

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

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Facts

An operator (A) occupied a site with its electronic communications apparatus. A had been granted a 20 year lease that expired in October 2016. The lease had been contracted out of the security of tenure provisions contained in Part 2 of the Landlord and Tenant Act 1954. However, A remained in occupation and, prior to the Electronic Communications Code 2017 (the Code) coming into force (on 28 December 2017), enjoyed rights under the Electronic Communications Code 1984 (the 1984 Code). The freeholder (W) acquired the site in 2014.

A sought from W new rights under the Code.

Issues

1. On what basis was A in occupation of the site following the expiry of its lease?
2. Could A obtain a renewal of code rights under Part 5 of the Code?
3. Could A obtain new code rights under Part 4 of the Code?

Decision

1. The parties agreed that, following the case of Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd [2014] EWCA Civ 303, A occupied under a tenancy at will (rather than under a periodic tenancy) whilst the parties negotiated for a new lease and the tribunal decided that nothing had happened since to change that status (negotiations had paused while the parties discussed a framework agreement that would apply to all their sites).
2. Part 5 is concerned with the termination and modification of agreements and the renewal of rights. The transitional provisions of the Code apply the Code (including Part 5) with modifications to agreements relating to communications apparatus that were subsisting on the day that the Code came into force, but only where there is an "agreement in writing" for the purposes of the 1984 Code. A was occupying under a tenancy at will that arose after the expiry of the fixed term of A's lease which was on the same terms as that lease (so far as relevant and consistent with a tenancy at will). It was, however, an unwritten agreement. The only agreement in writing was the expired lease and it was W's conduct that provided the continued permission for A to remain on site. Part 5 of the Code did not therefore apply.

3. Part 4 (paragraph 20) is concerned with the imposition of new code rights by the court. However, in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755, the Court of Appeal held that code rights under paragraph 20 could only be conferred by the occupier of a site and there was no jurisdiction to impose an agreement on a landowner where a third-party operator remained in occupation of a site. The tribunal therefore concluded (extremely reluctantly) that A (as an operator in occupation without existing code rights) could not make an application for the imposition of new code rights on W (as the landowner) under paragraph 20.

Point to note/consider

The judge noted the serious difficulties her decision will cause and suspected that the law had taken a wrong turn at some point. As it stands, operators in the same position as A (i.e. those whose contracted out leases expired before the Code came into force) are effectively 'shut out' from the Code and are in danger of being held to ransom by landowners (exactly the situation that the Code was intended to avoid in the first place).

The judge did suggest a couple of possible workarounds. One might involve the sitting operator itself conferring code rights on another 'friendly' operator and then applying under the Code for the landowner to be bound by those rights. Another might involve the operator moving out and starting again (wasting time and money and causing its services to be interrupted). Neither of these are very satisfactory and an appeal to the Court of Appeal seems inevitable.

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