

**UPPER TRIBUNAL (LANDS CHAMBER)**



**UT Neutral citation number: [2021] UKUT 167 (LC)  
UTLC Case Numbers: LC-2020-25**

**ELECTRONIC COMMUNICATIONS CODE – jurisdiction – termination and new agreement or modification of subsisting agreement – whether operator must plead site specific reason for new agreement – whether applicant can claim alternative relief not preceded by notice proposing change**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

**BETWEEN:**

**EE LIMITED AND HUTCHISON 3G UK  
LIMITED**

**Claimants**

**and**

**(1) DAVID PAUL STEPHENSON  
(2) AP WIRELESS II (UK) LIMITED**

**Respondents**

**Re: Land at Pendown Farm, Pendown Cross,  
Cornwall, TR4 9NE**

**Before: The President, Mr Justice Fancourt  
The Rolls Building**

**Hearing: 27 May 2021**

Mr Graham Read QC and Mr James Tipler for the Claimants  
Mr Christopher Pymont QC and Mr Wayne Clark for the Respondents

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The following cases are referred to in this decision:

*EE Limited / Hutchison 3G Limited v Duncan* [2021] CSIH 27

*O'May v City of London Real Property Co Ltd* [1983] 2 A.C. 736

*Cornerstone Telecommunications Infrastructure Ltd v Ashloch Limited* [2021] EWCA Civ 90

*Jenkin R Lewis & Sons v Kerman* [1971] Ch 477, 496

*Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 WLR 6096

*Wallis Fashions Group Ltd v CGU Life Assurance* (2001) 81 P&CR 28.

*Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EWHC 2224 (Ch)

*Edwards & Walkden (Norfolk) Ltd v City of London Corporation* [2013] 1 P&CR 10

## Introduction

1. This is the decision of the Tribunal on two preliminary issues in this reference, which were directed to be tried by order dated 4 February 2021. They raise important questions of law and practice about when and how applications to the Tribunal for a new code agreement under the Electronic Communications Code, as now set out in Schedule 3A to the Communications Act 2003 (“the Code”), can be made. The new version of the Code was inserted by the Digital Economy Act 2017 (“the 2017 Act”). In this decision, I shall use the word “application”, as the Code does, rather than the word “reference”, which is how the Tribunal’s own Practice Directions describe it.
2. The application in this case was made by the Claimants as operators under para 33(5) of Part 5 of the Code. It seeks an order for termination of the existing code agreement (an expired agreement dated 9 August 2011 that granted rights for a term of 13 years from and including 17 May 2006) (“the Lease”) and entry into a new agreement conferring code rights on the Claimants. The exact terms in which the application was made and the relief sought are of the essence of the preliminary issues and I shall revert to them in due course.
3. It is agreed that the existing agreement was in substance a demise of an identified site, with ancillary rights, for a term of years for the primary purpose of granting rights under the old electronic communications code in Schedule 2 to the Telecommunications Act 1984, and that it was validly contracted out of security of tenure under Part II of the Landlord and Tenant Act 1954 (“the 1954 Act”). When the Code came into force on 28 December 2017, the Lease was a “subsisting agreement” within the meaning of Schedule 2 to the 2017 Act (Transitional Provision) and it thereafter took effect as an agreement under Part 2 of the Code, subject to the modifications made by those transitional provisions.
4. As such, Part 5 of the Code (Termination and Modification of Agreements) applies to the rights conferred by the Lease and, notwithstanding the expiry of the term of years, the code agreement continues and rights conferred by the Lease continue to be exercisable by the Claimants until terminated pursuant to Part 5. The Claimants are therefore still bound by the terms of the Lease, including the annual market rent payable for the site, currently at the rate of nearly £5,700 p.a.
5. The lessor under the Lease was the First Respondent. About 8 weeks after the expiry of the term of the Lease, the First Respondent granted the Second Respondents (“APW”) a lease for a term of 50 years of the land that was demised by the Lease (“the reversionary lease”). Upon expiry of the term of the Lease, the First Respondent was therefore the “site provider” within the meaning of Part 5.
6. Upon grant of the reversionary lease, APW became a person bound by the continuing code rights. Whether it thereupon became a party to the continuing code agreement for the purposes of Part 5 of the Code is not wholly clear, but the parties are agreed that APW to the exclusion of the First Respondent is to be treated as the site provider for the purposes of the application. The First Respondent played no part in the hearing and indicated his willingness to be bound by whatever rights are granted to the Claimants.

7. The site demised by the Lease is an area of land 100m<sup>2</sup>, on which the Claimants agreed to and did erect a mast and cabinet containing telecommunications apparatus. The Claimants continue to use the site for electronic communications purposes.
8. On 21 June 2019, after the expiry of the Lease but before the grant of the reversionary lease, the Claimants served notices on the First Respondent pursuant to para 33(1) of the Code, requiring him to agree the terms of a new agreement. The notices were in the form prescribed by OFCOM, pursuant to para 88 of the Code, and it is not disputed that the notices served were valid. They stated that each of the Claimants required a change to the terms of the code agreement with effect from 27 December 2019, namely termination of the existing agreement and entry into a new agreement, in the form of the Claimants' standard, modern, greenfield lease, which was attached to the notices.
9. Under Part 5 of the Code, if the parties do not agree on the proposal within 6 months of the date on which the notice is given, the person serving the notice may apply to the Tribunal for it to make an order under para 34 of the Code: para 33(5). (An operator may similarly apply for an order under para 34 pursuant to para 32(1)(b), if the site provider has served on it a notice to terminate under para 31.)

### **The Para 34 Jurisdiction**

10. Para 34 of the Code is central to the matters in dispute between the parties. It reads as follows (omitting two sub-paras):

“(1) This paragraph sets out the orders that the court may make an application under paragraph 32(1)(b) or 33(5).

(2) The court may order that the operator may continue to exercise the existing code right for such period as may be specified in the order (so that the code agreement has effect accordingly).

(3) The court may order the modification of the terms of the code agreement relating to the existing code right.

(4) Where under the code agreement more than one code right is conferred by or otherwise binds the site provider, the court may order the modification of the terms of the code agreement so that it no longer provides for an existing code right to be conferred by or otherwise binds the site provider.

(5) The court may order the terms the code agreement relating to the existing code right to be modified so that –

(a) it confers an additional code right on the operator, or

(b) it provides that the site provider is otherwise bound by an additional code right.

(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which –

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

(b) provides for a code right to bind the site provider.

(7) The existing code agreement continues until the new agreement takes effect.

(8) This code applies to the new agreement as if it were an agreement under Part 2 of this code.

(9) The terms conferring or providing for an additional code right under sub- paragraph (5), and the terms of a new agreement under sub- paragraph (6), are to be such as are agreed between the operator and the site provider.

(10) If the operator and the site provider are unable to agree on the terms, the court must on an application by either party make an order specifying these terms.

(11) Paragraphs 23(2) to (8), 24, 25 and 84 apply –

(a) to an order under sub- paragraph (3), (4) or (5), so far as it modifies or specifies the terms of the agreement, and

(b) to an order under sub- paragraph (10)

(12) In the case of an order under sub- paragraph (10) the court must also have regard to the terms of the existing code agreement.

(13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to –

(a) the operator’s business and technical needs,

(b) the use that the site provider is making of the land to which the existing code agreement relates,

I any duties imposed on the site provider by an enactment, and

(d) the amount of consideration payable by the operator to the site provider under the existing code agreement.

.....”

In England and Wales, the jurisdiction of the court is exercised by the Upper Tribunal (Lands Chamber).

11. Para 34(3), (4), (5) and (6) mirror the terms of para 33(1) of the Code, which permits an operator or site provider by notice to require the other party to a code agreement to agree (in summary) that:
  - (a) the existing code agreement should have effect with modified terms;
  - (b) the existing code agreement should no longer provide for an existing code right to be conferred by or otherwise bind the site provider;
  - (c) the existing code agreement should confer an additional code right on the operator, or
  - (d) the existing code agreement should be terminated and a new agreement should have effect between the parties.

It appears that para 34(2), which allows the court to continue the existing agreement for a specified period, may have been included to cater for an application under para 32(1)(b) following the service of a counternotice under para 32(3)(a) (“...[stating] that the operator does not want the existing code agreement to come to an end”); however, by virtue of para 34(1), the court’s ability to make such an order is general and is not limited to that type of application.

12. By virtue of paras 2(1) and 7(4) of Schedule 2 to the 2017 Act, in relation to a subsisting agreement in force when the Code came into effect, para 34 of the Code takes effect in relation to the code agreement with the omission of sub-paragraph (13)(d). Despite the requirement in para 34(13) to have regard to all the circumstances of the case in deciding which order to make under para 34, it therefore appears that the amount of rent or licence fee currently payable to the site provider is not a relevant consideration in reaching that decision.

## **The Application**

13. The Claimants applied to the Tribunal on 13 November 2020, attaching a statement of case. This pleads the Lease, its expiry, the application of Part 5 of the Code, the reversionary lease and the service of the para 33 notices seeking termination of the subsisting agreement and the making of a new agreement. The Application confirms that the Claimants seek an order terminating the subsisting agreement and imposing on the parties a new agreement in the form of the draft code agreement that was annexed to the notices, and:

*“...on the terms set out therein, with such modifications as may be necessary or appropriate in the circumstances (alternatively, such an order as against only the First Respondent; or such other order under para 34 as the Tribunal may consider*

*appropriate in all the circumstances of the case against the Respondents or the First Respondent only)*".

14. The statement of case asserts that the site is used to transmit and receive signals to customers in the area and provides valuable coverage to an area with otherwise limited service provision; that neither Respondent is able to make any use of the site, but that the rights conferred do not interfere with the use of the rest of Pendown Farm; that the Respondents have no statutory duties, so far as the Claimants are aware, in relation to the site; that a new agreement is in the public interest; and that there would be no or only minimal prejudice to the Respondents caused by an order for a new agreement, which could be adequately compensated in money.
15. As for the reasons why a new agreement was sought, the Claimants plead that:
  - (a) a new agreement is required to provide longer-term certainty in use of the site, which is necessary to justify continued investment in it;
  - (b) their business needs are to provide the most up to date technical equipment for the transmission and receipt of signals at minimum cost, to meet evolving customer demand; and that, to this end, it is necessary for as many sites as possible "to come within the Code", as aspects of the Code (the sharing and rent provisions) involve either a saving in cost or a "favourable receipt";
  - (c) the proposed new agreement would enable freer sharing, producing further savings and environmental benefits, consistent with the sharing policy of the Code;
  - (d) the proposed new agreement would allow unfettered upgrading of the apparatus at the site, enabling enhancement with new technology without delay; and
  - (e) the consideration payable for a new agreement would be in the region of £250 p.a. rather than the passing rent of £5,693.64, a saving that the Claimants are entitled to realise and redeploy in their business.
16. APW filed a statement of case in reply on 18 December 2020. This admits the Claimants' entitlement to apply under para 33(5) of the Code for an order against them but denies that an order under para 34(6) or any other order should be made. It denies that the existing agreement could be terminated by the Respondents, other than on one of the statutory grounds for termination in para 31 of the Code that do not exist on the facts of this case. As to the reasons advanced by the Claimants why a new agreement should be ordered, it pleads that:
  - (a) the Claimants have sufficient long term security and the draft standard form of lease gives no better security;

- (b) an extended term providing security could be achieved by making an order under para 34(2);
- (c) the facts and matters pleaded do not justify the termination of the existing agreement and imposition of a new agreement;
- (d) the pleaded case of the Claimants discloses no genuine business need, and the existing agreement was “within the Code”;
- (e) it is unclear what further rights to share or upgrade apparatus the Claimants are seeking, but nothing more than what is contemplated by para 17 of the Code should be provided, which does not amount to unfettered rights to share or upgrade, and these rights do not require a new agreement to be made;
- (f) the Claimants are required to prove the likelihood of freer sharing of the apparatus on the site occurring in practice;
- (g) the appropriate level of consideration to be ordered under the Code is substantially in excess of £250 p.a.
- (h) the appropriate order to be made is one under para 34(2) of the Code, extending the existing agreement for a specified period, and it is not in the public interest for a new agreement to be ordered;
- (i) prejudice would be caused to APW and other infrastructure providers if operators were allowed to seek new agreements where that was not necessary, simply in order to take advantage of the lower consideration terms contained in the Code; and
- (j) the probative burden lies on the Claimants to justify a new agreement or changes in the terms of the existing agreement, and any modifications sought must be identified and the justification properly pleaded.

As regards the latter point, APW expressly relied on the decision of the Lands Tribunal (Scotland) in *EE Limited / Hutchison 3G Limited v Duncan* made on 23 September 2020 (“*Duncan*”), in which an application for a new code agreement was dismissed by that tribunal on the basis that no site-specific justification for a new agreement had been identified by the claimants. (The Code applies in Scotland and Northern Ireland as it does in England and Wales.) I shall return to that decision later.

17. The statements of case on both sides are rather wordy and argumentative and do not identify clearly the central matters in dispute on the application. These only emerged at the hearing before me. At that stage, it became clear that APW does not dispute that the Claimants are entitled in principle to have the terms of the existing agreement varied, in order to incorporate the minimum sharing and upgrading rights that the new Code confers, and that on any variation of the existing agreement, as on the making of a new agreement, the Claimants



would be entitled to have the consideration payable for the code rights determined in accordance with the valuation provisions in Part 4 of the Code.

18. However, APW contends that the Claimants are not entitled to have a variation of the existing agreement on this Application because they have not served the prescribed OFCOM notice required as a preliminary to applying for such a variation; and the “sweep up” claim in their statement of case of “such other order under para 34 as the Tribunal may consider appropriate in all the circumstances of the case” is not a valid plea, absent such a prior notice. Further, the Claimants have given no particulars of the alternative relief sought.
19. As regards the notice that the Claimants did serve and the primary claim for a new agreement under para 34(6) of the Code, APW contends that such an application is not valid unless an applicant has and pleads a site-specific need and justification for a new agreement rather than continuation or variation of the existing agreement to include the minimum rights in the Code (to the extent that they are not already comprised in the existing agreement). Further, as regards the terms of any new agreement, the onus lies heavily on an applicant to justify any change to the existing terms against the wishes of the respondent, which should be done on a term-by-term basis, and not simply by annexing the applicant’s standard form code rights agreement.
20. In this regard, APW accepts in principle that the presence in the Code of minimum sharing and upgrading rights is sufficient justification for varying the existing agreement, where necessary, to include those rights. APW also seemed to accept that it was legitimate to seek a consideration determined pursuant to the terms of para 24 of the Code. In other respects, however, it is necessary for an applicant to plead justification for the making of a new agreement in relation to code rights at the site in question, and otherwise to justify any changes to the terms of the existing agreement.
21. Accordingly, APW’s case is that the Claimants’ statement of case pleads no sufficient justification for a new agreement, and that it is not justifiable for the Claimants, by general words, to seek in the alternative some other order, whether that is the modification of the existing agreement, the conferring of new code rights or a new fixed term for the existing agreement.

### ***Duncan***

22. The origin of APW’s approach is the decision of the Lands Tribunal (Scotland) in *Duncan*. The decision was referred to at a case management conference held in this case in January 2021 and it was in light of it that preliminary issues were ordered to be tried, as follows:

“1. Whether, as asserted by the Second Respondent at paragraphs 20(v) and 21 of its statement of case, the claim for the termination and replacement of the subsisting Code agreement with a new agreement is bound to fail in circumstances where the Claimants do not aver a site-specific need for the termination and replacement of the subsisting agreement.

2. Whether the Claimants’ alternative claim for the Tribunal to make a different order under paragraph 34 (other than under paragraph 34(6)) is bound to fail in the absence of full particulars of the alternative form of order sought and the site-specific need for such order.”

23. In *Duncan*, the Lands Tribunal (Scotland) decided applications by operators in each of nine cases for termination and a new code agreement. The site providers applied for dismissal of the applications for want of competency and relevancy. The first of their two main grounds depended on the Scots law doctrine of tacit relocation, under which a fixed term tenancy whose term has expired continues from year to year, and the Lands Tribunal rejected that ground. The second main ground was that the operators had not pleaded a relevant reason for an order under para 34(6) of the Code. The tribunal considered that, since no alternative application for a different order under the Code had been made, its jurisdiction was limited to deciding whether to grant or refuse the application for termination and the making of a new agreement. The applicant had to justify the order sought in its pleaded case. The tribunal observed that although the general benefits to be derived from new code rights were evident and rehearsed in the pleading, there was no averment that there was a particular need for a new agreement in relation to any site. What was needed was for the applicant to demonstrate a “need” for a new agreement – this was a “high bar”. The pleadings did not aver such a need and accordingly the applications were dismissed.

24. On 7 May 2021, the Court of Session (Inner House) allowed an appeal by the operators against the decision of the Lands Tribunal (Scotland). The Court disagreed with the tribunal that there was a need for an applicant to do more than point to the current arrangements with the site provider as being out of step with the minimum rights available under the Code. The requirement to consider the business and technical needs of the operator did not require an applicant to go beyond the benefits generally provided by the Code, which were for the purpose of benefiting an operator in its business. It did not mean that the applicant had to demonstrate a site-specific need for a new agreement. The reasoning of the Court is summarised in para [28] of the judgment:

“The tribunal erred in its approach to the requirement to have regard to the operators’ ‘business and technical needs’. In particular, there is no sound basis for requiring demonstration of a provision in the lease which is thwarting a specific project or is rendering the arrangement unduly onerous. The tribunal was wrong in inserting a ‘high bar’ into its assessment. Too much was imported into the term ‘needs’. It does not exclude the general business and technical opportunities afforded by, for example, agreements which reflect the new code’s approach to matters such as sharing and upgrading facilities, and ‘no scheme’ valuations. The tribunal’s analysis would severely curtail the legislative intention to create the opportunity to bring old agreements into line with new code arrangements. These aims are of a piece with those of the new code as a whole. The overall scheme of this part of the code is inimical to the proposition that significant weight should be given to the existing rights and obligations of the parties.”

25. In reaching its conclusion, the Court of Session placed much reliance on the purpose of the Code, as demonstrated by the terms of the Law Commission Report (LC336) dated 28 February 2013, in particular the public interest in the provision of high quality and

competitive networks and the benefits of the sharing of equipment and the unrestricted ability for operators to upgrade equipment as needed and to be able to share and assign code rights. The Court did not comment on the view of the tribunal that if an application was made seeking only termination and a new agreement it had no jurisdiction to make a different type of order under para 34.

26. The Claimants contend that as a matter of law I ought to follow the decision of the Court of Session and decide the first preliminary issue in their favour on that basis. They rely on the approach established by decisions of principle or statutory interpretation of tax statutes that apply north and south of the border. Para 38 of Halsbury's Laws of England Vol. 12 states:

“Decisions of the Scottish and Irish courts are not binding upon English courts, although entitled to the highest respect. On questions of principle, it is desirable that the laws of England and Scotland should be uniform and that a decision of the Supreme Court, when founded on principle and not on authority, should be regarded as applicable in both countries, unless the Supreme Court itself says otherwise. There is a well-settled practice that in revenue and taxation matters courts of first instance in England endeavour to keep in line with decisions of the Court of Session (Inner House) in Scotland, and the Court of Appeal in Northern Ireland. Further, an English court ought to follow the unanimous judgment of the higher Scottish and Northern Ireland courts, where the question is one which turns upon the construction of a statute which extends to those countries as well as to England, leaving it to be reviewed, if thought fit, by the appeal court, as it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the different countries.”

27. This is not, so far as I am aware, a principle that has been applied in relation to the meaning or application of statutes other than taxing statutes, though one can see that some of the reasons why there should be no difference in tax cases are equally applicable to a statute governing commercial rights that applies in different parts of the United Kingdom, particularly where the commerce in question crosses the border. Even if not obliged to follow *Duncan*, I consider that I should follow it unless, after according that decision all the respect that is due to a reasoned decision of a higher court, I am nevertheless persuaded that it is clearly wrong.

### **The parties' arguments**

28. Mr Pymont QC did not shrink from a submission that *Duncan* was clearly wrongly decided. He submitted, in essence, that the Court of Session had failed to have regard to important wording of the Code, in particular para 34(12), which requires the court, when making an order under para 34(10), to have regard to the terms of the existing code agreement; and also para 34(11), which incorporates provisions of Part 4 of the Code when making an order under para 34(3), (4) and (5) as well as under para 34(6). He submitted that, in consequence, the decision in *Duncan* is invalidated by the failure of the Court to consider those important sub-paras of Part 5 of the Code and the underlying case law, and that the right conclusion is that an applicant is indeed required, in its application, to plead the reasons why, in the

particular case, termination of the subsisting agreement and the making of a new agreement is justified and appropriate, rather than (say) a modification of the terms of the subsisting agreement or the conferring of additional code rights. On that basis, he submitted, the application in this case fails to do so and is therefore bound to fail. He further submits that it is impermissible in any event for an operator to apply for an order under para 34(6) simply by reference to its standard form draft Code agreement, annexed to the application, and that an applicant seeking such an order must seek to justify each change from the terms of the existing agreement.

29. Mr Pymont also submitted that the Claimants were not entitled to apply, without having served a preliminary notice in appropriate terms, for another type of order under para 34 as an alternative to an order for termination and a new agreement, and that the words of the application “or such other order under para 34 as the Tribunal may consider appropriate in all the circumstances of the case” were not a permissible basis on which to seek, in the alternative, a different order from the menu of orders set out in sub-paras (2) to (6) in para 34. Mr Pymont did not in terms suggest that this Tribunal would have no jurisdiction to make a different order, as the Lands Tribunal (Scotland) considered to be the case, but he submitted that the Claimants were not entitled to seek a different order in the alternative, in their application, or alternatively that (as the second preliminary issue states) the application for alternative relief was bound to fail in the absence of full particulars of the alternative relief sought and site-specific justification for such relief.
30. In more detail, My Pymont’s principal submission is that the Code does not permit an operator to have a new agreement “for the asking”, as it was put by the Lands Tribunal (Scotland), and that an operator must be able to justify a request for a new agreement rather than a modification of the terms of the existing agreement, the rights and benefits of which are being continued by para 30 of the Code notwithstanding its contractual expiry. In the case of applications either to modify a code agreement by conferring additional code rights or to terminate the existing agreement and enter into a new code agreement, the new terms of the existing agreement or the terms of the new agreement (as the case may be) are to be specified by the Tribunal, if the parties cannot agree them: para 34(9) and (10). In that case, the Tribunal must “have regard to” the terms of the existing code agreement (para 34(12)). That language was used, says Mr Pymont, in order to incorporate the meaning attributed to exactly the same words in section 35 of the 1954 Act, as interpreted by the House of Lords in *O’May v City of London Real Property Co Ltd* [1983] 2 A.C. 736:

“...I do believe that the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change....

[There] must, in my view, be a good reason based in the absence of agreement on essential fairness for the court to impose a new term in the current lease by either party on the other against his will” (*per* Lord Hailsham of Marylebone, L.C. at 740G and 741C)

“There is no obligation, under section 35 of the Act, to make the new terms conform with market practice, if to do so would be unfair to the tenant. And there

is no inherent necessity why the terms on which existing leases are to be renewed should be dictated by those of fresh bargains which tenants may feel themselves obliged to accept.” (*per* Lord Wilberforce at 748G)

31. The consequence is that, unless an applicant can justify a change to the terms of the existing agreement as being objectively fair and appropriate, notwithstanding the objection of the respondent, the terms of the new agreement should remain unchanged. There must, in other words, be justification in the facts of the particular application for having different terms in a new agreement, and the applicant for an order for termination and the making of a new agreement can be expected to plead what that justification is. If they do not, the application should be struck out.
32. Mr Pymont submitted that this Tribunal and the Court of Appeal have endorsed that interpretation of the language of para 34(12) of the Code in a case called *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Limited* [2021] EWCA Civ 90.
33. The issue in that case was whether an operator who had an existing agreement could apply for a new agreement under Part 4 of the Code, without regard to its rights under the existing agreement that entitled it to apply under Part II of the 1954 Act or Part 5 of the Code (depending on how the transitional provisions in Schedule 2 to the 2017 Act applied to the existing agreement). The decision of this Tribunal was that it plainly could not. In his reasoning, the Deputy President said:

“Cornerstone’s suggested operation of the Code would be even more astonishing in the case of a subsisting agreement to which Part 2 of the 1954 Act applies, which the Law Commission recommended should not obtain the benefits of the new Code retrospectively. Rather than making use of the right of renewal under the 1954 Act, which requires between six and twelve months’ notice to be given under section 26(2) expiring after the end of the contractual term, the operator would have an unrestricted opportunity to give 28 days’ notice under paragraph 20. Having done so the operator would escape the provisions in section 34 of the 1954 Act for determining the rent under a new tenancy, which substantially replicates the open market, and would instead obtain access to the valuation assumptions in paragraph 24 of the Code, including the no-network assumption which strips out the component of value referable to the intended use of the site as part of the operator’s network. The operator would also escape the restrictions of sections 34 [*sic*] of the 1954 Act, and those of para 34(12) of the Code, both of which make the terms of the existing tenancy or Code agreement the starting point when, in default of agreement, the Court or Tribunal is required to fix the terms on which new rights are to be enjoyed (see *O’May v City of London Real Property Co Ltd* [1983] 2 AC 726). Instead, the operator would have the benefit of paragraph 23(1)-(2) of the Code which requires the Tribunal to impose an agreement which gives effect to the Code right sought by the operator with such modifications and on such terms as the Tribunal thinks appropriate.”

34. The decision and reasoning were approved by the Court of Appeal.

35. Then Mr Pymont relied on para 34(11), which applies specific provisions of the Code in the case of orders for modification of the terms of the existing agreement under para 34(3), (4) and (5) and orders specifying the terms of a new code agreement. Thus, whichever type of order the Tribunal makes on an application under para 33(5) (other than an order under para 34(2)), the identified provisions of the Code apply, just as they do on the making of an order under para 20 conferring a code right on an operator where none currently exists.

36. These provisions include the following sub-paras of para 23 of the Code:

“(2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).

(3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person’s agreement to confer or be bound by the code right (as the case may be).

(4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).

(5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who –

(a) occupy the land in question,

(b) own interests in that land, or

are from time to time on that land.

(6) Sub-paragraph (5) applies in relation to a person regardless of whether the person is a party to the agreement.

(7) The terms of the agreement must include terms specifying for how long the code right conferred by the agreement is exercisable.

(8) The court must determine whether the terms of the agreement should include a term –

(a) permitting termination of the agreement (and, if so, in what circumstances);

(b) enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates (and, if so, in what circumstances).”

37. They also include:
- (ii) para 24 of the Code, which requires the consideration payable for an agreement that is imposed on a site provider to be determined on a “no network” basis, i.e. disregarding the fact that the site is to be used by an electronic communications operator, and further assuming that there are no minimum Code rights to share, upgrade and assign;
  - (ii) para 25, providing for payment of compensation for loss or damage caused or that will be sustained by the exercise of the code right to which the order relates, on the basis specified in para 84.
38. The effect, Mr Pymont submitted, is that when the Tribunal makes an order varying the existing agreement, just as much as when it makes an order for a new agreement, the Tribunal can determine the duration of the agreement, the appropriate consideration payable on a “no network” basis, and what other terms of the modified agreement are appropriate and necessary, not just to benefit the operator but to protect the site provider, and that these will therefore include the provisions of paras 16 and 17 of the Code relating to assignment, sharing and upgrading, even though by reason of the transitional provisions those very provisions do not apply to a subsisting agreement before an application is made under Part 5: see Schedule 2, para 5 of the 2017 Act. Thus, it is quite unnecessary for the existing agreement to be terminated and a new agreement made in order to confer on the operator the minimum Code rights or to fix the consideration on a “no network” basis. It can be done by an order under para 34(3) or (5). That being so, there must be justification for seeking termination of the existing agreement and the grant of a new agreement, rather than a modification of the terms of the existing agreement.
39. Mr Read QC and Mr Tipler, on behalf of the Claimants, strongly endorsed the conclusion and reasoning of the Court of Session in *Duncan*, and submitted that I am bound to follow that decision. They submit that the purpose of the transitional provisions of 2017 Act is to protect the rights of site providers under existing agreements, by not making the new Code apply in full retrospectively to such agreements, while enabling operators to take advantage of the greater benefits to them of the Code once a subsisting agreement has reached its expiry date. At that stage, there is every reason why an operator should be entitled to apply for a Code-compliant, new agreement, for a new term of years conferring security on the operator, and at a consideration that is determined afresh on a “no network” basis. There is therefore no reason for an operator to have to provide a site-specific justification for an order conferring those benefits.
40. The Claimants further submitted that if the existing agreement were allowed to continue on an *ad hoc* basis, the consideration would remain payable at a higher rate, contrary to the evident purpose of the transitional provisions, as shown by Schedule 2, para 7(4) of the 2017 Act, which specifies that in relation to subsisting agreements para 34 of the Code applies with the omission of para 34(13)(d), which otherwise requires the court to have regard to the amount of the consideration currently payable. Further, the agreement would remain a subsisting agreement and as such would be subject to a much shorter period of notice if and when the site operator did wish to give notice terminating the agreement – 3 months rather

than 18 months: Schedule 2, para 7(3) of the 2017 Act. Further, the otherwise mandatory assignment, sharing and upgrading provisions in paras 16 and 17 of the Code are excluded in relation to subsisting agreements: Schedule 2, para 5. It would be contrary to the intention of Parliament, they submit, that a subsisting agreement should remain such and that the new beneficial provisions of the Code would not be phased in on expiry of the term of the subsisting agreement.

41. Mr Read and Mr Tipler further submitted that the scheme of Part 5 of the Code does not permit the court to make no order on an application under para 33(5) so as to allow the subsisting agreement merely to continue, as Mr Pymont submitted might be appropriate and that the court has power to do. They submitted that since, when a site provider seeks to terminate a code agreement by notice under para 31 but fails to establish a ground for termination, the court *must* make one of the orders on the menu in para 34 (see para 32(5)), therefore the words “the orders that the court *may* make on an application under paragraph 32(1)(b) or 33(5)” in para 32(1) have to be read as if they were “... the orders that the court *must* make”. Accordingly, the court must as a minimum make an order under para 34(2), continuing the existing agreement for a specified period, and so once an application has been made the Code does not permit the existing agreement simply to continue. That is said to support an inference that, by the Code and the transitional provisions, Parliament intended a subsisting agreement to be able to be replaced by a new agreement with full Code benefits once the term of the subsisting agreement had ended.
42. In this regard, it is pertinent to observe that Part 5 of the Code applies as much to Part 2 agreements under the Code that were made after the Code came into force as to what are called “subsisting agreements” in the transitional provisions of the 2017 Act, i.e. agreements that were made before 28 December 2017 and treated after that date *as if* they were agreements made under Part 2 (subject to specified differences). The ability of either party to an agreement to serve a notice to agree a change and apply to the Tribunal for an order therefore arises in relation to agreements that already comply with the minimum rights specified by the Code as well as those that do not. The provisions of Part 5 therefore must not be construed as if they only apply to subsisting agreements. That fact may give a clue about the intention behind the menu of orders that the court may make, and indeed the menu of notices that can be served under para 33 by site providers or operators when the term of an existing agreement is coming to an end or has ended. A change by modifying the terms of an existing agreement may be more apt in the case of an agreement that is already Code-compliant, whereas a change by terminating a subsisting agreement and making a new one may be more apt where there is a non-compliant, outdated agreement at an open market rent.
43. The Claimants also had two distinct reasons why, on the facts of this case, it was necessary for the Tribunal to make an order for termination and a new agreement, rather than a different order. First, the existing agreement is in the name of the First Respondent, who is no longer a party directly affected by the code agreement, and APW should be the named party to the agreement. An amendment to change the parties to a contract must take effect as a new contract, therefore a new agreement is necessary. Second, the existing agreement was a lease and the term of a lease cannot be extended by a modification of the terms of the lease, only by the grant of a new lease in place of the old: *Jenkin R Lewis & Sons v Kerman* [1971] Ch 477, 496, per Russell LJ.



44. As regards the second preliminary issue, the Claimants submit that since the court has a discretion about what order to make, it makes sense that an applicant can add an alternative ground to its application, without having to serve a separate notice to agree that type of change, or specify a site-specific need for that change in its application. Statements of case would become unduly burdened with detail if an applicant had to spell out a series of alternative cases, rather than rely on its primary case but claim in the alternative either a particular order or such other order as the court might see fit to make. The Code should be interpreted in a way that provides procedural simplicity rather than complexity and, given that the court is given jurisdiction to make a different order, it is not sensible to preclude a party from arguing for one, as an alternative to its primary case.

## Conclusions

45. In this section of my decision, in the interests of clarity, I use the term “existing agreement” as a general description of the code agreement (whether expired or not) under which code rights currently exist. The term “subsisting agreement” denotes an existing agreement that came into effect before 28 December 2017 and continued after it, and so is subject to the transitional provisions of Schedule 2 to the 2017 Act. A “new agreement” is an agreement conferring code rights made pursuant to para 34(6) of the Code.
46. The Code was intended to confer broader rights and more flexibility on operators, in view of the impending arrival of 5G networks and new technology. This would enable operators better to provide high quality coverage and infrastructure and for there to be competition in networks, for the benefit of consumers. This much is clear from the Government’s response to its consultation on proposed measures to reform the Electronic Communications Code: *A New Electronic Communications Code* (DCMS, May 2016) (“the Response”). Parliament, which altered the proposals of the Law Commission regarding the basis for assessing the consideration payable, clearly intended operators to be able to provide services at lower cost to themselves, and in consequence at lower cost to consumers. The change from open market value, taking account of demand from telecommunications operators, to market value on a “no network” assumption is a very significant change introduced by the Code.
47. At the same time, Parliament accepted the recommendation that the Code should not have retrospective effect and deprive site providers of the bargains that they had made, or benefits that the old code had conferred on them. It is apparent from the way that Part 5 applies to subsisting agreements that it is intended that, as from the contractual expiry of subsisting agreements, parties should have the right to apply for new Code rights. The Response had referred to a “steady phasing in of new Code rights”. It cannot have been intended that the public benefits and investment incentives conferred by the new Code would be stultified by the continuation of subsisting agreements, with more limited rights at higher rents or fees, for a significant time after their expiry dates.
48. In that light, it seems clear that an operator under a subsisting agreement should not have to prove a site-specific justification for the replacement of an expired subsisting agreement with a new Code-compliant agreement. The significant additional rights conferred by the Code, the benefit of some or all of which will have been denied the operator for the duration of the subsisting agreement, are themselves a reason for the grant of a new agreement on different

terms, if the subsisting agreement has run its agreed course. It should not be necessary in those circumstances for an operator to prove a special justification for the grant of a new, Code-compliant agreement.

49. Although para 30 of the Code provides for code rights under the existing agreement to continue, for the protection of the operator, that can reasonably be seen as a temporary position (not to be confused with “temporary code rights” under para 27 of the Code) where the existing agreement is a subsisting agreement, rather than the basis for a continuing relationship. The position may well be different where a Code-compliant agreement made after 28 December 2017 has expired. The Transitional Provisions substitute a period of between 3 months and 18 months (depending on the unexpired period of the existing agreement at that date) for the 18 months’ notice stipulated by the Code, for a site provider to terminate a subsisting agreement: Schedule 2, para 7(3) of the 2017 Act. I agree with Mr Read that this difference is an indication that the prolonged continuation of pre-Code rights is not a satisfactory substitute for a new agreement, at least from an operator’s perspective. (It is clear, however, that the mandatory assignment, sharing and upgrading provisions of the Code can be included in a subsisting agreement by a modification ordered by the court under Part 5 of the Code, where appropriate.)
50. Under the provisions of Part 5, the court, presented with an application to vary or terminate the existing agreement, has to determine two matters. First, what order to make. Second, if applicable, the terms in which new rights should be conferred or a new agreement should be made. Para 34(13) requires the court, in determining which order to make, to have regard to all the circumstances of the case, and in particular to:
  - a. the operator’s business and technical needs;
  - b. the use that the site provider is making of the land to which the existing code agreement relates;
  - c. any duties imposed on the site provider by an enactment, and
  - d. the amount of consideration payable by the operator to the site provider under the existing agreement (though this is not a consideration in the case of a subsisting agreement).

If the court decides to make an order conferring additional code rights or terminating the existing agreement and requiring a new agreement to be made, it must make an order specifying the terms, to the extent that these are not agreed. In doing so, the court must also have regard to the terms of the existing agreement.

51. I respectfully agree with the Court of Session that by referring to the operator’s “business and technical needs” Parliament cannot have intended to impose on an operator a requirement to prove a specific need for the particular order sought in relation to the site in issue. The business and technical needs of an operator are its reasonable requirements as regards the statutory purposes, namely the provision of its network and an infrastructure

system. It seems to me that they may also include a need to have a standard form of agreement for its code agreements, for estate management reasons.

52. There can be no doubt that the structure and provisions of the Code are similar in various ways to Part 2 of the 1954 Act: the Law Commission Report makes the comparison expressly, in various respects. There is essential similarity in relation to: non-expiry and continuation of existing rights; the ability of the site provider to seek to terminate the agreement on specified grounds only; the ability of either party to serve a notice seeking the grant of a new agreement; the need in certain circumstances to apply to the court to protect existing rights; and the provisions for deciding the consideration payable by the operator. Further similarities include the provisions for interim rent and, as the Respondents would emphasise, for determining the terms of the new agreement.
53. However, the provisions of the Code are not in any respect exactly the same as those of Part II of the 1954 Act. One must be careful not to read in too much, based on superficial similarity of structure or language. The purpose underlying the 1954 Act was very different from that of the Code: to protect tenants of business premises from excessive costs, business interruption and loss of goodwill, by providing security of tenure while protecting the legitimate interests of landlords in recovering possession and receiving payment of a market rent. The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than open market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests. In both cases, there is an objective of providing security for the tenant/operator and continuity of operation.
54. Section 35 of the 1954 Act operates to limit changes in the terms of the tenancy (other than rent and duration) against the will of either party. This is an aspect of the provision of business continuity for the tenant, although it is sometimes the tenant who seeks the change. A heavy onus lies on the party seeking a change to justify it, in terms of overall fairness: *O'May*. Changes are readily justified where the law has changed: see *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 WLR 6096 and *Wallis Fashions Group Ltd v CGU Life Assurance* (2001) 81 P&CR 28. Changes may be justified where it is fair to both parties: see e.g. *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EWHC 2224 (Ch) (terms of tenant break option where existing lease had none) and *Edwards & Walkden (Norfolk) Ltd v City of London Corporation* [2013] 1 P&CR 10 (change from all-inclusive rent to rent plus variable service charge).
55. However, one objective of the Code was to change the terms that apply under code agreements, where these restrict operators from doing or having the flexibility to do what they reasonably need to do, or where they operate against the public interest. In the Code there is therefore not the same generally applied presumption against change that has been read into the language of s.35 of the 1954 Act. Rather, site providers are required to put up with a degree of change in the public interest of facilitating the provision of a choice of high quality networks.

56. Nevertheless, the words of para 34(12) of the Code must have been intended to reflect the effect that the words have been held to have under the 1954 Act. The terms of the existing agreement are intended to be of some materiality, subject to the other considerations. The words of para 34(12) are that the court shall *also* have regard to those terms. Read in context, this means that, in specifying the terms of the new code rights or the new agreement, regard is to be had to those terms as well as terms that the parties have agreed, if any, and the requirements of paras 23(2) to (8), 24, 25 and 84 of the Code: para 34(10), (11). These require a new code agreement to contain such terms as the court thinks appropriate, including for the payment of consideration in accordance with para 24, compensation in accordance with paras 25 and 84, terms for ensuring the least possible loss and damage caused to owners and occupiers (etc.) by the exercise of code rights, and terms as to duration and the possible need for rights of termination and repositioning or temporary removal of equipment. The terms must also be consistent with paras 16 and 17 of the Code.
57. Mr Pymont submitted that the *O'May* approach can accommodate these considerations, in that if an operator proves that the terms of the existing agreement will operate inconsistently with the Code, a change will be objectively fair and justified. I agree, as long as the justification is not to be identified in a narrow way, involving a site-specific need for the terms of the agreement to be changed. In the context of the Code, the terms of the existing agreement are only one matter to which the court is to have regard. Para 34(12) cannot be read as imposing an overarching restriction on change. Where the existing agreement is a subsisting agreement, it may well not contain terms that are appropriate in all the respects identified above, and there will therefore be a requirement to change them. If, on the other hand, the existing agreement is a new Part 2 agreement, it may contain terms that are appropriate in all these respects, in which case the terms of that agreement are likely to be of greater significance.
58. Despite the indication of this Tribunal and the Court of Appeal in *Ashloch* that an approach similar to that in *O'May* is suggested by the words of para 34(12), there are other considerations in play under the Code, as compared with under the 1954 Act. The Court of Appeal agreed that the requirement to have regard to the terms of the existing agreement was one of three significant respects in which an application under Part 5 or under the 1954 Act differed from an application under Part 4, but neither this Tribunal nor the Court of Appeal decided how para 34(12) operated in the context of Part 5 as a whole. I reject the argument that it was part of the *ratio* of *Ashloch* that para 34(12) of the Code has the same meaning and effect as section 35 of the 1954 Act.
59. Importantly, Part 5 of the Code draws a distinction between, first, a decision on which of the orders from the menu of orders the court will make and, second, specifying the terms of new rights or a new agreement, in so far as the parties cannot agree them. In deciding which order to make, the court is required to have regard to all the circumstances, but in particular the four factors (or three factors, where the existing agreement is a subsisting agreement) summarised in [50] above. In specifying the terms of any order under para 34(5) or 34(6), the court must have regard to the various considerations identified in [56] above, and to the terms of the existing agreement. What Part 5 does not contemplate is the application of the requirement in para 34(12) as a means of deciding what order, from the menu of orders, the court should make. That was, in my judgment, the effect of the argument advanced on behalf of APW. Rather, the court should decide what order to make taking into account all the

circumstances (including the terms of the existing agreement) but in particular the factors in para 34(13), and then, having done so, specify the terms of the new code right or new agreement, where that is required. The *O'May* principle does not have a direct role to play in deciding which order it is appropriate to make.

60. As to the orders that the court may make, it is clear that each of the five orders identified in para 34(2) to (6) is on the menu in the case of an application under para 33(5): see the wording of para 34(1). That is so whether the application is made by an operator or by a site provider. Although the court *must* make one of these orders where the application is made by the operator under para 32(1)(b), there is no similar requirement in the case of an application under para 33(5). I do not accept Mr Read's argument that because an order is expressed to be mandatory under para 32(5), para 34(1) has to be read as if "*may*" were "*must*". The word "*may*" is used to denote the choice of different orders that the court has; substituting "*must*" does not make sense of the language of para 34(1). There is no inconsistency between the permissive terms of para 34(1) and the mandatory requirement of para 32(5). The Code would have said so expressly if the court has to make one or other order on an application under para 33(5). It might be an unusual case in which a court would make no order, rather than an order under para 34(2), but it is not impossible to think of circumstances in which that might be justified, *e.g.* where a site provider has served a notice to terminate during the currency of the operator's application.
61. In my judgment, there is therefore nothing in para 34(11) or (12) that should have led the Court of Session in *Duncan* to reach the opposite conclusion and uphold the decision of the Lands Tribunal (Scotland). The case of *O'May*, though not referred to in the judgment of the Court, was referred to in the decision of the tribunal, so it is unlikely that it was overlooked in argument. The Court of Session did not refer to para 34(11) or (12) in its judgment, but these sub-paras do not have the far-reaching effect that APW submits that they do, which in many cases – if APW were right – would prevent an operator under an expired subsisting agreement from applying for a new Code-compliant agreement. I respectfully agree with the conclusion in *Duncan*.
62. Para 33(1) of the Code confers on operators and site providers a right to serve a notice requiring the other party to agree any of four different changes in the existing agreement (including its termination and the grant of a new agreement). The only restrictions on the service of such a notice are those specified in para 33(2) and (3) of the Code. The form of notice prescribed by OFCOM requires the person giving the notice to identify which change or changes to the existing agreement they seek. In the case of a notice proposing termination and a new agreement, the terms of the new agreement must be annexed to the notice. If the notice served is valid and the proposed change is not agreed within 6 months, para 33(4) and (5) of the Code confer on the giver of the notice the right to apply to the court for the court to make an order under para 34. The court must then decide which order to make, if any, and specify the terms of any new code rights or new agreement to the extent that the parties have not agreed them.
63. I consider that Mr Pymont is right to say that the Code does not permit an application for an order for a change to the code agreement that was not the subject of a prior notice. Thus, if the notice proposed termination and a new agreement on terms annexed, the giver of the notice cannot apply to the court for modification of the existing agreement on different

terms. The purpose of the notice is so that the parties can spend up to 6 months trying to reach agreement on what has been proposed. That purpose would be undermined and the Code would operate unfairly to the respondent to an application if the applicant could apply for an order that had not been previously identified. (It is of course open to a respondent to waive any non-compliance, if they are content to engage with the application that has been made.)

64. It would be surprising if, having validly served a notice seeking agreement on termination and the grant of a new agreement and duly applied to the court for that order, an applicant could be nonsuited at the first stage on the basis that it should instead have sought a modification of the existing agreement. That is particularly so where the existing agreement is a subsisting agreement. As the Court of Session held, the changes introduced by the Code and the generic business and technical needs of operators in the current market are at least arguably sufficient in themselves to entitle an operator to apply for termination and the grant of a new, Code-compliant agreement. An operator is not, at the stage of pleading its claim, required to justify seeking a new agreement in place of a subsisting agreement that has expired.
65. The respondent to an application is, of course, entitled to plead that an order terminating the existing agreement and for a new agreement should not be made because, in the particular circumstances of the case, a different order that the court may make is more appropriate, or is sufficient for the applicant's needs. The applicant will engage with that argument in its points of reply. The respondent can also plead that if a new agreement is to be made it should be on different terms. The court will have to resolve such issues when it hears the application. It is unnecessary for an applicant to invoke the court's jurisdiction to make a different kind of order in the alternative. The court has jurisdiction to make any of the orders on the menu, whether the applicant has applied for them or not.
66. In my judgment, it is not permissible for an applicant to plead an alternative case for a different change to the existing agreement unless it has served a notice that identifies the relief sought. That is so whether the alternative relief sought is specific or "such other relief as the Tribunal thinks fit to grant". The issue of whether a different order is more appropriate will be determined if raised by the respondent to the application, in which case an applicant is entitled to respond to the case that it faces, both in principle and as to the terms of the order proposed. But an applicant may not in the guise of reply to the respondent's case seek another different type of order.
67. As for the additional case-specific arguments of the Claimants as to why a new agreement has to be ordered, I reject both these arguments for the following reasons.
68. The effect of expiry of the term of the Lease after the Code came into force was that the code agreement continued, under para 30(2) of the Code, and the First Respondent as site provider continued to be bound by the code rights: para 30(2)(b). Upon grant of the reversionary lease, APW became a person bound by the code rights, under para 10(2)(b) of the Code. APW was thereupon a site provider for the purposes of para 30(2). Although the Lease had expired, the code agreement had not and APW was bound by it, regardless of the fact that it was not the grantor of the Lease or a contracting party.

69. That position would continue without limit of time, absent an application under para 31 or para 33, and there is no reason why it should not continue if the court were to see fit to make an order under para 34(2), (3), (4) or (5). The terms of the code agreement would be modified but the agreement would otherwise continue and APW would be bound by the code rights. If, on the other hand, a new agreement were ordered to be made, it would be made with APW, as reversionary lessee. The Claimants' argument wrongly confuses the doctrine of privity of contract with the existence of a code agreement and code rights under Parts 2 and 5 of the Code.
70. It is also wrong to suggest that the code agreement or code rights depend on the continuation of a lease. The Lease terminated on 16 May 2019 but this had no effect on the code agreement or the code rights. APW is bound by those rights and it is unnecessary for a lease to exist. There would be no need for an extension of the term of the Lease upon making an order under para 34(2), (3), (4) or (5), were that the appropriate order to make.
71. There is therefore no requirement for the Tribunal's order in this case to be for termination and grant of a new agreement for either of the specific reasons advanced by the Claimants. Whether an order under para 34(6) is the appropriate order to make will be the subject of a trial in due course, when the Tribunal will consider the reasons why the Claimants seek a new agreement and APW's case that extension or modification of the existing agreement under para 34(2) or (3) is more appropriate. At the same trial, the Tribunal will specify the terms of any new agreement, if an order is to be made under para 34(6).
72. I therefore find for the Claimants on the first preliminary issue. The application for termination of the existing agreement and the grant of a new agreement is not bound to fail in the absence of a site-specific case advanced as to why a new agreement is needed. There is no reason why an operator cannot apply for a new agreement in the terms of its standard form Code agreement, with any changes agreed with the site provider following service of the para 33 notice, if any, provided that the standard form was annexed to the notice. The respondent should raise in its points of defence, in general terms, any issue about the terms of the new agreement. The Tribunal is likely to give directions for a travelling draft to be exchanged, which is the appropriate stage at which specific drafting issues will be clarified.
73. As for the second preliminary issue, I have concluded that, not having served a notice identifying that a different change to the existing agreement is sought, the Claimants may not pursue a case for alternative relief. That does not preclude the Claimants from responding to APW's argument that a different order should be made and engaging with it. Such engagement can include explaining why, if the Tribunal were minded to modify and continue the existing agreement, it should be on terms differing from any proposed by APW. But the Claimants cannot plead a case for a different kind of order under the pretext of the general words that they included in their points of claim. That part of the claim starting with the words "or such other order ..." is therefore struck out.

74. The precise preliminary issue ordered by the Tribunal concerning lack of particularity of the alternative relief sought and the absence of a site specific justification for it therefore does not need to be determined on the facts of this case, in view of the conclusion that I have reached about invalidity.

Mr Justice Fancourt

14 July 2021