UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – JURISDICTION – mast site subject to operator's tenancy at will following expiry of lease – tenancy at will terminated – whether site owner in occupation - whether Tribunal having jurisdiction to impose new Code agreement on site owner and third-party claimant if site owner not in occupation - reference dismissed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

COMPTON BEAUCHAMP ESTATES LIMITED

Respondent

Re: Gallyherns Farm,
Longcot,
Faringdon SN7 7QT

Martin Rodger QC, Deputy Chamber President and P D McCrea FRICS

Royal Courts of Justice
12-13 March 2019

Mr Jonathan Seitler QC and *Ms Myriam Stacey*, instructed by DAC Beachcroft, for the claimant
Mr Wayne Clark, instructed by Wilmot & Co Solicitors LLP, for the respondent

The following cases are referred to in this decision:

EE and another v London Borough of Islington [2019] UKUT 0053 (LC)

Longrigg, Burrough & Trounson v. Smith [1979] 2 EGLR 42

Javad v. Aqil [1986] 1 WLR 386

Loveridge v Healey [2004] EWCA Civ 173

Powell v McFarlane (1977) 38 P&CR 452

Wheat v E Lacon and Co [1966] A.C. 552

R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20, [2011] 1 A.C. 437

Prest v Secretary of State for Wales (1982) 81 LGR 193

R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12

EE Ltd & Hutchison 3G UK Ltd v London Borough of Islington [2019] UKUT 53 (LC)

Introduction

1. On the edge of an arable field in the Vale of White Horse, next to a cutting on the main Didcot to Swindon railway line, a telecommunications mast stands on a concrete base in a fenced compound. The mast is 15 metres high and supports two large panel antennae and two microwave dishes, with ancillary apparatus housed in three metal cabins at the foot of the structure. The mast and the apparatus on it belong to Vodafone Ltd which was granted a lease of the site in 2004 for a term of 10 years; since the expiry of the lease Vodafone has remained in occupation of the site.

2. Vodafone shares the use of the mast with Telefonica UK Ltd; both companies provide separate 2G, 3G and 4G services to the surrounding area and in particular to the railway line.

3. The claimant, Cornerstone Telecommunications Infrastructure Ltd, is a joint venture formed by Vodafone and Telefonica (which are independent and unconnected companies) to own and manage a combined portfolio of telecommunications sites contributed by each of them. Each company owns half of the shares in the claimant and their intention is that each shall continue to provide their own separate services using infrastructure provided to them by the claimant.

4. The mast is situated off Old Wharf Road at Longcot, about six miles east of Swindon town centre on land belonging to the respondent, Compton Beauchamp Estates Ltd, and forming part of its Galleyherns Farm. Galleyherns Farm comprises about 188 acres and is within a much larger estate of about 10,000 acres owned by the respondent.

5. In this reference the claimant seeks the imposition by the Tribunal of an agreement under the new Electronic Communications Code ("the Code"). The proposed agreement is a lease by the respondent in favour of the claimant which, if granted in the terms sought, would allow the claimant to occupy the mast site to the exclusion of the respondent and all others and to exercise the full range of Code rights. Rights over the site were first requested by a notice given by the claimant's solicitors to the respondent under paragraph 20 of the Code on 19 June 2018.

6. These are not the only proceedings concerning the Galleyherns Farm mast site. As we shall explain possession proceedings were commenced in the County Court in 2017 when negotiations for a new lease broke down. In those proceedings the respondent claims possession of the site from Vodafone whose defence is that it is in occupation under a periodic tenancy with security of tenure under the Landlord and Tenant Act 1954.

7. The reference raises a number of important issues for the first time. Of particular significance to the claimant is the question whether the Tribunal has jurisdiction to confer Code rights on it in circumstances in which a third party, namely Vodafone, is currently in occupation of the site.

8. At the hearing the claimant was represented by Mr Jonathan Seitler QC and Ms Myriam Stacey, and the respondent by Mr Wayne Clark. Factual evidence was given on behalf of the

claimant by Mr Mohamed Elhabiby, a senior networks manager for Vodafone, and by Mrs Tina Middleton, one of the claimant's in-house solicitors. For the respondent factual evidence which was not challenged was given by Mr Matt Retsall of The Phone Mast Company, and by Mr Richard Salmon, a director and company secretary of the respondent. Expert evidence was given by Mr Anthony Chase FRICS for the claimant and by Mr Ian Thornton-Kemsley MRICS for the respondent.

An outline of the issues

9. The reference gives rise to four main issues; in the order in which they logically arise they are as follows.

10. The first issue is one of principle concerning the Tribunal's jurisdiction (Mr Seitler QC referred to it is a "capacity issue"). It is whether the Tribunal can make an order pursuant to paragraph 20 of the Code imposing an agreement between the claimant and the respondent where a third party, Vodafone, is the occupier for the time being of the site. Mr Seitler QC informed us at the start of the hearing that he was instructed by Vodafone to offer such undertakings as might be required that it would give up its current rights so far as was necessary to enable a new agreement to be imposed to which it was not a party. Mr Clark's response was that the issue was not one of mechanics but went to the Tribunal's jurisdiction to make any order at all which was a question of construction of the Code.

11. The second issue is whether the claimant can satisfy the second qualifying condition in paragraph 21 of the Code which requires it to show that the public benefit likely to result from the making of an order outweighs the prejudice to the relevant person (who at this stage is assumed to be the respondent). It is the respondent's case that an agreement cannot be sought by the claimant where the site forming the subject matter of the proposed agreement is already being used, and can continue to be used in any event, for the provision of the same electronic communications services by the claimant's shareholders. The respondent also requires the claimant to establish that it otherwise satisfies the second qualifying condition and questions whether the Tribunal should exercise its discretion to impose an agreement in these circumstances.

12. The third issue arises if the Tribunal is to impose a Code agreement and concerns the terms of that agreement. By its notice under paragraph 20 of the Code the claimant sought the imposition of its standard form of agreement. The respondent has suggested a number of significant changes to that form. Some of these have been agreed but a large number of terms remain in dispute, which the parties addressed only in writing.

13. The fourth issue is, given the terms to be imposed by the Tribunal, what consideration ought to be paid and should any sum be paid in compensation? The claimant's expert, Mr Chase, based his figure for consideration on the value of the land for agriculture, which he ascertained by having regard to freehold capital values. On that basis he calculated that the consideration payable for the whole of the proposed 10-year term should be £26. The only compensation he considered to be payable was in respect of professional fees. Mr Thornton-Kemsley took a different approach, basing his assessment of consideration on alternative uses of land in rural locations, including but not only for telecommunications purposes. His figure was £9,500 a year assuming the claimant's terms are accepted by the Tribunal. He also assessed consideration on the basis of more conservative terms

(the OFCOM standard form of agreement) which he valued at £4,300 a year. As far as compensation was concerned Mr Thornton-Kemsley suggested that a sum of £37,000 should be payable to the respondent for the loss of the benefit of the rent payable for Vodafone's occupation of the site.

The Electronic Communications Code

14. The Code came into force on 28 December 2017 and replaces the original telecommunications code ("the old Code") in Schedule 2 of the Telecommunications Act 1984 ("the 1984 Act"). The new Code is found in section 106 and Schedule 3A of the Communications Act 2003 ("the 2003 Act"), which were inserted by section 4 of the Digital Economy Act 2017 ("the 2017 Act").

15. The Code sets out the basis on which electronic communications operators may exercise rights, known as "Code rights", to deploy and maintain electronic communications apparatus on, under or over land.

16. By transitional provisions contained in Schedule 2 to the 2017 Act an agreement which conferred rights under the old Code and which was in force as between an operator and another person when the new Code came into force on 28 December 2017 is known as a "subsisting agreement" (paragraph 1(4)). A subsisting agreement has effect after that date as an agreement under Part 2 of the Code (paragraph 2).

17. The claimant is an "operator" for the purpose of the Code, having been granted a direction under section 106 of the 2003 Act by OFCOM in May 2017. Vodafone and Telefonica are also operators in their own right.

Code rights

18. "Code rights" are defined in paragraph 3 of the Code. They are expressed under nine separate sub-paragraphs. It is sufficient for this reference to note that they include the right for the statutory purposes to install electronic communications apparatus on, under or over the land; to keep it installed; to inspect, maintain, adjust, alter, repair, upgrade or operate it; to carry out works on the land in connection with those activities; to enter the land; to connect to a power supply; to interfere with or obstruct a means of access to or from the land; and to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that may interfere with such apparatus.

19. A Code right may only be exercised for one of the statutory purposes specified in paragraph 4 of the Code, namely, for providing an operator's network, or for providing an infrastructure system.

20. Both "network" and "infrastructure system" are defined expressions. By section 32 of the 2003 Act an "electronic communications network" means a transmission system for the conveyance of signals of any description by the use of electrical, magnetic or electro-magnetic

energy, together with the apparatus comprised in the system. An "infrastructure system" is defined in paragraph 7 of the Code as a "system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purpose of the provision by them of their networks". Without attempting a comprehensive analysis of these provisions one way of understanding the distinction between the two terms is that a network comprises both the hardware (masts, lines, conduits etc) and the software necessary to provide a telecommunication service to customers, while an infrastructure system comprises only the hardware used in the provision of such a service.

21. Where the Code applies to an operator by virtue of an OFCOM direction under section 106 of the 2003 Act its "network" means so much of the electronic communications network or infrastructure system provided by the operator as is not excluded from the application of the Code by the direction (Code, paragraph 6(a)).

The acquisition of Code rights

22. Code rights in respect of land may be acquired by an operator in one of two different ways. Under Part 2 of the Code they may be conferred by an agreement between the occupier of the land and the operator; paragraph 9:

> "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 paragraph 11 explains, an agreement under Part 2 of the Code must be in writing, signed by or on behalf of the parties and must include a statement of how long the rights are to be exercisable and the period of notice required to terminate the agreement.

23. Paragraph 9 of the Code stipulates that a Code right may only be conferred by an "occupier". The meaning of "occupier" in relation to different types of land is explained by paragraph 105. Omitting provisions inapplicable to land in England which is not a footpath, bridleway or street the paragraph provides as follows:

> "105 **Meaning of *"occupier"***
>
> (1) References in this code to an occupier of land are to the occupier of the land for the time being.
>
> (2)-(4) ….
>
> (5) Sub-paragraph (6) applies in relation to land which—
>
> (a) is unoccupied, and
>
> (b) is not a street in England and Wales or Northern Ireland or a road in Scotland.
>
> (6) References in this code to an occupier of land, in relation to land within sub-paragraph (5), are to—
>
> (a) the person (if any) who for the time being exercises powers of management or control over the land, or

(b) if there is no person within paragraph (a), to every person whose interest in the land would be prejudicially affected by the exercise of a code right in relation to the land.

(7) …"

24. The alternative means of acquiring Code rights is under Part 4 of the Code. Paragraph 19 explains that Part 4 makes provision about the circumstances in which the court can impose an agreement on a person "by which the person confers or is otherwise bound by a code right". A court (or in England and Wales the Tribunal) may impose an agreement which confers Code rights on an operator by an order under paragraph 20.

25. Paragraph 20 describes the circumstances in which the Tribunal may impose an agreement for Code rights. Because of its importance to the issue of jurisdiction we will set it out in full:

"20 When can the court impose an agreement?

(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—

(a) to confer a code right on the operator, or

(b) to be otherwise bound by a code right which is exercisable by the operator.

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

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

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

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

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

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

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

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

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

26. By paragraph 22 an agreement imposed by an order under paragraph 20 "takes effect for all purposes of this code as an agreement under Part 2…".

27. It will be seen that an operator which requires a person to agree to confer Code rights, or to be bound by them, must first give that person a notice setting out the rights and the terms of the agreement the operator seeks and inviting the person's agreement to those terms (paragraph 20(2)). The recipient of such a notice is referred to as the "relevant person". If the relevant person does not agree the operator may apply to the Tribunal for an order under paragraph 20 imposing an agreement between the operator and the relevant person. The agreement will either be one which confers the Code rights on the operator, or will provide for them to bind the relevant person (paragraph 20(3)-(4)).

28. The test to be applied by the Tribunal in deciding whether to make an order imposing an agreement under paragraph 20 is contained in paragraph 21 which provides that two conditions must first be satisfied, as follows:

> "21. **What is the test to be applied by the court?**
>
> (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.
>
> (4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.
>
> (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."

Terms of Code agreements

29. The terms which may be imposed by the Tribunal are specified in paragraph 23(1) as being the Code rights sought by the operator "with such modifications as the Tribunal thinks appropriate". The terms must include terms for the payment of consideration by the operator to the relevant person for their agreement to confer or be bound by the Code rights (paragraph 23(3)). Such terms must also be included as the Tribunal thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the Code rights to those who occupy the land, own interests in it, or are from time to time on the land, whether or not they are party to the agreement (paragraph 23(5)-(6)).

30. Detailed provisions are contained in paragraph 24 for the determination of the consideration payable for a Code agreement entered into or imposed by the Tribunal. These provisions have recently been considered by the Tribunal in *EE and another v London Borough of Islington* [2019] UKUT 0053 (LC) and it is not necessary for us to refer to them in detail at this stage. The operator is obliged to pay the relevant person an amount representing the market value of their agreement to confer or be bound by the Code right (paragraph 24(1)). That market value is assessed on a conventional willing buyer/ willing seller basis, subject to certain assumptions, including the "no-network" assumption i.e. that the right that the transaction relates to does not relate to the provision or use of an electronic communications network (paragraph 24(3)(a)).

31. In addition to consideration for the rights conferred, paragraph 25 allows the Tribunal to direct the payment of compensation by the operator to the relevant person for any loss or damage that has been or will be sustained by that person as a result of the exercise of the Code rights. Detailed compensation provisions are contained in Part 14, and particularly paragraphs 84 and 85, which it is not necessary to refer to at this stage.

How Code rights bind third parties

32. Where they are conferred by agreement Code rights will only bind third parties to the extent provided for by paragraph 10. The provision is elaborate but its effect is clear and can be summarised. Code rights bind successors in title to the interest of the occupier of the land by whom the rights were conferred (paragraph 10(2)(a)); such successors are treated as being parties to the agreement by which the rights were conferred (paragraph 10(3)). Code rights also bind the owners of derivative interests created after the rights were conferred, and any other person in occupation pursuant to rights granted by a person who was bound by the Code rights when the rights of occupation were granted (paragraph 10(2)(b)-(c)). By paragraph 10(4) a Code right also binds any other person with an interest in the land who has agreed to be bound by it (in which case, by paragraph 10(5), the right will also bind their successors in title to that interest, holders of derivative interests and subsequent occupiers under them).

33. Paragraph 10 does not provide that an agreement by the owner of land to confer a Code right under Part 2 will bind the owner of a derivative interest created before that agreement. Paragraph 10(2)(b) makes it clear that only a person with an interest in the land created after the right is conferred will be bound by it.

34. Nor can a tenant or other person in occupation become bound by a Code right against their will except by an order of the Tribunal under Part 4. That is because paragraph 9 prevents Code rights being conferred on an operator except by an agreement between the occupier of the land and the operator. An agreement by a person who is not the occupier of the land cannot confer rights.

35. In the light of paragraph 9 it can be seen that the purpose of paragraph 10(4) is not to provide a mechanism by which a tenant or other person in occupation may become bound by a Code right conferred by their immediate landlord. It is rather to enable a Code right conferred by

the agreement of the occupier to become binding on the occupier's landlord or other third party. Without paragraph 10(4) the owners of superior interests or their successors could not become bound by Code rights with the result that an operator could not obtain rights of longer duration than that of the occupier's interest in the land. This is important because by paragraph 37(2) a landowner who has never been bound by a Code right over their land is entitled to require the removal of the operator's apparatus from the land.

36. Paragraphs 9 and 10 therefore lay down two principles which apply to the conferral of Code rights by agreement. First, that a Code right may only be conferred by a person in occupation. And secondly that a Code right conferred by someone else may only become binding on a person with a pre-existing interest by their separate agreement or by an order of the Tribunal.

The continuation and termination of Code rights

37. To guarantee continuity in the provision of telecommunications services to consumers Part 5 of the Code provides for statutory continuation of Code agreements. By paragraph 30, where a Code agreement comes to an end and the rights conferred by it would cease to be exercisable under the terms of the agreement, the agreement itself is prolonged so that the operator may continue to exercise the Code rights conferred by it and the site provider continues to be bound by them. An agreement may only be brought to an end on limited grounds by a site provider by giving at least 18 months' notice. The operator may then give a counternotice and apply to the Tribunal for an order continuing the agreement on the same or modified terms or granting a new agreement.

38. The continuation of Code agreements by Part 5 of the new Code is in contrast to the effect of the old Code. An old Code agreement came to an end in accordance with its terms. Continuity of service was ensured by paragraph 21 of the old Code which restricted the rights of land owners to require the removal of electronic communications apparatus from their land and deemed its presence after the expiry of a Code agreement to be lawful.

Vodafone's occupation of the site

39. The site of the Galleyherns Farm mast was originally subject to a lease granted by the respondent to Vodafone on 25 March 2004. The lease was for a term of 10 years at a rent of £4,000 a year subject to reviews at 3 yearly intervals to the greater of the current open market value of the site or the commencing rent uplifted by RPI. It demised a rectangular area of 60 square metres shown on a series of drawings and granted Vodafone the right to erect, install and use a mast and its associated apparatus. The lease also granted rights of access from the nearest public highway; the access route follows a concrete farm road for 650m almost reaching the Galleyherns Farm buildings before diverting for a further 350m over un-made ground around two sides of the field to reach the site.

40. The lease included a prohibition on parting with possession of the site but permitted the sharing of the site with third parties wishing to install electronic communications equipment. That qualified right was subject to the proviso that the landlord must be notified in advance and

the tenant must pay 30% of any rental income or licence fee received by it from the third party in respect of the sharing arrangements.

41. The lease was contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954 and was not continued by the operation of the statute when it came to an end on 25 March 2014.

42. At that time the old Code was still in force. The respondent was not entitled to secure the removal of Vodafone's apparatus from the site except first by giving notice and then by obtaining an order of the court under paragraph 21 of the old Code. While the apparatus remained installed on the site, as against the respondent it was deemed to be there lawfully by paragraph 21(9) of the old Code.

43. No notice requiring the removal of Vodafone's apparatus was given by the respondent at the expiry of the lease and it remained lawfully on the site. The parties' evidence about what then occurred was superficial and incomplete. After the conclusion of the hearing the parties submitted additional documents and an agreed chronology together with a summary of the relevant legal principles. From the agreed chronology and documents the following sequence of events emerges.

44. On 21 March 2014, a few days before the expiry of the term, Vodafone made a payment of one quarter's rent in advance by BACS. On 31 March Mr Restall, the respondent's agent, returned the rent to Vodafone and pointed out that the lease had now expired. He stated that the respondent was allowing Vodafone to remain in occupation on a tenancy at will and proposed a six-month period for negotiation of a new agreement. This proposal was followed on 10 April by an email from Mr Restall marked "without prejudice and subject to contract" proposing the grant of new lease to the claimant, rather than Vodafone, at an increased rent. By the end of April 2014 Mr Restall had been put in touch with the claimant's agents, Galliford Try, and the parties were in negotiation.

45. The temporary arrangement proposed by Mr Restall in his letter of 31 March 2014 was a tenancy at will. Such a tenancy creates a legal estate, albeit a precarious one since it depends on the continuing will of each party (*Woodfall: Landlord and Tenant*, para 6.070). A tenancy at will is terminable by either party at any time. In the case of the landlord the tenancy is terminated by a demand for possession. For the tenant to terminate a tenancy at will it must both give notice to the landlord and give up possession; doing one without the other is insufficient (*Woodfall*, para 6.074).

46. Vodafone continued to pay rent by regular instalments, but it is not now suggested that the tender and acceptance of rent by itself gave rise to a new periodic tenancy. The parties agree that there is no rule that where a tenant holds over after a previous tenancy has been determined, the tender and acceptance of rent raises a presumption of a periodic tenancy. What matters is the intention of the parties, construed objectively having regard to all the surrounding circumstances. The critical question is whether on an objective fair consideration

or appraisal of the facts the inference sensibly and reasonably to be drawn is that the parties' intended that there should be a periodic tenancy.

47. Having regard to the well-known decisions of the Court of Appeal in *Longrigg, Burrough & Trounson v. Smith* [1979] 2 EGLR 42, and *Javad v. Aqil* [1986] 1 WLR 386 the parties also agree that holding over by a tenant during negotiations between the parties for a new tenancy after the expiry of a lease is a classic instance of an implied tenancy at will.

48. In this case a tenancy at will had clearly come into existence by the end of April 2014, whether expressly or by implication. That was the basis on which Mr Restall stated that the respondent would allow Vodafone to remain in occupation. The parties had embarked on negotiations within a few days of the expiry of the lease and although Vodafone was not the intended grantee of the proposed new lease it was so closely connected to the claimant (as the respondent knew) that its continued occupation of the site can only be taken to have been with the respondent's concurrence and with the intention that it would continue until terms were agreed with the claimant for a new lease or the negotiations broke down.

49. Negotiations for the grant of a new lease to the claimant reached the stage of draft heads of terms by October 2014 and comments on the claimant's standard form of lease by January 2015.

50. Matters proceeded slowly until at some point in the summer of 2017 the respondent became aware that Vodafone was already sharing the use of the mast with Telefonica (in fact this had been the position, unknown to the respondent, since August 2014). As a result, the respondent required an increased rent and a premium for the proposed new lease and threatened to serve a notice to quit if these were not agreed. The respondent's appetite for an increased rent was influenced by the decommissioning of a Telefonica site elsewhere on its land which it linked to the sharing of Vodafone's site.

51. The claimant was not prepared to offer improved terms and on 20 October 2017 the respondent gave notice to Vodafone terminating any tenancy will that might have arisen while the negotiations over a new lease had continued; the notice made clear that the respondent did not accept that any such tenancy had in fact arisen because Vodafone had been entitled to remain in occupation under the provisions of the old Code. We do not accept that analysis for the reasons we have already given above. Vodafone's status since the end of March 2014 had been that of a tenant at will during the continuation of negotiations. The tenancy at will was terminated on the receipt by Vodafone of the respondent's notice to quit.

52. The response of the claimant's solicitors appears to have been to claim that a periodic tenancy had arisen from the payment and acceptance of rent (the response itself is not in evidence). A further notice to quit was served on 31 October by the respondent's solicitors in the same terms as before except that it allowed Vodafone 28 days to quit. We are satisfied that the second notice was unnecessary and of no legal effect as the tenancy at will had already been terminated by the first notice.

53. The notice of 20 October 2017 also asserted the respondent's entitlement under paragraph 21 of the old Code to require the removal of the electronic communications apparatus from the site. On 31 October Vodafone served a counternotice under paragraph 21(4) of the old Code. As a result, Vodafone's apparatus on the site remained there lawfully and the respondent was not entitled to enforce its removal except in pursuance of an order of the court.

54. The respondent also gave notice to Telefonica under paragraph 21 of the old Code requiring it to remove its apparatus from the site. Telefonica's response, by its solicitors, was that it did not occupy the site.

The County Court possession proceedings

55. On 9 November 2017 the respondent issued proceedings against Vodafone and Telefonica in the Swindon County Court claiming possession of the site on the basis that the Vodafone lease had expired in 2014 and no new agreement had subsequently been entered into. The respondent acknowledged that Vodafone continued to enjoy rights under the old Code.

56. In its defence filed on 13 January 2018 Vodafone asserted that its rights under the old Code continued to bind the respondent after the expiry of the lease and that its rights under the transitional provisions of the new Code were now binding on it (that assertion was not explained by reference to any of the provisions of either Code and has not been pursued before us). Vodafone's primary pleaded position was that, following the expiry of the lease and because of its continued occupation of the site, a periodic tenancy had arisen which was protected by the Landlord and Tenant Act 1954. The notices served by the respondent were said to be invalid. Moreover, Vodafone asserted, until the respondent had terminated the periodic tenancy it was not entitled to require the removal of Vodafone's apparatus and its notice pursuant to paragraph 21 of the Code was also therefore invalid. As for Telefonica, it was agreed between all parties, and recorded in an order of the County Court on 22 January 2018, that it had no apparatus on the site and claimed no rights of its own under the old Code, so the proceedings against it were dismissed by consent.

57. The current reference was commenced on 3 August 2018, the right to a new agreement having first been asserted by the claimant by a notice given to the respondent under paragraph 20 of the Code on 19 June 2018. In their covering letter serving the notice the claimant's solicitors acknowledged Vodafone's continuing occupation of the site, positively asserted that this was by way of a periodic tenancy, and denied that the respondent was entitled to possession. Despite those assertions the notice itself sought an agreement between the claimant and the respondent, and nothing was said about the continuation or termination of Vodafone's existing rights.

58. The claimant's notice and its statement of case in the reference also sought the imposition of temporary Code rights under paragraph 27 pending the determination of the reference. On 24 August 2018, by consent, the Tribunal imposed temporary rights as sought. The Tribunal's order was expressly made without prejudice to the respondent's defence to the application under paragraph 20.

59. Once the reference to the Tribunal had been commenced it suited both parties to change the position they had adopted in the County Court proceedings.

60. On 24 October 2018 the respondent's solicitors, Wilmot & Co, wrote openly to Vodafone's solicitors informing them that the respondent was now prepared to agree that Vodafone had a periodic tenancy under the Landlord and Tenant Act 1954 and no longer sought to remove it or its apparatus from the site. They proposed that a consent order be entered into which would recognise that tenancy. In reply on 22 November, Osborne Clarke asserted on behalf of Vodafone that it continued to occupy the site as a tenant at will and pursuant to its rights under the Code and suggested that the proceedings should be terminated by a consent order on that basis. These tactical exchanges concluded on 24 January 2019 with the respondent's solicitors saying they relied on Vodafone's open position in its defence in the possession proceedings, and that if Vodafone wished to alter that position it would have to amend its defence.

61. In his submissions before the Tribunal Mr Clark relied on the admission made by Vodafone that it was a periodic tenant and sought to persuade us that the admission was determinative of Vodafone's status for the purpose of this reference. He pointed out that the admission could not be withdrawn without leave of the County Court under CPR 14.1(5) and that Vodafone has not in fact amended its defence to the claim for possession; its case in the County Court remained that it was a periodic tenant with security of tenure. The respondent had admitted that case in its solicitors' letter of 24 October.

62. Mr Clark added that if Vodafone sought to amend its defence to plead that it was not a periodic tenant the respondent could resist that application on the basis that it would be an abuse of process to deny the relief which the Claimant had previously sought and which had been admitted before the proposed amendment.

63. Mr Clark referred to *Loveridge v Healey* [2004] EWCA Civ 173 in which the Court of Appeal held that a court should decide whether statutory pre-conditions to the exercise of its jurisdiction to make an order for possession were satisfied in the same way it approached any other substantive issue in the litigation. The parties could agree the facts which conferred jurisdiction in which case they would not need to be investigated by the Court.

64. We do not accept Mr Clark's submissions on this aspect of the case. The issue in this reference is between the claimant and the respondent. Vodafone is not a party to the reference and an admission made by Vodafone in the County Court does not bind the claimant in this reference.

65. It was not suggested by Mr Clark that the exchanges between solicitors in October and November 2018 themselves created any new rights in favour of Vodafone – his case was based only on the suggested effect of Vodafone's pleading that it was a periodic tenant. No tenancy came into existence, even when the respondent's solicitors agreed with that assertion, and we are satisfied that no change in the parties' legal rights occurred as a result.

66. We therefore intend to approach the issue of the Tribunal's jurisdiction in this reference on the following factual basis. First, that until 25 March 2014 Vodafone was in occupation of the site pursuant to the lease granted to it in 2004. Secondly, that Vodafone's status changed and it had become a tenant at will by the middle of April 2014. That tenancy at will was brought to an end by the notice to quit served by the respondent on 20 October 2017, although Vodafone remains in occupation formally asserting a continuing right to occupy in the County Court proceedings. Vodafone has had no rights of occupation in relation to the site other than its right under the old Code which deem the continuing presence of its apparatus to be lawful and prevent its removal except by an order of the court. That was the position when notice was given by the claimant requiring the respondent to enter into an agreement to confer Code rights on it. The parties having agreed that the temporary Code rights granted by the Tribunal's order of 24 August 2018 were to be without prejudice to the respondent defence to the application under paragraph 20, it must also be taken to be the current position.

67. Although there was a hostile exchange of emails between the agents for the claimant and the respondent in July 2018 when Mr Restall suggested that if the claimant's valuer came to the site the police might be called, there is no suggestion that the respondent has taken any steps to resume possession of the site or go into occupation. At all times since March 2004 the occupier of the site has been Vodafone.

Issue 1: Can an agreement be imposed on the respondent while it is not in occupation?

68. The notice served by the claimant on the respondent under paragraph 20 of the Code on 19 June 2018 required it to agree to confer a Code agreement on the claimant in the form annexed to the notice. By paragraph 40(a) of its statement of case in the reference the claimant seeks an order under paragraph 20(4) conferring the rights sought in the notice for a period of ten years from the date of commencement of the agreement. Mr Seitler explained that the claimant wishes the term of the agreement to commence immediately on the making of the Tribunal's order.

69. It was no part of the claimant's case that Vodafone should be party to any agreement in any capacity, but Mr Seitler said he was instructed to undertake on its behalf, as he put it, "to surrender in the county court proceedings" and abandon its claim to a periodic tenancy protected by the Landlord and Tenant Act 1954. No notice of abandonment of Vodafone's defence has yet been given and it was our understanding that no such notice would be given until an order had been made by the Tribunal imposing a new agreement in the claimant's favour. Nor was it our understanding that Vodafone would concede the respondent's entitlement in those proceedings to an order for the removal of its apparatus from the site.

70. Mr Clark submitted that Code rights could only be conferred by a person who is the occupier of the land. As far as agreements under Part 2 of the Code were concerned paragraph 9 is explicit: "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". Under paragraph 2 of the old Code the agreement in writing was required "of the occupier for the time being of any land" in order to confer code rights. The new Code was not materially different.

71. We agree with Mr Clark's submission on the requirements of an agreement under Part 2, from which Mr Seitler did not dissent. To be in a position to confer Code rights by agreement a person must be an occupier of the land. It is clear from paragraph 105 of the Code that occupation for this purpose is a question of fact, rather than a matter of legal status; it means physical presence on and control of the land. Paragraph 105(1) explains that references to an occupier of land are to the occupier of the land for the time being. Where there is no person satisfying that description because the land is not occupied paragraph 105(6) identifies the person who for the time being exercises powers of management or control over the land (if there is one) as the occupier. Thus, the occupier is the person in actual control of the site for the time being.

72. It is obvious from the nature of Code rights themselves why they may only be conferred by an occupier. Code rights authorise an operator to be present on the land and to do things there which are likely to interfere significantly with the ability of anyone else to make use of it.

73. Mr Seitler submitted that as a matter of ordinary legal usage an "occupier" is not necessarily the person who is physically present on the land. The occupier might be the person who is entitled to possession. Mr Seitler gave no example of the circumstances he had in mind in which a person who was not physically present might nevertheless be an occupier. We have no difficulty in accepting that, in the absence of evidence to the contrary the person entitled to possession of land will be deemed to be in possession (one of the basic principles relating to the concept of possession identified by Slade J in *Powell v McFarlane* (1977) 38 P&CR 452, 470). For the purpose of the Code that entitlement to possession is likely to be sufficient to satisfy paragraph 105(6) if there is no other person in occupation. But we do not accept that the person with a right to possession is the occupier for the purpose of the Code if there is someone else in actual occupation.

74. Mr Seitler also pointed out that it is possible for more than one person to be the occupier of premises at any one time, and referred to *Wheat v E Lacon and Co* [1966] A.C. 552, a case under the Occupiers Liability Act 1957; liability under the Act depended on having a degree of control over the premises, and control, and thus occupation, could be shared. We do not doubt the correctness of that proposition, but it has no application in this case. The respondent is not jointly in occupation of the site with Vodafone, and Mr Seitler did not identify any basis on which it could be suggested that it was.

75. As we have explained above, at all times since 2004 the occupier of the site has been Vodafone. Mr Seitler relied on the fact that the respondent has itself issued possession proceedings against Vodafone in which it asserts that it is entitled to possession, but we do not regard that as relevant to the question of occupation. A legal entitlement to possession, on the one hand, and occupation for the time being, on the other, are not the same thing. There is inconsistency between the pleaded cases of both Vodafone and the respondent in the County Court and the positions the parties now take, but the facts are clear. The respondent went out of occupation of the site when it gave exclusive possession to Vodafone in 2004, and it allowed Vodafone to retain that exclusivity while it was tenant at will between April 2014 and 20 October 2017. When the respondent terminated the tenancy at will by notice it took no

steps to resume occupation. It asserted a right to possession in the County Court proceedings but that is not the same as taking occupation of the site, which it did not do. Vodafone remained in occupation.

76. It follows that the respondent could not have complied with the paragraph 20 notice given to it by the claimant on 19 June 2018. It was not the occupier and, because of paragraph 9, it could not enter into an agreement to confer Code rights without first going into occupation. It could not do that without Vodafone's agreement, because Vodafone's apparatus was lawfully on the site. That problem could no doubt have been overcome with Vodafone's cooperation, but the agreement proffered by the claimant said nothing about Vodafone; it did not (for example) provide for Vodafone to join as a party to surrender the periodic tenancy it claimed or to acknowledge that it had no such right.

77. That being the position, and the respondent being unable to confer the rights sought by an agreement under Part 2 of the Code without the involvement of a third party which was not provided for by the proposed agreement, is the position different under Part 4? Is the Tribunal in a position to impose an agreement on the respondent at all?

78. As Mr Clark acknowledged, as far as Part 4 is concerned paragraph 20 does not use the expression "the occupier" to identify the person on whom a Code agreement may be imposed by the Tribunal. Instead it refers to "the relevant person". Mr Seitler submitted that the respondent's focus on references to the occupier was therefore misplaced. Part 4 does not import the requirement of paragraph 9 and does not employ the term "occupier". Instead, paragraph 20(1) allows the Tribunal to impose an agreement whenever an operator requires the relevant person to agree to confer or be bound by a Code right. The "relevant person" is not limited to the occupier. The proper construction of paragraph 20(1), was therefore that the relevant person is the person who has been required by the operator to agree to confer the code right. In this case that was the respondent.

79. We do not accept Mr Seitler's submission on this point. As we have already described when considering how Code rights bind third parties, a clear distinction is maintained in the Code between an agreement by which rights are conferred (which may only be entered into by an occupier of the land) and an agreement to be bound by Code rights (which will have been granted by someone else). We agree with Mr Clark that paragraph 20 is drafted to accommodate this structure. Paragraph 20 refers to a "relevant person" not because an agreement to confer Code rights can be imposed on someone who is not an occupier but because two different types of order may be made by the Tribunal. The relevant person will either be an occupier who is to be compelled to confer rights, or will be a person who is to be bound by rights conferred by another.

80. There is nothing in Part 4 which suggests a fundamental departure from the rule laid down by paragraph 9 that only an occupier may confer rights. The nature of Code rights remains the same whether they are imposed or conferred by agreement, and it is necessary that the occupier should be involved in each case, whether voluntarily or by compulsion.

Paragraph 22 confirms that an agreement imposed by order under paragraph 20 takes effect for all purposes as an agreement under Part 2.

81. Mr Seitler also pointed out that it is expressly contemplated by the Code that rights can be granted to an operator who is itself in occupation. An operator might have been granted interim rights under paragraph 26 or temporary rights under paragraph 27 and might be the occupier of the site by virtue of those rights. In both cases the scheme of the Code contemplates that the operator might nevertheless still apply for paragraph 20 rights during the currency of its interim or temporary rights.

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

83. In this reference the claimant is not seeking an order that the respondent be bound by an agreement between it and Vodafone. It seeks an order for the respondent itself to confer Code rights on the claimant notwithstanding that the respondent was not an occupier of the site at the date of the notice, is not currently an occupier, and will not be an occupier when the order is made. It seeks the imposition of an agreement which makes no reference to the rights of Vodafone, and which does not require the concurrence of Vodafone. The imposition of such an agreement would have no effect on the rights of Vodafone.

84. Mr Clark submitted that the Tribunal does not have jurisdiction to impose a Code agreement requiring the respondent to confer rights which it is not in a position to confer and which cannot be effective without the concurrence of Vodafone or a separate decision of the County Court. Mr Seitler submitted that the Tribunal should proceed on the assumption that Vodafone would not be a sitting tenant. It had confirmed in a letter written to the claimant on 18 December 2018 that it would "terminate its occupational rights at the site in the appropriate manner at such time as is necessary to coincide with the adequate conferral of" Code rights on the claimant. Although Vodafone was not a party to the reference Mr Seitler was instructed to offer an undertaking on its behalf that it would abandon its defence in the possession proceedings.

85. We agree with Mr Clark that this issue goes to the jurisdiction of the Tribunal to make the order sought.

86. It is important to bear in mind when considering the effect of Part 4 of the Code that it involves the imposition by the Tribunal of intrusive rights on unwilling parties. It is properly regarded as a variety of compulsory acquisition and we consider it should attract the same cautious approach to its interpretation as has always been applied to powers of compulsory purchase.

87. That approach was considered by the Supreme Court in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 A.C. 437. Lord Collins of Mapesbury considered the relevant authorities at paragraphs 9 to 11, summarising their effect as follows:

> "9. … The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose ...

He referred also to *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 in which Lord Denning MR said that it was "a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament …" Finally, a decision of the High Court of Australia was cited, *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 in which, referring to private property rights subject to compulsory acquisition, French CJ said at paragraph 43: "where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."

88. Paragraph 20 of the Code lays down a procedure for the imposition of Code rights which the Tribunal is not free to depart from. That procedure requires the operator to identify in its notice under paragraph 20(2) inviting agreement both the Code right and "all of the other terms of the agreement that the operator seeks". Having regard to the principle referred to by Lord Collins, it is those rights, and no more, which the operator may apply to the Tribunal to have imposed on the unwilling occupier of the land (we say nothing at this stage about whether an application can be made for lesser rights). The right to apply to the Tribunal is triggered by the refusal of the relevant person to confer or otherwise be bound by the Code right sought: "The operator may apply to the court … if (a) the relevant person does not … agree to confer or otherwise be bound by the code right" (paragraph 20(3)). The order which the Tribunal may make under paragraph 20 is either one which "confers the code right on the operator" or provides for that right to be made binding on the relevant person (paragraph 20(4)).

89. The clear effect of the procedure is that if the relevant person has not been asked to agree to confer the rights or to be bound by them, no application may be made in respect of them. If the claimant's notice had been framed under paragraph 20(1)(a), requiring rights to be conferred on it by the occupier, we do not consider the Tribunal would have jurisdiction to make an order under paragraph 20(4)(b) providing for the rights to bind that person because they are not in occupation. The claimant could have reached agreement with Vodafone for it, as occupier, to confer rights on the claimant, and could then have asked the Tribunal to impose an agreement providing for those rights to bind the respondent, but it did not do so.

90. We also interpret paragraph 20(3) as meaning that if the relevant person does not agree to confer the Code rights on the terms proposed by the operator, the operator may apply to the Tribunal for an order imposing both the rights and the terms. The reference in paragraph 20(3)(a) and (b) to "the code right" must be taken to be a reference to the whole of what has been proposed in the notice served under paragraph 20(2) i.e. "the code right, and all of the terms of the agreement that the operator seeks." If that were not the case, there would be no way of resolving a dispute over the terms of the agreement where the Code rights themselves were agreed.

91. On that basis we consider there are two fatal objections to the claim.

92. First, the agreement which the claimant asks to be imposed would not confer Code rights on it because the respondent is not in a position to grant those rights. In our judgment the respondent cannot be made subject to an order compelling it to do that which it is unable to do. An operator could not ask a landlord to confer Code rights on it, and nor, we consider, could it ask any other landowner who was not in occupation to do so. The Code proceeds on the basis identified in paragraph 9 that the recipient of the operator's notice is in a position to confer the rights sought because they are in occupation. Where the recipient of the notice is not in occupation when the Tribunal is asked to make the order we consider that the Tribunal lacks jurisdiction to do so.

93. This is an extreme case because Vodafone's rights are so precarious and there is every reason to believe it would cooperate in allowing the claimant to take occupation of the site. But there is nothing in the Code which differentiates between third parties in occupation who are well disposed to the imposition of rights over the site and those who are hostile. If, as we have concluded, the Tribunal lacks jurisdiction to impose an agreement on a site owner who is not in occupation, we are not entitled to bend the rules because the third party which is in occupation might be expected to fall into line with the Tribunal's order.

94. Secondly, if we are wrong on the extent of our jurisdiction, at best in this case the Tribunal could impose an agreement which was contingent on Vodafone voluntarily giving up its right not to be removed from the site except by order of the court, and withdrawing its claim to be entitled to a periodic tenancy. Code rights could not be imposed until those steps had been taken. We are told that Vodafone is prepared to do those things and we accept that it would, but neither in its notice, nor in its statement of case, nor in the latest travelling draft of the agreement which the claimant relies on has the claimant sought a right contingent on Vodafone's concurrence or coming into effect at some time in the future when Vodafone's claims are abandoned.

95. The Tribunal asked Mr Seitler specifically about this matter during his submissions and was told that the claimant wanted the proposed rights to commence immediately on the making of the Tribunal's order and did not seek to involve Vodafone other than by the giving of an undertaking. For the first reason we have already given (even if we had jurisdiction) we do not consider that is possible. The respondent has not been asked to agree to a contingent right. We have heard no argument about whether it is necessary that such a right should have

been sought in the paragraph 20 notice, nor whether it would be consistent with paragraph 20(4) which arguably contemplates that the effect of an order is to confer rights immediately. The Code is a complex piece of legislation affecting many land owners; it is in its infancy and its effects are being worked out through a series of decisions of the Tribunal which, invariably, are vigorously contested. In those circumstances we do not consider that it is open to the claimant to ask the Tribunal to proceed on a different basis from that which it has claimed and for which it has argued. We do not reach that conclusion because of a lack of jurisdiction, but rather as a matter of case management.

96. In its recent decision in *EE Ltd & Hutchison 3G UK Ltd v London Borough of Islington* [2019] UKUT 53 (LC) at paragraphs 15 to 24 the Tribunal explained its reasons for refusing to allow a site provider to dispute the terms of a Code agreement proposed by an operator. The site provider had failed to comply with the Tribunal's directions designed to enable the disputed terms to be clearly identified so that the Tribunal could reach a conclusion without having to devote a disproportionate share of its limited resources to the reference. This case is not comparable in terms of compliance with the Tribunal's directions, but it is nevertheless true that the claimant's statement of case and the terms of the agreement which it seeks to have imposed would both require to be amended to reflect the involvement of Vodafone. No draft of either document has been produced in an amended form, no application to amend has been made, and no argument has yet been heard about whether such an application should be permitted; nor has the undertaking which Vodafone is said to be willing to offer been reduced to writing.

97. The claimant has long been aware of the respondent's case on its inability to confer rights because it is not in occupation. In its statement of case served in September 2018 the respondent identified Vodafone as being in occupation and asserted that until Vodafone terminated or renounced the rights it asserted in relation to the site the respondent had no entitlement to confer rights on the claimant because it did not have the right to immediate possession of the land. The Tribunal is entitled to proceed on the basis that the claimant has brought forward its full case in answer. It is not for the Tribunal to draft terms of the agreement which the claimant has not seen fit to propose but which would be necessary if the Tribunal were to impose an agreement on the respondent despite it being out of occupation.

98. For these reasons we will dismiss the reference.

99. We would add that it follows from the first ground of our decision that the Tribunal had no jurisdiction to impose temporary rights on the claimant and the respondent, as its order of 24 August 2018 made with the consent of both parties purported to do. Vodafone was in occupation at the time the order was made and continued to assert its own rights of occupation in the County Court. It was not a party to the order. Because it was in occupation only it could confer rights by agreement under Part 2 or have them imposed on it by order under Part 4. It is not necessary for us to consider whether, in principle, some species of Code rights by estoppel might be capable of coming into existence because it was expressly agreed by both parties, and recorded in the Tribunal's order, that the imposition of an agreement for temporary rights was without prejudice to the respondent's defence to the claim for rights under paragraph 20.

The other issues

100. We can deal with the remaining issues in less detail.

Public benefit

101. The second issue is whether the public benefit likely to result from the making of the order sought by the claimant outweighs the prejudice to the respondent. It is the respondent's case that an agreement cannot be sought by the claimant where the site forming the subject matter of the proposed agreement is already being used, and can continue to be used in any event, for the provision of the same electronic communications services by the claimant's shareholders. The respondent's claim was pleaded and argued on the basis that Vodafone was entitled to remain in occupation of the site as a periodic tenant on the terms of the original lease.

102. We are satisfied for the reasons we have already given that Vodafone has no such rights. It was a tenant at will but that tenancy has come to an end. Its rights under the old Code are precarious because the 2004 lease is not a pre-existing agreement for the purpose of the transitional provisions in the 2017 Act and is not continued as a Code agreement under the new Code. If an agreement is not imposed in favour of the claimant it would be necessary for either Vodafone or Telefonica to ask the respondent to grant them new Code rights and for the whole process to begin again. We are therefore satisfied that the balance of prejudice should be considered on the basis that there are, as yet, no property rights and (ignoring the temporary rights, as we must, in view of the without prejudice basis on which they were agreed) only very limited old Code rights in existence.

103. It has not been suggested that the prejudice to the respondent of being made subject to a new Code agreement is incapable of being compensated in money. As there are no subsisting property rights we are satisfied on the evidence of Mr Elhabiby that the public benefit resulting from the making of an order for a new agreement would outweigh the prejudice to the respondent. Had it been the case that Vodafone did have a right to possession of the site under a periodic tenancy on the terms of its original lease (which allowed sharing) we would have faced a much more difficult decision. The claimant advanced an unpleaded case on public interest which essentially equated its own commercial interest with the public interest in access to a choice of high quality electronic communications services. That case was argued exclusively on the basis of documents already in the public domain, including self-serving press releases and similar promotional material, exhibited to the witness statement of its solicitor Mrs Middleton. We formed no view on what this voluminous evidence really proved, but it was open to the criticism levelled by Mr Clark that it did not explain why the same benefits as were said to accrue to the public could not equally be obtained by the continuation of the previous arrangements with Vodafone.

The terms of the Code agreement

104. The third issue concerns the terms of the agreement which we have decided will not be imposed. The two days requested for the hearing did not allow time for oral submissions on

the disputed terms. We have received extensive written material, from which it is clear that there are a number of issues of principle, but it would not be a good use of the Tribunal's resources for us to address those issues in this reference. Similar issues arise in other cases waiting to be determined and they are better dealt with then.

Consideration

105. The final issues concern consideration and compensation. There is a limit to what we can usefully say without first determining the terms of the agreement, but we heard oral evidence and cross examination of the experts which enables us to make some observations intended to be of assistance in the preparation of other cases.

106. Mr Chase's approach on behalf of the claimant could be described in shorthand as "pro-rata existing use". He sought to determine the annual rental value of the site for non-Code purposes using the freehold capital value of arable land in the district as his starting point, which he decapitalised to give a notional annual equivalent and then assumed that a small parcel of land would have the same value per square metre as a much larger block.

107. Where no other potential alternative use can be identified by reference to evidence of similar sites, existing use value may provide an appropriate starting point for determining consideration (as it did in *EE and another v London Borough of Islington* where the evidence established that an inner-London roof top had no alternative use but for telecommunications). But there were two weaknesses in Mr Chase's approach – the freehold rate adopted, and the yield used to convert that freehold rate to a leasehold equivalent. Whilst both were agreed as figures with Mr Thornton-Kemsley, it became apparent during the hearing that their application had not been agreed.

108. Mr Chase's method, being based simply on a pro-rata apportionment, seeks to derive a rate from transactions in which hundreds of acres of land change hands, and then apply it to a very small parcel. This exercise inevitably results in a tiny sum when converted to a leasehold annual figure. Mr Chase considered that the sum which would be agreed between willing parties as the annual rent for the site payable for a ten-year term would be £2.96 per year, equivalent to 5 pence per week, and the sum which would be agreed for rent and compensation combined would be £95 per year, or £1.82 per week. We are not persuaded that is right, and it is not consistent with the evidence we received from Mr Thornton-Kemsley of open market agreements relating to small rural sites let for non-telecommunications purposes.

109. As to yield, the two valuers had different views on what their agreed yield of 2% represented. We make no further comment on that, save to observe that an agricultural yield based on investment transactions would, we assume, reflect a triennial or quinquennial opportunity for the freeholder to review the rent, whereas Mr Chase applied it to a ten year term. If the yield is intended to be the return that a farmer would expect to achieve from having the land in hand, there seem to us to be difficulties in applying that yield to a freehold rate in seeking to determine a rent under the Code.

110. Putting those technical valuation difficulties to one side, there are other wider issues which it seems to us would be taken into account by willing parties and which are wholly overlooked by Mr Chase's approach. As in any valuation exercise, it is necessary to stand back and look at the product of the valuation method which has been adopted; if it seems improbably high or low, as Mr Chase's figures seem to us, it is necessary to ask critical questions. What are the consequences for the parties of entering into the transaction? We found force in Mr Thornton-Kemsley's evidence that many rural landowners have well founded reservations about allowing an operator to have relatively unrestricted access over their land. He provided evidence of difficulties which had been experienced in practice owing to breaches of bio-security, operators' vehicles becoming stranded, or interference with sporting rights. Risk factors of that sort might weigh in the hypothetical parties' minds when negotiating consideration. We are not persuaded that the tiny sums suggested by Mr Chase take into account the understandable reluctance of rural landowners to lose control of their land to the extent that entry into an agreement for Code rights is likely to entail, and we do not think his method is a reliable way of determining the market value of the landowner's agreement to be bound by the code right.

111. Mr Thornton-Kemsley's approach could be described in short-form as a "discounted network" valuation. He applied a series of discounts and adjustments to the headline rental values he deduced from this range of evidence to reflect what he considered to be the onerous terms proposed by the claimant. He undertook the same exercise by reference to alternative terms based on the OFCOM standard agreement. He concluded that the consideration under the claimant's terms should be £9,500 a year, while under the OFCOM terms it should be £4,300 a year.

112. To arrive at his headline figure Mr Thornton-Kemsley relied on three groups of comparables.

113. The first were "network" comparables, involving agreements for telecommunications uses which Mr Thornton-Kemsley adjusted to reflect the "no network" assumption by applying a fairly arbitrary discount of 35% based on discounts for restrictions of one sort or another allowed by courts or arbitrators in a variety of reported cases involving lease renewal or commercial rent review. He applied this discount to his own assessment of the sum which would be likely to be negotiated for Code rights, based on agreements entered into since the Code came into existence. We did not find this way of arriving at an appropriate adjustment convincing.

114. The second were a group of transactions which we were told were agreements under the new Code. But the details of these were sketchy, and the results inconsistent. It was not known whether there was any particular pressure on the operator in a particular location, nor whether the parties took into account the fact that the alternative to a negotiated agreement might be a Tribunal determination involving the "no network" assumption. The agreements are market evidence of the value of Code rights and if it could be demonstrated in the future that such transactions were agreed having regard to the statutory assumptions, or if a coherent basis for adjustment could be suggested, then such evidence might be persuasive. Mr Thornton-

Kemsley was not able to provide the required level of detail and was forced instead to make an arbitrary deduction in an attempt to reconcile the evidence with the no-network assumption.

115. The third group of transactions relied on by Mr Thornton-Kemsley were transactions in respect of similar rights granted for non-telecommunications purposes – weather stations, air-traffic control stations and the like. This sort of evidence has the advantage that it does not require adjustment to reflect the no-network assumption. It might therefore also be useful. Its value is likely to increase if it can be shown that the reference land may realistically be of interest to those types of user. The prospect of planning permission being forthcoming may also be a relevant consideration.

116. It is not necessary for us to reach any conclusion on the appropriate consideration in this case, nor would it be possible to do so without resolving the disputed terms of the agreement, a number of which may influence the valuation (although we say nothing about the scale of any relevant adjustments). We have indicated the main weaknesses we have found in the approaches taken by both valuers and we hope that the evidence presented in future references involving rural property will focus more closely on specific transactions in relevant comparable situations.

Compensation

117. Finally, the suggested claim for compensation representing the value to the respondent of its agreement with Vodafone is ingenious but unsustainable. Vodafone's occupation of the site is precarious and the respondent has no expectation of its continuation, or renegotiation, on terms as to rent similar to the original lease. In short, had the application under paragraph 20 succeeded, the respondent would not have lost the Vodafone rent because of the imposition of the new agreement. There is no reason to believe that, had it not been for the claimant's application, new terms would have been negotiated or imposed between Vodafone and the respondent which would have been more favourable than those which would have been imposed in this reference had it not failed on the first issue.

Disposal

118. For these reasons the reference is dismissed. If the parties are unable to agree a consequential order dealing with costs they should agree a short timetable for the sequential exchange of submissions.

Martin Rodger QC,
Deputy Chamber President

P.D. McCrea FRICS
Member

3 April 2019