Beauchamp has been taken to have decided that no application can be made under paragraph 20 by a sitting operator (Ashloch and Arqiva).

[23] See the inhouse legal analysis published by CTIL on 17 July 2020, here.

3) In any event, so far as paragraph 26 is concerned, the UT had already decided and explained that interim rights could be sought under paragraph 26 without also seeking permanent rights under paragraph 20. This was subsequently confirmed by the Court of Appeal itself on 26 November 2019 in Cornerstone Telecommunications Infrastructure Ltd v University of London [2019] EWCA Civ 2075 at [68]-[84][24]. The Court of Appeal's reasoning (from a panel which included Lewison LJ) is rather different from that in Compton Beauchamp: indeed, it would seem to cut across it. In University of London, a contrast was drawn between the wording of paragraph 26 ("a notice *which complies with* paragraph 20(2)") and paragraph 27 ("a notice *under* paragraph 20(2)"). On that basis, the court decided that an application under paragraph 26 did *not* need a notice to have been given under paragraph 20: it merely needed a notice which contained the information required by paragraph 20(2)[25]. The court simply noted that this difference in language was "*not referred to*" in Beauchamp; but University of London would seem to undermine the reasoning in Compton Beauchamp as regards paragraph 26.

4) That leaves paragraph 27. The court's judgment in University of London says explicitly that:

> "*a notice "under" paragraph 20(2) is one which seeks the imposition of an agreement under that* paragraph*: i.e. an application for full code rights. That is reinforced by paragraph 27(1)(b) which provides that the notice "under" paragraph 20 must "also" require agreement on a temporary basis. Accordingly, the application under paragraph 20 and the application under paragraph 27 are inextricably linked. We do not consider that the wording of paragraph 26(3) compels the same conclusion.*"

On that basis, an application under paragraph 27 can only be made if an application can also be made under paragraph 20. That would seem to cut across Lewison LJ's approach in Compton Beauchamp[26]. Similarly, in Arqiva, the UT decided that because an application could not be made under paragraph 20, and the applications under paragraphs 20 and 27 should both be struck out: see [164]-[169] and [180]. In the judge's view, paragraph 27 is not the solution that Lewison LJ suggested.

5) A similar problem arises under paragraph 40. This provides the procedure for enforcing the removal of apparatus, along the lines of old Code paragraph 21. Paragraph 40(8) stipulates that an order cannot be made under paragraph 40 if an application has been made under paragraph 20(3) and not determined. This was clearly intended to enable a sitting operator to apply for rights under the new Code, and it seems that Lewison LJ contemplated

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[24] It is also the same approach as has been taken in Scotland: see EE Ltd v MacDonald, 6.3.2020, LT (Scot) and Arqiva Ltd v Kingsbeck Ltd (21.5.2020), LT (Scot) (where an application for interim rights under the new Code was accepted as valid at the same time as separate applications for temporary and permanent rights under the old Code)

[25] If this is right, then it is tempting to suggest that it is paragraph 27 that should have used the term "interim" (given that it applies until the determination of proceedings for a new agreement or for removal of the electronic communications apparatus) and paragraph 26 the term "temporary". The Oxford England Dictionary identifies several meanings of the word "interim", but they all involve something which is "in the meantime" – i.e. in the time between now and something else happening. Not so in the Code, it seems: nothing ever need follow an "interim" right, or even be wanted.

[26] It is also difficult to see how the UT's attempt in Ashloch at [28] to explain this part of Compton Beauchamp can survive the decision in University of London. It is also in conflict with the later decision in Arqiva.

that an application made under Code para.20 could be effective for this purpose even if it was made against a person who was not the occupier. But if the presence of apparatus makes the operator the occupier, the scheme does not work.[27] The operator is not entitled to apply under para.20. As identified in in Arqiva, the UT would have no jurisdiction to deal with the application and would be obliged to strike it out[28]. How can an invalid application under para.20 have the effect envisaged under paragraph 40(8)?

That leaves us with significant question marks over Lewison LJ's solutions to the problems in Compton Beauchamp. Without those solutions, there appears to be a lacuna in the new Code in relation to paragraphs 27 and 40.

A lacuna was clearly not intended. The Law Commission Report recommended[29] that:

> *"the revised Code should provide that where a Code Operator has applied for Code Rights in respect of apparatus that is already situated on land,* that *operator should also be able to apply for such temporary rights as are reasonably necessary for securing that, pending the determination of the application for Code Rights, the service provided by the operator's network is maintained and the apparatus properly adjusted and kept in repair."*

New Code paragraph 27 was intended to provide for this. As drafted, it operates where Code rights are being applied for under paragraph 20 in circumstances where there was a risk of removal of existing apparatus. On this basis, paragraph 27 must have been intended to apply to sitting operators in situations covered by the old Code paragraph 21, once those conditions were satisfied. In the original consultation paper, the Law Commission itself identified some of the situations in which this might be needed[30]:

> *"We think that the categories of person entitled to require removal must include:*
> *(1) a landowner against whom code rights have expired – for example at the end of a lease;*
> *(2) a landowner on whose land apparatus has been installed pursuant to code rights, who has never been bound by those rights;*
> *(3) a landowner on whose land apparatus has been abandoned, because paragraph 22 provides that in these circumstances the operator is not entitled to keep the apparatus there; and*
> *(4) a landowner on whose land electronic communications apparatus has been installed by mistake – for example because of an error over the position of a boundary."*

The problem is that new Code paragraph 20 does not seem to cover these situations, if the presence of the apparatus means that the operator is in occupation. Here, the problem identified in Arqiva is revealed as one aspect of a wider one. Sitting operators with apparatus on site were intended to be able to apply for new rights whenever they are at risk of being required to remove their apparatus under Part 6, at least in *some* situations. Under the new Code – at least as interpreted in Compton Beauchamp – they cannot do so in *any* situation.

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[27] Similarly, paragraph 37 deals with rights to remove apparatus. In that context, paragraph 37(4) speaks of land being occupied by someone who has conferred a code right; but if the apparatus leads to the operator occupying the land instead, then paragraph 37(4) is simply inapplicable, contrary to its apparent intention.
[28] Under rule 8(2) of the Lands Chamber Rules.
[29] In paragraph 6.134.
[30] See para.5.26, referring to the circumstances in which paragraph 21 might be operated.

It is an open question whether sitting operators were intended to be entitled to such a right in *all* situations covered by Part 6. For example, was this really intended where a Code agreement has been brought to an end under Part 5 (either through the operator having failed to serve a counter-notice or through the agreement having been terminated by order), given the detailed new procedure under Part 5? There is no readily identifiable answer to this in any policy statements. That makes it difficult to be sure of the right solution.

The way ahead?

There is undoubtedly some confusion in the drafting of the new Code, particularly in failing to appreciate that an operator may become the occupier. There may also have been a failure to appreciate how changes introduced in the structure of the new Code, and perhaps the omission or revision of a few somewhat obscure provisions in the old Code, could affect its operation. The difficult question is how the UT and the courts can and should respond to the confusion and the deficiencies in the drafting.

Compton Beauchamp has been subjected to a sustained challenge by at least some code operators. It might be said that some of those challenges have been aimed at securing wider rights than were ever intended (Compton Beauchamp and Ashloch), but at least in *some* circumstances, there clearly is a 'black hole' for sitting operators at the moment. The Upper Tribunal and the Court of Appeal are struggling to deal with this.

The latter may have an opportunity to look at it again if appeals are pursued in Ashloch and Arqiva. It is not easy to see how it can get around its own decisions in Compton Beauchamp and University of London. On the other hand, there are at least arguable routes to a solution which would honour the decisions in those cases while also enabling a sitting operator in the position of the operator in Arqiva to make use of Part 4. Will we see such a solution? That may depend not only on the Court of Appeal being satisfied that there is a viable and legally justifiable route to it, but also on code operators being prepared to argue for and to accept a narrower solution[31].

The core issue seems now to be out of the hands of the Court of Appeal, CTIL having recently announced that it has been given permission to appeal to the Supreme Court in Compton Beauchamp. The Supreme Court will not be impeded by any of existing decisions. Had the results of Compton Beauchamp been straightforward, it might have been questionable whether it would have taken a different view, but it might now be given pause for thought. However, if an expansive view of "the occupier" in new Code paragraph 20 means that code operators are given very wide rights indeed, cutting across the structure of the Code, then that may still prove to be a step too far, both as a matter of interpretation and as a matter of policy.

A narrower interpretative solution, in line with the general understanding of the old Code, might be the best (and right) answer, but there is no guarantee that either the Court of Appeal or Supreme Court will provide this. If not, then what else might be done?

Further transitional provisions might be a partial solution, and address the most pressing current concerns of sitting operators, but will still leave a lacuna.

[31] This might now be the position being adopted by CTIL: see its own analysis dated 17 July 2020 here.

The only other alternative may be further legislation. Given issues of retrospectivity, we may need that *before* the lacuna becomes a problem. Arguably, what is needed is no more than a structure under which a sitting operator may apply for code rights under Part 4 when faced with an application for removal under Part 6, with a possible exception where this is the result of the operation of Part 5[32]. Whether a sitting operator should be able to apply for *better* rights on top of *existing* rights[33] might also need to be considered. Changes of this sort need not be unduly complicated.

The Government has already proved itself willing to act in this area, through the Telecommunications Infrastructure (Leasehold Property) Bill, so there may be the necessary political will. Whether there is the capacity and energy needed to deal with it in Whitehall and Westminster is a bigger question.

Perhaps, by asking for too much, code operators have contributed to their own current misfortune. On any view, though, the Digital Economy Act 2017 did not get to grips with the situation in the way that all involved were entitled to expect. Perhaps those with current complaints should address at least some of their fire towards Oliver Dowden CBE MP, Secretary of State for Digital, Culture, Media and Sport, and/or Matt Warman MP, Minister for Digital Infrastructure.

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[32] And perhaps also where it is the result of a county court decision under the 1954 Act to refuse a new lease, or a voluntary decision by a code operator not to accept such a lease: compare Arqiva at [171] and [175].
[33] As suggested in Explanatory Note 499.
[34] The author is very grateful to **Tim Calland of Maitland Chambers** for reviewing a draft of this article. All errors and omissions remain those of the author.