

# Supreme Court Decisions on Occupier Test - ignore the facts, focus on the bigger picture!

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*In a much anticipated decision of the Supreme Court in no less than three appeals by telecommunications operators, Lady Rose made clear today that the much litigated question as to who was the occupier of land for the purpose of paragraph 9 of the New Code had a fairly simple answer - not the Operator!*

Since 2017 the Upper Tribunal and the Court of Appeal have wrestled with who has the locus to enter into code agreements when there is a sitting operator in occupation of the land and that operator does not (owing to the transitional provisions) have a route to renewal under Part 5 of the New Code.

Further, the question of acquiring new rights during the term of an existing agreement has also been a vexed issue and one without a satisfactory outcome.

In a short judgement delivered across all three appeals by Lady Rose on 22 June 2022 it has now been conclusively confirmed that:

- **An Operator can progress an application under Part 4 where it has no route to a renewal of its agreement under part 5 of the Code or the Landlord and Tenant Act 1954.**

*The Court of Appeal erred in holding that the proper construction of the new Code results in the tribunal having no jurisdiction to consider an application under Part 4 of the new Code from an operator on the grounds that the operator is in occupation of the site because of the presence there of its ECA. It is inherent in paragraph 9 of the Code (which states who may confer Code Rights), read in the context of the regime created by the Code, that the “operator” who seeks a Code Right, as referred to in that provision, is different from “the occupier of the land”, as that term is used in that provision.*

*The operator seeking to have a Code Right conferred on it is therefore ignored.*

- **An Operator can progress an application under Part 4 in order to seek additional Code Rights**

*A further consequence of the change to the occupier test means that an Operator can use part 4 of the code to obtain additional Code Rights. Lady Rose was clear that part 4 can only be used to impose additional Code Rights and not to modify rights already conferred in an existing part 2 agreement or a Code Agreement to which Part 5 applies.*

*This potentially gives Operators a route to seek additional Code Rights in the event that they have a requirement to install additional equipment on a building and their current agreement contains a cap or limitations on their rights. That said, differences of opinion are sure to arise as to whether the Operator is seeking additional rights or modification of the rights it already has.*

- **An Operator in occupation with the protection of the 1954 Act can only use the 1954 act to renew its agreement.**

*Lady Rose agreed with both the Upper Tribunal and Court of Appeal that a subsisting agreement with the protection of the 1954 act should not have a right of renewal under the Code. An Operator would have the option to apply under the Code for additional rights but it cannot bypass the fact that it has ongoing rights under a tenancy which it is entitled to renew under the 1954 Act.*

The effect of the above led to the following outcomes:

## Cornerstone Telecommunications Infrastructure Ltd (Appellant) v Compton Beauchamp Estates Ltd (Respondent)

- Vodafone is in occupation of a telecommunications site pursuant to a tenancy at will that followed after the expiry of a 1954 Act contracted out lease in 2014.
- Vodafone set up a joint venture company with Telefónica UK - Cornerstone - to hold the assets of its network. Cornerstone served a para 20 notice on Vodafone’s landlord seeking Code Rights.
- The Upper Tribunal and Court of Appeal determined that it could not impose an agreement under para 20 on an operator in occupation and dismissed Cornerstone’s application.

- The Supreme Court determined that the occupier, for the purpose of Cornerstone's application, was Vodafone and not Vodafone's landlord therefore Cornerstone's appeal was dismissed.
- Vodafone could have served a para 20 notice on its Landlord given that Vodafone's occupation would have been disregarded when considering who is the occupier.
- Cornerstone could have served a para 20 notice on Vodafone and made an application for Vodafone's landlord to be bound by the terms of the resulting Code Agreement.

Cornerstone Telecommunications Infrastructure Ltd (Appellant) v Ashloch Ltd and AP Wireless II (UK) Ltd (Respondent)

- Vodafone was in occupation of a telecommunications site pursuant to a lease that benefitted from the protection of the 1954 Act. The contractual term of the lease expired in 2012 and Vodafone subsequently assigned the lease to Cornerstone.
- Cornerstone served a para 20 notice and sought a new Code Agreement from its Landlord.
- The Upper Tribunal and Court of Appeal determined that Cornerstone cannot use para 20 to seek a new agreement when it has a route to renewal available under the 1954 act.
- The Supreme Court determined that Cornerstone could only use para 20 to seek additional rights and it was unclear whether the rights sought were additional to Cornerstone's existing rights. The court invited the parties to submit whether they would like the appeal to be remitted to the Upper Tribunal to consider this.

On Tower UK Ltd (formerly known as Arqiva Services Ltd) (Appellant) v AP Wireless II (UK) Ltd (Respondent)

- On Tower is in occupation of a telecommunications site pursuant to a tenancy at will that followed after the expiry of a 1954 Act contracted out lease in 2016. On Tower served para 20 and 27 notices seeking new rights under the Code.
- On Tower's application was dismissed on the basis that it could not seek an agreement under para 20 due to it being the occupier of the land.
- The Supreme Court allowed the appeal. On Tower's occupation is to be disregarded for the purpose of determining who is the occupier under para 9 of the Code. On Tower could not renew under part 5 of the Code or the 1954 Act therefore On Tower was able to seek Code Rights under para 20.

**Commentary**

Many operators occupy cell sites under expired agreements which do not allow a renewal under part 5 of the Code or the 1954 Act. The Court of Appeal's decision in Cornerstone v Compton also prevented the operator from using para 20 and left the operator in a position where it could not renew or seek new code rights.

This important decision of the Supreme Court means that operators will now have a route to seek a new code agreement in circumstances where a statutory renewal is unavailable under the Code or 1954 Act.

This is a welcome move forward and aligns well with the planned further modifications of the Code that are now well progressed in their parliamentary journey as part of the Product Security and Telecommunications Infrastructure Bill.

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