Press Summary

22 June 2022

Cornerstone Telecommunications Infrastructure Ltd (Appellant) v Compton Beauchamp Estates Ltd (Respondent)
Cornerstone Telecommunications Infrastructure Ltd (Appellant) v Ashloch Ltd and AP Wireless II (UK) Ltd (Respondents)
On Tower UK Ltd (formerly known as Arqiva Services Ltd) (Appellant) v AP Wireless II (UK) Ltd (Respondent)
[2022] UKSC 18
On appeals from: [2019] EWCA Civ 1755; [2021] EWCA Civ 90 and [2020] UKUT 0195 (Lands Chamber)

Note: the three appeals will be referred to as follows (in line with above numbering):

(1) The *Compton Beauchamp* appeal
(2) The *Ashloch* appeal
(3) The *On Tower* appeal

Justices: Lord Hodge (Deputy President), Lord Sales, Lord Leggatt, Lord Burrows, Lady Rose

Background to the Appeal

These appeals concern the grant to telecommunications operators ("**operators**") of "code rights" enabling them to install and operate their network electronic communications apparatus ("**ECA**") on land not owned by them. The main issue is whether and how an operator who has already installed ECA on a site can acquire new or better code rights from the site owner.

Code rights are governed by the Electronic Communications Code contained in a schedule to the Communications Act 2003 ("**the new code**"). Paragraph 9 of the new code 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*" ("**Paragraph 9**"). Such an agreement can be made with the consent of the site owner (under paragraph 11 of the new code) or failing that, by an operator applying to the Upper Tribunal (Land Chamber) ("**the Tribunal**") for the

imposition of an agreement on the site owner (under paragraph 20 of the new code ("**Paragraph 20**")).

The Court of Appeal concluded that when an operator has already installed ECA on land, it will often be both the "*operator"* and "*occupier of the land"* for the purposes of Paragraph 9. As an operator cannot enter into an agreement with itself, the Court of Appeal concluded that in those circumstances an operator is precluded from applying for new code rights.

This has implications for the many thousands of agreements which were already in place between operators and site owners at the time the new code came into effect. The new code replaced a previous version contained within the Telecommunications Act 1984 ("**the old code**"). The move from the old code to the new code was governed by a set of transitional provisions ("**the transitional provisions**") which determined which kinds of old code agreements would be treated as "subsisting agreements" and therefore when and how they would be subject to the provisions of the new code.

All the appellants are operators of mobile telecoms networks. They installed ECA on land owned by the respondents many years ago in accordance with the provisions of the old code. Those agreements tended to grant rights for a long period because the operator would not want to invest in installing the ECA there as part of its network unless it was sure of the rights lasting for a long time. Some of the operators simply kept their ECA installed on the land after the agreement expired, without objection from the site owner. Now the operators want to improve the security of their position on the land by applying for new code rights. The appellants argue that on the true construction of Paragraph 9, an operator with ECA on land pursuant to code rights cannot be the "occupier of the land", and therefore that the presence of an operator's ECA on land should be disregarded for the purposes of Paragraph 9 so that they can apply to the site owner or to the tribunal for new code rights.

The respondent site owners say that the telecoms operators' ability to change the rights they have only arises once Part 5 of the new code ("**Part 5**") applies to them. Part 5 does contain provision for the renewal and modification of an existing code agreement but only once the initial period covered by the agreement comes to an end. This means that if the code rights were originally granted by the site owner for a period of, say, 10 years, Part 5 of the new code provides that the rights continue in effect after that 10 years has expired and at that point both sides can apply for new rights or to change the terms on which the existing rights are exercised. The transitional provisions for agreements entered into under the old code provide, the site owners argue, that the same applies to old agreements treated as subsisting agreements at the time of the switch from the old to the new code. The rights can only be modified only once the initial term has come to an end and the operator cannot apply for new rights to be conferred under the new code until then.

Judgment

In a unanimous judgment, the Supreme Court: (1) dismisses the *Compton Beauchamp* appeal; (2) requests further submissions from the parties in *Ashloch* prior to deciding its outcome; and (3) allows the *On Tower* appeal. Lady Rose gives the judgment, with which the other members of the Supreme Court agree.

Reasons for the Judgment

The "occupier of the land" issue

The main issue before the court is whether – in determining who is the "occupier of the land" in Paragraph 9 – the word "occupier" incudes an operator who is presently on the site as a result of having installed and operated ECA there, or alternatively whether you must ignore the presence of that operator's ECA **[100]**.

The Supreme Court starts from the proposition that the word "occupier" has no fixed meaning but takes its content from the context in which it appears and the purpose of the provisions in which it is used **[102]**. Looking at the new code as a whole, the Supreme Court holds that an operator which is already a party to a code agreement can only apply to the Tribunal to *modify* the terms of existing code rights it already has once Part 5 of the new code becomes available **[115-116]**. This is because parties should generally be kept to their bargains although they can seek a consensual variation under paragraph 11 of the new code **[130]**.

This does not, however, prevent an operator on site from being able to obtain *additional* code rights in respect of the same land. The Supreme Court concludes that it is inherent in Paragraph 9 when read in context that the "operator" seeking a code right is different from the "occupier of the land" **[116]**. This is an industry where technology develops quickly and Government policy is to encourage the roll out of new digital infrastructure across the whole country. It would impede this policy if operators could not apply for the new rights they need for their network simply because their ECA is already installed on the site **[119]**. The bar on applying for new rights would also operate in an arbitrary way because not every installation of ECA on a site by an operator would result in that operator becoming the 'occupier' of the site under the test applied by the Court of Appeal. There is no reason why Parliament would have wanted an operator who has to install a mast in a closed-off area in a rural setting to be in a different position under the code from an operator who simply attaches an antenna to the roof of an urban building **[122 – 124]**. The Court of Appeal's construction of the code would also lead to unnecessary disputes about whether in any particular case the operator was the occupier of the site or not **[125]**. The Supreme Court also finds that there are other provisions of the new code which are drafted on the assumption that an operator can apply for new code rights even if they already have ECA installed on the site **[141 – 158]**.

Outcome of the appeals

Although the Supreme Court therefore largely accepts the operators' arguments this does not result in all the appeals being allowed. The *Compton Beauchamp* appeal is dismissed because it was Vodafone which was in occupation of the site not the site owner Compton Beauchamp to which Cornerstone as operator had applied for the rights **[162 - 164]**. The Supreme Court does not hold that all occupation of *any* operator with ECA installed on the site falls to be disregarded. It is only the occupation of the operator who seeks to have a new code right conferred on it which is disregarded **[140]**. The *On Tower* appeal is allowed because On Tower's occupation of the land by virtue of its ECA being installed falls to be disregarded and there is therefore no barrier to a code agreement being imposed under Paragraph 20 **[165]**.

As regards the *Ashloch* appeal, the distinctive feature in this appeal concerns the fact that the tenancy initially conferring code rights under the old code was protected by Part 2 of the Landlord and Tenant Act 1954. This gives security of tenure to business tenants and permits the tenant to apply to the court to renew the lease when its initial term expires. The Supreme Court agrees with the Upper Tribunal and Court of Appeal that the transitional provisions

mean that an operator with a subsisting agreement protected under the 1954 Act does not have the option of renewing the rights under the new code. An operator in this position must instead exercise its rights under Part 2 of the 1954 Act. It is not apparent from the description of the background facts as set out in the judgments below whether the application made by Cornerstone covered new rights or rather sought to renew the rights that can only be renewed under the 1954 Act. The Supreme Court therefore invites submissions from the parties as to whether the appeal should be remitted to the Upper Tribunal to consider this. **[166 - 170]**.

References in square brackets are to paragraphs in the judgment