Shut Out of the Electronic Communications Code

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Arqiva Services Limited -v- AP Wireless II (UK) Limited

Since the introduction of the Code back in December 2017, a good deal of Tribunal time has been used up on questions of capacity and the ability of operators to seek Code rights, as opposed to the terms on which such rights should be granted; valuation and the like. What do we know so far?

- We know that an operator cannot seek Code rights from a landowner where there is a third party already in occupation of the site – *CTIL -v- Compton Beauchamp Estates*;
- We know that operators cannot use the Code where their existing agreement is 1954 Act protected – *CTIL -v- Ashloch*; and
- We know that paragraph 26 is a stand-alone Code right – *CTIL -v- The University of London*

In a lengthy and wide-ranging Judgment issued just today (in which all of the above earlier decisions are referenced) the Tribunal has now reluctantly decided that a sitting operator with no Code protection cannot utilise paragraphs 20 and 27 to hold and protect its position at an existing site, pending the grant of long term rights to remain.

This is a decision which will have very significant implications indeed for many existing telecoms sites (and therefore potentially telecoms network coverage) across the country.

The Facts

Arqiva occupied this site pursuant to a lease which expired in October 2016 and was contracted out of the 1954 Act. Nevertheless, Arqiva remained in occupation paying rent, up to the point of issuing this reference.

The first part of the Judgment therefore considers the legal basis upon which Arqiva occupied the site and whether that occupation constituted a subsisting agreement under the Code.

The Tribunal then moved on to consider whether it has jurisdiction to impose an agreement under paragraph 20.

Occupation

In short, the Tribunal concluded that Arqiva was a tenant at will, which did not qualify as a subsisting agreement under the Code, on account of there being no written agreement between the parties to this effect. There is some very detailed and useful analysis in the Judgment itself, which sets out the basis upon which the Tribunal reached its decision.

The implication of this is that Arqiva was in a vulnerable position at the site, with no Code protection and no right to renew under Part 5. As an aside, due to the outcome in Ashloch, the Tribunal commented that the position would have been the same in the event that it had found that Arqiva occupied the site pursuant to a periodic tenancy (although it would at least have had the opportunity to renew under the 1954 Act).

Jurisdiction

This case is a development of the arguments in Compton Beauchamp and, at the end of the day, the outcome has been dictated by the reasoning of the Court of Appeal in that earlier case, to the frustration of the Tribunal it seems.

Under paragraph 9 of the Code, we know rights can only be conferred by the occupier of land. When the Tribunal decided Compton Beauchamp, it was of the view that Code rights could be granted to a sitting operator, as the grant of a new agreement between those two parties (whether by agreement or compulsion) would effect a surrender of any old interest. That did not work (as in the case of Compton Beauchamp) where a third party infrastructure company was seeking rights over the site, as no simultaneous surrender would be effected.

In the subsequent Court of Appeal case, however, a much more narrow approach to paragraph 20 was adopted. In essence, the Court found that there is no jurisdiction, in any circumstances, to impose an agreement under paragraph 20 on an operator that is already in occupation of a site. That is the case regardless of whether that paragraph 20 application is made in conjunction with one under paragraph 27.

Decision

In these circumstances, the Tribunal in this reference considered that it was bound to follow the outcome of the Compton

Beauchamp Court of Appeal decision to determine that it did not have jurisdiction to make a impose a paragraph 20 agreement in the favour of Arqiva.

The Tribunal also determined that the practical effect of this outcome was to significantly limit the benefits and effect of paragraph 27, in circumstances where no follow up paragraph 20 application can be made. Essentially, all that paragraph 27 can now do is hold the position, pending removal.

The Tribunal went on to comment "*this seems to me to be inconsistent with the policy of the Code, as well as doing violence to the provisions of paragraph 27*".

And then "*The policy of the Code is to facilitate the public interest in access to a choice of high quality electronic communications services. True, operators who have subsisting agreements have to honour that bargain whilst it lasts, and then must make use of Part 5 to extend or renew their rights.* ***Operators without Code rights are supposed to be able to use Part 4, specifically paragraph 20 to get them****. It is not possible to discern from the Law Commission's report or from any Government statement, an intention that any such operator would be excluded from paragraph 20 in relation to a particular site, and I can think of no reason why that would have been Parliament's intention*".

And finally "*I suggest, with respect to the Court of Appeal, that a wrong turn may have been taken, and that the narrow interpretation of the requirement of occupation in the Code leads to results that are unacceptable in terms of the policy of the Code*".

The Tribunal did made it clear that, but for the Court of Appeal decision in Compton Beauchamp, it would have followed its own reasoning at first instance and therefore avoid this outcome.

Consequences

The practical consequences of this outcome could be, on the face of it, severe for telecoms operators and, with it, telecoms network coverage.

There are many existing sites, as in this case, which have no Code or 1954 Act protection, the underlying agreement having expired prior to December 2017. These sites are now effectively, as the Tribunal says, "shut out" from the Code.

Some workarounds are suggested by the Tribunal – for example, the sitting operator conferring Code rights on a third party "friendly operator", then seeking for the landowner to be bound by those rights, or else moving the site altogether and starting again! These limited options are, however, only really brought up to highlight the perverse effects of this outcome. Another alternative would be for the operator to agree a ransom rent with the landowner, i.e. exactly what the Code was intended to avoid in the first place.

The Tribunal has already indicated that it will grant permission to appeal upon application, so this decision could yet be reversed. It goes without saying, however, that we have not seen the last of these jurisdiction arguments yet!

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