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Case No: LC-2023-810

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LC-2023-391

Royal Courts of Justice, Strand
London WC2A 2LL

4 June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – JURISDICTION – whether operator entitled to apply for new Code agreement under Part 4 of the Code after losing right of renewal under Pt.2, Landlord and Tenant Act 1954 through delay in serving claim form – Paras 20, 27, 37, 40, Sch.3A, Communications Act 2003; Sch.2, Digital Economy Act 2017 – when unserved claim "finally determined" for purpose of s.64, Landlord and Tenant Act 1954 – appeal allowed

BETWEEN:

GRAVESHAM BOROUGH COUNCIL

Appellant

-and-

ON TOWER UK LIMITED

Respondent

The Hive, Hive Lane
Northfleet
Gravesend

Martin Rodger KC, Deputy Chamber President

24 May 2024

Jonathan Wills, instructed by Freeths LLP, for the appellant
Oliver Radley-Gardner KC, instructed by Gowling WLG (UK) LLP, for the respondent

The following cases are referred to in this decision:

Aktas v Adepta [2011] QB 894

Arqiva Services Ltd v AP Wireless II (UK) Ltd [2020] UKUT 195 (LC)

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2022] 1 WLR 3360

Crawley Borough Council v EE Ltd and another [2022] UKUT 158 (LC)

Johnson v Gore Wood & Co [2002] 2 AC 1

Piepenbrock v Associated Newspapers and others [2020] EWHC 1708 (QB)

Shotley Point Marina (1986) Ltd v Spalding [1997] 1 EGLR 233

Vodafone Ltd v Potting Shed Bar and Gardens Ltd & Anor [2023] EWCA Civ 825

Introduction

1. If a telecommunications operator unsuccessfully applies to the court under Part 2 of the Landlord and Tenant Act 1954 for a new tenancy of a mast site, can the operator then ask the tribunal for an order imposing a new tenancy of the same site under Part 4 of the Electronic Communications Code?

2. In the First-tier Tribunal, Property Chamber (the FTT), Judge David Jackson decided that the operator could validly seek such an order and he refused an application by the owner of the site to strike out the operator's claim. He granted the owner permission to appeal.

3. The mast site is on the roof of The Hive, a block of flats in Northfleet which is owned by the appellant, Gravesham Borough Council ("the Council"). It was represented at the hearing of the appeal by Mr Jonathan Wills. The operator is On Tower UK Ltd ("On Tower"), which was represented by Mr Oliver Radley-Gardner KC. Cases under the Code are always tricky, and I am grateful to both Counsel and their instructing solicitors for their assistance in unravelling this one.

The issue

4. In *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] 1 WLR 3360 ("*Compton Beauchamp*"), the Supreme Court held that tribunals have no jurisdiction under Part 4 of the Code to impose a code agreement in favour of an operator which is already in occupation of a site under a tenancy protected by the 1954 Act (at least so far as the code rights sought are already conferred by the tenancy). Lady Rose discussed the relationship between the Code and the 1954 Act at paras [56] to [63] and explained that the dual security of tenure afforded to leases which conferred Code rights under the old Code (which were both within the old Code and within the 1954 Act) was thought by the Law Commission not to be necessary or helpful. That duplication could have been avoided in different ways, but the policy direction taken by the new Code was that rights of renewal under the Code are not available to operators in respect of leases protected by the 1954 Act. Leases in existence when the new Code commenced are covered by transitional provisions in Schedule 2 to the Digital Economy Act 2017 which specifically exclude any application for renewal under Part 5 of the Code. But once a new lease has been obtained under the 1954 Act it is a code agreement like any other, with any future renewal being governed by Part 5 of the Code. In that way full effect has been given to the principle that the new Code is not intended to apply to contracts entered into before it came into effect.

5. In *Compton Beauchamp* the Supreme Court therefore decided that (with very limited exceptions) it would be inconsistent with the way the Code was intended to work for an operator who has a lease which predates the Code to be given a choice whether to seek a new agreement under Part 4 of the Code or to renew its lease under the 1954 Act. If an operator wants a new lease conferring the same code rights it has to renew its existing lease under the 1954 Act and cannot not rely on the Code.

6. The further question which this case poses is whether an operator which has tried to obtain a new lease under the 1954 Act but has failed, may then seek renewal of its rights by

applying to the tribunal under the Code. Mr Radley-Gardner KC says that the effect of the Code is that an operator which has exhausted its rights under the 1954 Act can always then apply under the Code. In some circumstances its application may be liable to be dismissed as an abuse of process or as an attempt to relitigate issues which have already been decided against it, but that does not affect the tribunal's jurisdiction to consider the application. There may be other cases, and Mr Radley-Gardner says this is one of them, in which it would be appropriate for the tribunal to impose a new code agreement in favour of the operator, despite the fact that it has been unable, for whatever reason, to obtain a renewal of its rights under the 1954 Act.

The facts

7. In 1997 the Council granted a lease of the mast site on the roof of The Hive to a predecessor of On Tower for a term of 20 years. The term expired on 31 March 2017, but the tenancy of the site was continued by Part 2 of the 1954 Act.

8. The new Electronic Communications Code in Schedule 3A of the Communications Act 2003 came into force on 28 December 2017. It did not affect the security of tenure of operators under existing agreements covered by the 1954 Act.

9. In September 2019 the continuing tenancy was assigned to On Tower which continued to occupy the mast site for the purpose of its business of providing a telecommunications infrastructure system.

10. For a number of years the Council has been anxious to undertake repairs to the roof of the building to prevent water from leaking into the flats below, but no agreement had been reached with On Tower or its predecessor to enable those works to be carried out. On 17 December 2021 therefore, the Council gave notice to On Tower under section 25, 1954 Act, terminating its tenancy on 30 June 2022 and notifying it that a renewal of the tenancy would be opposed.

11. On Tower was entitled to apply to the County Court for a new tenancy of the site under section 24(1) of the 1954 Act. If it did so, the effect of section 64(1) would be that the tenancy would continue until it terminated at the expiry of the period of three months beginning with the date on which the application was "finally disposed of".

12. On 28 June 2022 On Tower's solicitors filed a claim for a new tenancy in the County Court at Birmingham. The Court issued the claim on 12 July and returned it to On Tower's solicitors for service on the Council.

13. CPR r.7.5(1) allows a period of four months for the service of a claim form within the jurisdiction, which in this case expired on 12 November 2022. Although the Council's solicitors pressed for early service of the claim form On Tower's solicitors did not oblige them. Evidence provided to the FTT explained that the first solicitor dealing with the matter left the firm at some unspecified point during those four months, and that the second was involved in an accident and was off work for several weeks. A third solicitor became involved but, due to human error, service of the claim form did not take place until 18 November 2022. At the same time On Tower made an application under CPR r.7.6 for an

order extending the period for service of the claim form, but on 23 February 2023 that application, and the claim itself, were dismissed by the Court. There has been no appeal against that dismissal.

14. On 17 February 2023, shortly before the hearing of its application to extend time for service, On Tower had given notice to the Council under paragraph 20 of the Code requiring it to enter into a new agreement under Part 4 of the Code; the notice included a request that the Council also enter into an agreement for temporary rights under paragraph 27 of the Code while the terms of the main agreement were negotiated or determined. The Council responded by giving On Tower notice under paragraph 40 of the Code, requiring it to remove its apparatus from the roof of the building.

15. On 27 June 2023, with no new agreement having been entered into, On Tower referred its paragraph 20 request to the tribunal. On 19 July the Council applied to strike out the reference, but by his decision handed down on 18 October Judge Jackson refused that application.

The relevant provisions of the Code

16. 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 states that: "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator". "Occupier" is explained by paragraph 105(1) and means "the occupier of the land for the time being". In *Compton Beauchamp* the Supreme Court held that it was a fundamental premiss of paragraph 9 that the "operator" and the "occupier of the land" are different persons.

17. Where an operator and an occupier of land are unable to agree, the alternative way for the operator to acquire code rights is under Part 4 of the Code. A court (or in England and Wales, a tribunal) may impose an agreement between an operator and an occupier of land which confers code rights on the operator by making an order under paragraph 20. 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…".

18. Under Part 4, an operator need not give a site provider more than 28 days' notice before making an application for a code agreement to be imposed (paragraph 20(3)). If the operator can establish that the public interest conditions in paragraph 21 are satisfied the grounds on which a site provider can resist the imposition of an agreement are limited to proving that it intends to redevelop the site and would be unable to do so if an agreement was imposed. If the tribunal decides that an agreement should be imposed, it will include terms for the payment of consideration determined in accordance with paragraph 24. The basis of valuation will include an assumption favourable to the operator 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)).

19. Part 5 of the Code is about the termination and modification of agreements. To guarantee continuity in the provision of telecommunications services to consumers Part 5 provides

for the statutory continuation of Code agreements after their contractual expiry date. By paragraph 30(2), where code rights would otherwise cease to be exercisable because the agreement conferring them has come to an end, the agreement is prolonged so that the operator may continue to exercise the rights. An agreement may only be terminated by a site provider who has given 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 terminating the agreement and imposing a new one (paragraph 34). The landowner is entitled to resist such an application but will only succeed if it establishes one of the statutory grounds (which include the ground that the test in paragraph 21 is no longer met.

20. The continuation of Code agreements by Part 5 of the new Code contrasts with the effect of the "old Code" (the statutory predecessor of the Code in Schedule 2 to the Telecommunications Act 1984). An old Code agreement came to an end in accordance with its terms. Continuity of service was ensured by paragraph 21 which restricted the rights of landowners 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.

21. In *Compton Beauchamp* Lady Rose explained at paragraphs [118] to [129] that Part 4 of the Code does not apply to code agreements which are being continued by paragraph 30, but that before Part 5 becomes available parties may agree the grant of additional rights which an operator does not yet enjoy, or the operator may ask the tribunal to impose them under paragraph 20. But "paragraph 20 can only be used to impose additional code rights and not to impose a modification of the rights already conferred in an existing Part 2 agreement or in a code agreement to which Part 5 applies" (paragraph 130).

22. Lady Rose acknowledged (at paragraphs [134] and [135]) that by permitting Part 4 to be used to obtain additional code rights, but not to secure modifications of existing code rights, the interpretation of the Code she preferred "may create the need in some cases for nice distinctions to be made". It would be for the tribunal to determine when an application was really for new code rights or was an illegitimate attempt to improve on the bargain struck at the start of the agreement by dressing up a modification of the existing agreement as a request for new rights. She added, at paragraph [135], that:

> "The tribunal will also be astute to ensure that an operator whose application under Part 5 for new rights or for its right to continue an agreement has already been rejected by the tribunal cannot have a second bite at the cherry by making an application under Part 4. The Upper Tribunal has powers under its rules to deal promptly with applications such as those; no doubt the landowner will draw the failed application under Part 5 to the attention of the tribunal."

23. In *Crawley Borough Council v EE Ltd and another* [2022] UKUT 158 (LC) the Tribunal (Judge Cooke) explained that one of the reasons why the old Code was regarded as unsatisfactory was that it was very difficult for landowners to get rid of electronic communications apparatus on their land which was not supposed to be there – either because there had never been an arrangement for it to be there, or because rights had expired. Part 6 of the Code addresses this problem by providing a right for landowners to require removal of apparatus which is not covered by any Code right. Paragraph 37 begins by posing a question, which it then answers, as follows:

> "37. *When does a landowner have the right to require removal of electronic communications apparatus?*
>
> (1) A person with an interest in land (a "landowner") has the right to require the removal of electronic communications apparatus on, under or over the land if (and only if) one or more of the following conditions are met.
>
> …
>
> (3) The second condition is that a code right entitling an operator to keep the apparatus on, under or over the land has come to an end or has ceased to bind the landowner—
>
> (a) as mentioned in paragraph 26(7) and (8),
>
> (aa)-(c) …
>
> (d) where the right was granted by a lease to which Part 5 of this code does not apply."

24. Paragraph 40 explains how the right to require removal conferred by paragraph 37 is to be enforced. If the site is not vacated following the service of a notice the landowner can apply to the Tribunal under paragraph 40(6) for an order requiring the operator to remove its apparatus. In *Crawley v EE* the Tribunal decided that where the circumstances in paragraph 40 were met the making of a removal order is not discretionary and involves no balancing of the interests of the landowner and those of the operator or the wider public. But that is subject to the following important qualification in paragraph 40(8):

> "(8) On an application under sub-paragraph (6) or (7) the court may not make an order in relation to apparatus if an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined."

25. The termination and modification provisions in Part 5 are subject to transitional provisions contained in Schedule 2 to the Digital Economy Act 2017. These were outlined by Lady Rose in *Compton Beauchamp* at paragraphs [46] to [55]. An agreement in writing which was a code agreement for the purpose of the old Code, and which remained in force when the new Code commenced is described in the transitional provisions as a "subsisting agreement". By paragraph 2(1) of Schedule 2, a subsisting agreement had effect after the new Code came into effect as an agreement under Part 2 of the new Code, subject to the modifications made by the Schedule. Those modifications provide that a subsisting agreement does not benefit from the provisions about assignment, sharing and upgrading in the Code.

26. The transitional provisions also dispense with the duplication of rights of renewal under the Code and the 1954 Act which had been a feature of the old Code. By paragraph 6(2) of Schedule 2, Part 5 of the Code does not apply to a subsisting agreement if it is a lease of land to which Part 2 of the 1954 Act applies which has not been contracted out of the security of tenure provisions of that Act by an agreement under section 38A. In contrast, a subsisting agreement which is a contracted out lease is not excluded from Part 5.

27. The Supreme Court rejected the argument of the operator in the *Ashloch* appeal (one of those decided together with *Compton Beauchamp*) that it had a choice either to seek a new

tenancy under the 1954 Act or to apply for the imposition of code rights under Part 4 of the new Code. Lady Rose had dismissed that suggestion at paragraph [167]:

> "I find the reasoning of the Upper Tribunal and the Court of Appeal in *Ashloch* as to why an operator with a subsisting agreement protected under the 1954 Act should not have the option of renewing the rights under Part 4 of the new Code to be persuasive. The intention of the Government, following the recommendation of the Law Commission, was that such an operator should not get the retrospective benefit of the new Code, in particular the substantial benefit of the no-scheme valuation of the rights."

28. The transitional provisions say nothing about the application of Part 4 of the Code to subsisting agreements so, having regard to paragraph 2(1) of Schedule 2, it must be taken that Part 4 applies to a subsisting agreement as it would to any agreement under Part 2 of the Code.

Grounds of appeal

29. The FTT dismissed the Council's application to strike out On Tower's claim under Part 4 and held that an operator whose right of renewal under the 1954 Act had become exhausted was entitled to pursue a claim for new rights under the Code. An operator does not have concurrent rights under the Code and the 1954 Act, and cannot choose which route to follow, but it does have the right to use the two regimes consecutively if necessary.

30. On behalf of the Council Mr Wills advanced three separate grounds of appeal against the FTT's conclusion:

    1. First, that the only route to the renewal of On Tower's rights was under the 1954 Act, and having failed under that Act, on a proper interpretation of the statutory scheme, it was not entitled to try again under Part 4 of the Code.

    2. Alternatively, for On Tower to try again under Part 4 of the Code was an abuse of process and its claim should be dismissed.

    3. Alternatively, On Tower's paragraph 20/27 notice had been served while its tenancy was being continued under the 1954 Act and while it still enjoyed Code rights and was therefore invalid and could not be used to as the basis of an application to the tribunal.

25. In their oral submissions both counsel found it convenient to consider the last of these grounds first, because it raises quite a short point which, if successful, might make it unnecessary to consider the more complicated issues which arise under the Code. But having considered the way in which the Judge dealt with the issues it appeared to me that his approach to the third issue could only be understood in the light of his earlier conclusion on the question of jurisdiction. I will therefore deal with the grounds of appeal in the order in which I have listed them above.

Ground 1: Does the Code prohibit an operator which has exhausted its rights of renewal under the 1954 Act from making a further application under Part 4?

26. On behalf of the Council Mr Wills submitted that to allow an operator to utilise Part 4 where it had already tried and failed to obtain renewal under Part 2 of the1954 Act would be inconsistent with the general scheme of the Code. There is no single statement to that effect in the Code, but it is clear from the structure of the Code as a whole. *Compton Beauchamp* pointed to a purposive interpretation of the Code, as Lady Rose had explained at paragraph [106] when interpreting paragraph 9 of the Code: "The correct approach is to work out how the regime is intended to work". The Court of Appeal had adopted the same approach in *Vodafone Ltd v Potting Shed Bar and Gardens Ltd & Anor* [2023] EWCA Civ 825 when interpreting paragraph 10 of the Code. To allow an operator to bring a Part 4 claim after it had been unsuccessful in securing a renewal under the 1954 Act would enable it to circumvent the policy that the more favourable basis for renewal allowed by the Code was not to apply retrospectively to agreements which were in existence when the new Code came into force. It would allow a second bite at the cherry once the intended renewal process had been exhausted, and it would give rise to numerous anomalies and absurdities.

27. Mr Radley-Gardner submitted that there was no jurisdictional bar to an operator claiming new rights under the Code after exhausting its rights of renewal under the 1954 Act. On the contrary, that was what the Code provided for, including in particular in paragraph 40(8). In *Compton Beauchamp* the Supreme Court had decided that an operator with apparatus installed on a site is not to be regarded as the occupier of that site for the purposes of paragraph 9 of the Code. The operator can agree new code rights with the person who is in a position to grant them, and it can give notice under paragraph 20 requesting a relevant person to confer a new code right on it. It cannot do so during the contractual term of its agreement (unless it seeks additional rights) or while renewal under Part 5 remains available to it, but subject to those restrictions its occupation of the site is no bar to reliance on Part 4. In this case therefore, the fact that On Tower was in occupation of the site on the roof of The Hive did not disqualify it from making an application under Part 4.

28. There was no reason, Mr Radley-Gardner argued, to distinguish between an operator which has exercised rights of renewal under the 1954 Act without success, and an operator which has agreed under section 38A, 1954 Act that it will not enjoy rights of renewal, or whose occupation is a tenancy at will which has arisen during the course of negotiations, or an oral agreement, neither of which is a subsisting agreement for the purpose of the transitional provisions. On Tower had been in that position at the site which was the subject of its appeal determined by the Supreme Court together with *Compton Beauchamp*. Lady Rose had explained why it was entitled to make use of Part 4 of the Code, at paragraph [165]

> "On Tower's ECA is present on the site pursuant to an initial lease which fell within Part 2 of the 1954 Act but which had been contracted out of the protection of tenure provided by that Act. If its current rights had been contained in a "subsisting agreement" within the meaning of the transitional provisions, it would have been entitled to use Part 5 of the new Code. This is because para 6 of the transitional provisions applies Part 5 to subsisting agreements and On

> Tower's agreement would not be in the category of excluded agreements. The Upper Tribunal held, however, that On Tower's rights were no longer embodied in a "subsisting agreement" because they were in an unwritten tenancy at will. On Tower could not rely on the transitional provisions because they only applied Part 5 to subsisting agreements. The Upper Tribunal's conclusion that On Tower was also prevented from using para 20 of the new Code was based solely on the judgments in *Compton Beauchamp* and *Ashloch* which had ruled that an operator with ECA on site such as On Tower was the occupier of the site for the purposes of para 9 and therefore unable to apply under para 20. As explained above, I consider that no such bar is created by the new Code and that the Upper Tribunal has jurisdiction to determine On Tower's application. I reiterate the point I made in para 93 above, that this conclusion does not improve the position of On Tower over the position it was in under the old code as the Upper Tribunal and the Court of Appeal have suggested. There was nothing in the old code which precluded an operator vulnerable to an application to remove his apparatus from applying for fresh rights to be imposed by order of the court under para 5 of the old code."

29. The consequence of Mr Radley-Gardner's argument, as he acknowledged, is that any operator faced with a removal application under Part 6 of the Code would be entitled to defend that application by seeking new rights to remain under Part 4. Paragraph 40(8) specifically contemplated that an application under paragraph 20 could be made while a landowner was seeking an order requiring removal of an operator's apparatus. It directed that no removal order may be made until the operator's paragraph 20 application has been determined. As Lady Rose had pointed out, this replicated the position under the old Code.

30. According to Mr Radley-Gardner there were good reasons for the existence of a safety net allowing an operator which had been unable to secure a renewal of its rights in proceedings under the 1954 Act to apply under Part 4. The grounds of opposition to a lease renewal available to a landlord under the 1954 Act are wider than under the Code; for example, there is no equivalent of section 30(1)(g) of the 1954 Act, which allows a landlord to oppose renewal on the grounds of its own intention to occupy the holding. If the ground of opposition on which a landlord succeeded in resisting renewal under the 1954 Act was one of those which would also have provided a ground of opposition under paragraph 31(4) of the Code (substantial breach of agreement, persistent delay in making payment, or redevelopment) an application under paragraph 20 might be struck out as an abuse of process. But if the 1954 Act ground was not one recognised by the Code, it might be necessary, having regard to the public interest in access to a choice of high quality electronic communications services, to seek renewal under the Code. The facts might also change, and a landlord which successfully resisted renewal on the ground that it intended to redevelop the holding might find that it was unable to do so for some reason. It would not be surprising if, in those circumstances, the operator was able to seek renewal under the Code.

31. Mr Radley-Gardner also relied on the lengths to which, he suggested, operators would be driven if the safety net of an application under Part 4 was not available to them in response to a removal application. At paragraph [126] of her judgment in Compton Beauchamp Lady Rose agreed with the concerns expressed by Judge Cooke in her decision in this Tribunal in the On Tower case (then known as *Arqiva Services Ltd v AP Wireless II (UK)*

Ltd [2020] UKUT 195 (LC)) at paragraph [160] that an operator unable to seek renewal could make an application under paragraph 20 in relation to an immediately adjacent site in the same ownership, and move its apparatus a few yards sideways, or could shut down its equipment and the service it provides and move out of occupation, so as to be in a position to serve a paragraph 20 notice.

32. I do not accept Mr Radley-Gardner's submissions. They appear to me to be inconsistent with the intended operation of the Code, as described by the Supreme Court in *Compton Beauchamp*, and to contradict the policy reflected in the Law Commission's report, the Government's response, and the transitional provisions, that rights of renewal are available to an operator either under the Code, or under the 1954 Act, but not under both.

33. The Law Commission recommended that operators with rights under the old Code should not immediately acquire the benefits of the new Code when it came into force. That recommendation was the subject of government consultation, and in its response to that consultation, *A New Electronic Communications Code*, published in May 2016, the relevant Department (DCMS) stated that it had "not been sufficiently convinced the public benefits of retrospective application are such that they outweigh interference with carefully negotiated arrangements under the existing Code". Instead it looked forward to "a steady phasing in of Code rights" and promised "a clear and robust set of transitional provisions".

34. The "phasing in of Code rights" envisaged by the government's consultation response includes the phasing in of the provisions on termination and modification in Part 5. The transitional provisions prohibit renewal under Part 5 in the case of agreements which already enjoy rights of renewal under the 1954 Act. In *Compton Beauchamp*, at paragraph [167], Lady Rose rejected the operators' argument that an operator with a subsisting agreement protected under the 1954 Act should have the option of renewing its rights under Part 4 of the new Code: "The intention of the Government, following the recommendation of the Law Commission, was that such an operator should not get the retrospective benefit of the new Code, in particular the substantial benefit of the no-scheme valuation of the rights."

35. Nowhere in her comprehensive discussion of renewal under the Code did Lady Rose suggest that the assignment of operators to one route of renewal or the other applies only until the right of renewal under the 1954 Act had been exhausted. The reasoning of this Tribunal and the Court of Appeal in *Ashloch*, which Lady Rose found "persuasive", focused on what I had suggested would be the "astonishing" consequences if, contrary to the recommendations of the Law Commission, operators could choose to renew under the Code instead of under the 1954 Act. The Code is much more favourable to operators than the 1954 Act; it allows a much shorter notice period, a considerably more generous basis of assessment of rent, and a less restricted approach to other terms. Whether under Part 4 or Part 5 it also provides more limited grounds of opposition for the site provider. In my judgment the suggested operation of the Code proposed by On Tower would result in a truly absurd state of affairs in which an operator obliged first to seek renewal under the less favourable regime of the 1954 Act would know that, if they failed, they would then gain access to the more desirable reward of a renewal under Part 4 of the Code. It would become pointless for a site provider to resist renewal under the 1954 Act on any ground other than redevelopment (since only redevelopment would avail them in the event of a

subsequent application under Part 4). Even if operators did not succumb to the temptation to manage a 1954 Act application incompetently, so as to secure its dismissal, landlords would soon appreciate that it would be in their own interests to waive or forgive any procedural defect or default (whether deliberate or inadvertent) which might otherwise cause the renewal to fail.

36. In short, a sequential scheme of renewal designed to allow access to the greater prize only after the applicant has failed to secure the lesser would not be a rational scheme, and I have no doubt that it is not the scheme Parliament intended when it enacted the transitional provisions.

37. The suggested equivalence between an operator who has no right of renewal under the 1954 Act because they have agreed to contract out, and the operator whose right of renewal has been pursued unsuccessfully, is a false one. The Code allows each operator one route to the renewal of their rights. The policy choice to require those with security of tenure under the 1954 Act to seek renewal under its provisions necessarily entailed the possibility that any particular renewal might not succeed. The only reason to instal a safety net to protect against that eventuality would be if the priority to be given to the public interest in maintaining the operator's network was intended to trump the right of the landlord to resist a renewal on 1954 Act grounds. But if that had been the balance Parliament had intended to strike it would surely have given operators access to Part 4 of the Code straight away, without transitional provisions designed to phase it in, rather than creating an unwieldy and expensive two stage process.

38. Nor do I believe that consideration of the position under the old Code is of assistance. As Lady Rose pointed out in *Compton Beauchamp*, at the end of paragraph [165], there was nothing in the old Code which precluded an operator vulnerable to an application to remove its apparatus from applying for fresh rights to be imposed by order of the court under paragraph 5 of the old Code. But Lady Rose drew attention to that opportunity in the context of her explanation of the position of an operator which did not have a subsisting agreement, and which would otherwise have had no right to seek code rights. She was not considering the rights of an operator which had enjoyed rights under the 1954 Act but had exhausted them without securing new rights under the Code. In any event, the policy of the Code was to end the duplication of security of tenure which was a feature of the previous arrangements when the old Code and the 1954 Act provided protection to the same agreements.

39. Mr Radley-Gardner's reliance on paragraph 40(8) of the Code also seems to me to be misplaced. The direction that, on a removal application, the tribunal may not make an order in relation to apparatus if an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined does not in itself authorise the making of an application under Part 4. The right to make such an application must be found elsewhere. The most that can be said is the paragraph 40(8) indicates that there will be circumstances under which an application under Part 4 may coincide with a removal application under Part 6.

40. The circumstances in which a removal application may be made are listed in paragraph 37 of the Code. One is where a code right entitling an operator to keep the apparatus on the land has come to an end or has ceased to bind the landowner as mentioned in paragraph

26(7) and (8) of the Code (paragraph 37(3)(a)). Once an agreement conferring interim code rights under paragraph 26 has come to an end, if no new agreement has been imposed under paragraph 20, paragraph 26(8) gives the landowner who was party to the agreement the right to require the operator to remove its apparatus from the land. Paragraph 40(8) regulates the sequence in which the tribunal must determine the removal application and any pending application under paragraph 20 to grant new rights (which may be either temporary or permanent).

41. Mr Wills pointed out a number of other circumstances in which a removal application may be made against an operator which is in a position to apply for Code rights under Part 4. The former tenant under a tenancy contracted out of the 1954 Act which ended before the commencement of the Code, and which had not yet been replaced by a new agreement would be one. An operator which had mistakenly installed apparatus on land believing it had the right to do so, when it did not, would be another. It will also be remembered that, in *Crawley BC v EE*, at paragraph [8], Judge Cooke explained that the old Code was unsatisfactory in part because it was very difficult for landowners to get rid of apparatus which should not have been on their land, including where there had never been an arrangement for it to be there. These are the sorts of circumstances in which an operator who is already occupying land may apply under paragraph 20 while the landowner seeks a removal order.

42. I therefore do not think paragraph 40(8) advances On Tower's argument.

43. Nor do I consider that the greater opportunities available under the 1954 Act for a landlord to oppose the renewal of a tenancy justify interpreting the Code so that it provides a fall back in the event that renewal under the 1954 Act is denied. On the contrary, as I have already said, the policy decision to require renewal under the 1954 Act, where that route is available to the operator, must have entailed an acceptance that some renewal applications would fail. If that possibility was too unpalatable to feature during the transition to the new Code, the transition arrangements would surely have been designed differently.

44. Finally, the risk that, without the safety net of an application under Part 4, operators might be driven to the wasteful expedients which were a concern to Judge Cooke in *Arqiva v AP Wireless* at paragraph [160], and Lady Rose in *Compton Beauchamp*, at paragraph [126], seems to me not to have anything like the same force in this case. The issue in *Compton Beauchamp* was whether an operator *in situ* was to have any right of renewal at all. That issue concerned the fundamental structure of the Code and affected a substantial part of the existing electronic communications networks of all operators at "sites across the country", as Lady Rose put it. The issue in this case is not about how the Code is intended to work on site after site across the country; it is about what happens on the relatively rare occasions when an operator is unable, for whatever reason, to obtain renewal by the route which the designers of the transitional provisions intended to be the primary route. The risk that, in that event, a particular operator might have to make alternative arrangements, including seeking new rights on an adjoining site, or vacating the existing site and then seeking to re-occupy it, is not a matter of wider significance.

45. I am therefore satisfied that the proper interpretation of the Code requires that an operator which has exhausted its rights of renewal under the 1954 Act is prevented from making a

further application for rights under Part 4 of the Code. In my judgment the FTT did not have jurisdiction to entertain On Tower's reference under Part 4 and should have struck it out under rule 9(2)(a) of the FTT Rules.

Ground 2: Was On Tower's application under Part 4 of the Code an abuse of process and should the reference be dismissed?

46. Because of the conclusion I have already reached on ground 1, I can deal with ground 2 briefly.

47. I was referred to a number of authorities of relevance to this ground of appeal.

48. The leading modern case on abuse of process is *Johnson v Gore Wood & Co* [2002] 2 AC 1 which concerned the problem of successive civil actions arising from the same facts. Having considered the different categories under which that problem had previously been analysed Lord Bingham said this (at 31 A-D):

> "But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as the unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

49. One significant feature of this case is that On Tower is seeking to bring new proceedings having suffered the dismissal of its original claim on purely procedural grounds, rather than after an examination of its merits. In that regard it is clear from *Aktas v Adepta* [2011] QB 894 that a merely negligent failure to serve a claim form in time is not to be regarded as an abuse of process and is not a reason in itself why a second claim raising the same

cause of action should be struck out (even where the expiry of the primary limitation period means that the claimant needs a discretionary extension of time).

50. If I am wrong in my conclusion on the first ground of appeal, and if the proper interpretation of the Code is that an operator who has tried unsuccessfully to obtain a renewal of its Code rights by proceedings under the 1954 Act is not barred from making a further claim under Part 4 of the Code after its first claim has been dismissed, then I would not be prepared to strike this claim out as an abuse of process. That is for two reasons. First, because if Mr Radley Gardner is right, the opportunity to bring a second claim is part of the design of the Code, and it would require something more than simply bringing the claim to amount to abuse. And secondly, if it is not an abuse of process to claim the same remedy in a second civil action after a first has been dismissed on procedural grounds which do not themselves involve any misconduct or abusive behaviour, I do not see how it can be an abuse of process to claim a different remedy, albeit one similar to the first, in a second set of proceedings unless there is something else in the circumstances which amounts to an abuse, such as attempting to relitigate an issue which has been decided in the first action.

51. If I had had to decide the second ground of appeal, I would therefore have refused it. As it is, the second ground does not arise.

52. As a postscript I would add that the public interest in securing finality in litigation, which Lord Bingham referred to in the passage from *Johnson v Gore Wood* cited above, provides further support for the interpretation of the Code which I have preferred in dealing with the first ground of appeal.

Ground 3: Was On Tower prevented from serving a valid paragraph 20/27 notice on 17 February 2023 because its tenancy was still being continued by the 1954 Act?

53. The notice given by On Tower on 17 February 2023 invited the Council to enter into two different agreements, the first conferring temporary rights under paragraph 27 of the Code and the second for unrestricted rights under paragraph 20. Paragraph 27 is intended to provide an operator with a means of keeping electronic communications apparatus which is already on a site functioning while it seeks new permanent rights.

54. Paragraph 27 only applies where each of three conditions in paragraph 27(1) is satisfied. The operator must give a notice under paragraph 20(2) inviting the recipient to enter into an agreement conferring code rights; the notice must also invite the recipient to enter into an agreement on a temporary basis in relation to apparatus which is already on the land; and the recipient of the notice must have the right to require the removal of the apparatus in accordance with paragraph 37 or paragraph 40(1), but the operator must not yet have been required to remove it. It follows from the third of these conditions, paragraph 27(1)(c), that a claim for temporary code rights is only available after an existing agreement has come to an end.

55. Mr Wills pointed out that the third condition cannot be satisfied where an operator is in occupation of a site under a subsisting agreement which continues to bind the site provider, including under a tenancy which was being continued by Part 2 of the 1954 Act following

its contractual termination. The site provider would not have the necessary right to remove the apparatus if the operator still had a tenancy of its own. Mr Radley-Gardner did not disagree with that proposition.

56. Mr Wills also relied on *Compton Beauchamp* which establishes that paragraph 20 and Part 4 of the Code cannot be used by an operator *in situ* to obtain a modification (or renewal) of its existing code rights. Only Part 5 can be used for that purpose (although Part 4 can be used to obtain additional code rights).

57. It followed, Mr Wills submitted, that an operator who seeks renewal of its existing code rights enjoyed under a lease which predates the commencement of the Code and which is being continued by the 1954 Act cannot bring a claim under the Code or serve a valid paragraph 20 notice.

58. The critical question for the purpose of this ground of appeal is therefore whether On Tower's lease was still being continued by Part 2 of the 1954 Act when the paragraph 20/27 notice was given on 17 February 2023. If it was, the notice was premature, the condition in paragraph 27(1)(c) was not satisfied, and the claim under Part 4 (which seeks all the same code rights On Tower continued to enjoy and no additional rights) was impermissible.

59. Section 64(1) of the 1954 Act provides that, where an application has been made for a new tenancy under Part 2 of the Act and the effect of a notice to terminate the tenancy would be to terminate it earlier than the expiry of three months "beginning with the date on which the application is finally disposed of", the effect of the notice is to terminate the tenancy at the expiry of that period of three months and not at any other time. By section 64(2), the date on which the application is "finally disposed of" means:

> "… the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment".

60. The parties disagree on when the application was "finally disposed of". Mr Radley-Gardner submitted that the proceedings were finally disposed of when the time allowed by CPR r.7.5(1) for the service of the claim form expired, which was on 12 November 2022, without service having been achieved. On that basis the period of continuation of the tenancy provided by section 64 expired three months later on 12 February 2023, which was before the service of the paragraph 20/27 notice on 17 February 2023. Mr Wills submitted that the proceedings were not finally disposed of until On Tower's application for an extension of time to serve the claim form was refused and the application was formally dismissed by the Deputy District Judge on 23 February 2023. The tenancy was continued for a further three months after that date and did not terminate until 23 May 2023.

61. In the FTT, Judge Jackson accepted Mr Wills' submission that the tenancy continued until the application was formally dismissed and relied on the decision of the Court of Appeal

in *Aktas v Adepta* (to which I have already referred) in support of that conclusion. But he did not accept the consequence urged on him by Mr Wills and held instead that On Tower was entitled to apply to the tribunal under Part 4 because it had received notice from the Council under paragraph 40 of the Code requiring it to remove its apparatus from the site.

62. Section 64(2) identifies the date on which "the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired" as the date on which the application is finally disposed of for the purpose of starting time running under section 64(1). The critical question is therefore whether a claim for a new tenancy brought under Part 2 of the 1954 Act has "been determined" when the time for service of the claim form expires without service having taken place.

63. As Rix LJ explained in *Aktas v Adepta* at paragraph [91] "in England, unlike (all or most) civil law jurisdictions, proceedings are commenced when issued and not when served". The proceedings are therefore in being before they are served. I was shown nothing in the CPR which deals with the status of the proceedings where service has not been achieved within the period of 4 months permitted by CPR 7.5(1).

64. It is clear from CPR 7.6(1) that a claimant may apply for an order extending the period for service of a claim form, even after time has expired. That does not suggest that when time expires the claim form ceases to exist as a claim form. In *Aktas v Adepta*, at paragraph [17], Rix LJ said that there was "some uncertainty about the correct way to close down an action which cannot go forward because service is out of time or cannot be effected in time", but he did not suggest that "closing down" the action was unnecessary. On the contrary, he referred to the principle, reflected in CPR 3.10, that non-compliance with a procedural rule does not nullify the proceedings, or invalidate any step taken, unless the court so orders. At paragraph [18] he said that if a claim form is never served "the action appears to go into limbo, although it can of course be discontinued". Finally, at paragraph [21], he said that a District Judge's order setting aside a claim form served after the expiry of the permitted time did not seem "wide of the mark".

65. I was also referred to *Piepenbrock v Associated Newspapers and others* [2020] EWHC 1708 (QB), in which a claim form issued on 11 October 2019 was not served until 13 February 2020. Nicklin J said that by the time it was served the claim form was "no longer valid" and had "lapsed". Having refused various applications to extend time for service, to validate an ineffective attempt to serve the defendant's solicitor before the expiry of time, and to dispense with service altogether, he concluded that the defendants were entitled to an order under CPR Part 11 that the Court had no jurisdiction to hear the claimant's claim and a declaration that service of the claim form had been ineffective.

66. Neither of these authorities was concerned with the running of time under section 64 of the 1954 Act where a claim form has been issued but not served. But they suggest that a failure to serve a claim form within the permitted time does not determine the proceedings altogether. The claimant may apply for an extension of time, or the defendant may apply to set aside late service or to strike out the claim or for an order

that the Court lacks jurisdiction. It would follow that, until a further order has been made, the proceedings remain in being, and cannot be said to have been "determined".

67. It also seems to me that, in the context of section 64, the word "determined" implies more than an administrative termination; it suggests a judicial decision. It suggests that finality has been achieved and is used to identify the point in time when proceedings have been "finally disposed of". Accordingly, it does not seem to me to be apt to refer to proceedings as having been determined when they are in abeyance for some procedural reason but might nevertheless be revived.

68. I was not referred to any authority on the operation of section 64 itself. The decision of the Court of Appeal in *Shotley Point Marina (1986) Ltd v Spalding* [1997] 1 EGLR 233 was concerned with the date on which proceedings were finally disposed of when a notice of appeal was not served in time and an application to extend time was subsequently dismissed. The Court held that time ran from the expiry of the time limit for filing a notice of appeal, and not from the date of dismissal of the application for an extension of time, but that conclusion turned on the meaning of "proceedings … on an appeal" in section 64(2) and does not shed light on the issue in this case.

69. I therefore agree with what appears to have been the Judge's view that On Tower's proceedings under the 1954 Act were not "determined" when the time for service of the claim form expired. But the Judge did not accede to Mr Wills' submission that the notice served under paragraph 20/27 was invalid because it was served while On Tower's tenancy was still being continued by the 1954 Act. The reason he gave in paragraph 42 of his decision was that on 30 May 2023 the Council had served notice under paragraph 40 to enforce removal of On Tower's apparatus. Under those circumstances the Judge considered that the reference under Part 4:

> "… was made at a time when the claimant operator was vulnerable to an application for removal of its apparatus. By that date the 1954 Act tenancy had been determined by operation of section 64 (3 months from 23 February 2023). The claimant thus found itself in "the last chance saloon" and, absent abuse of process or relitigating issues already determined, could access Part 4 of the Code."

70. There is no doubt that, by 30 May 2023 On Tower was vulnerable to an application for the removal of its apparatus. But that was not yet the position on 17 February 2023 when the paragraph 20/27 notice was given. At that time the tenancy was still being continued and On Tower was in the same position as the operator in *Ashloch*. The Judge's reasoning left unresolved the question of whether a paragraph 20 notice could be served before the final termination of the tenancy which was being continued under the 1954 Act.

71. Mr Radley-Gardner did not invite me to adopt the Judge's reasoning on this point, but instead put forward an alternative submission. That was that by 12 November 2022, when time for service of the claim form expired, On Tower ceased to have access to the 1954 Act renewal machinery. It then became an operator without access to any renewal regime apart from that under Part 4 of the Code. Whatever the procedural status of the

claim form On Tower had no renewal rights when it served the paragraph 20 notice and was therefore entitled to invoke the Code to prevent its removal.

72. I have already rejected Mr Radley-Gardner's analysis of the rights of an operator which has lost its opportunity to renew under the 1954 Act. It is clear that, on the view I take of the status of the proceedings after the failure to serve the claim form in time, On Tower was not entitled to serve a notice under paragraph 27 to secure temporary rights because its tenancy was still continuing. Even if I am wrong about the first ground of appeal, I would nevertheless hold that On Tower was also barred from serving a valid notice under paragraph 20 while its tenancy was being continued by the 1954 Act. On that basis its Part 4 claim was commenced without a valid request under paragraph 20 having first been made and without the required time for consideration of the request by the Council having elapsed. That is a further, free standing ground for dismissing the reference under rule 9(3)(a) of the FTT's Rules.

Disposal

73. For these reasons I allow the Council's appeal and strike out On Tower's notice of reference.

Martin Rodger KC,

Deputy Chamber President

4 June 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.