

CAAV NATIONAL TUTORIAL 2023

**ELECTRONIC COMMUNICATIONS CODE
DETAILED NOTES FOR MODEL ANSWER**

**Michelmores LLP
Broad Quay House
Broad Quay
Bristol
BS1 4DJ
Tel: 0117 906 9300**

1 BACKGROUND

2 The Brookfield Estate has a telecoms mast in the corner of one of the fields. The mast was put up by "Eulogy Systems" in 1999. There are no written terms, but Jill has established that the mast is located in one of the fields subject to Brian's tenancy. She does not believe that the Estate provided Brian with consent to grant Eulogy occupation of the mast. She has established that Brian has had £10,000 per year for it, from Eulogy. Jill has told you that on approaching Eulogy to obtain more information regarding the occupation, it referred to a change in the law that came in a few years ago, and that it was taking advice on its position. Brian has now approached the Brookfield Estate to say that Eulogy have requested a new tenancy under the Electronic Communications Code, at a rent of only £2,000 a year. The tenant isn't sure what to do.

Write Jill a letter explaining what has happened to the law in this area, and what might be done to improve or protect the Estate's position.

3 THE CODE

3.1 The Electronic Communications Code ("the Code") is a set of statutory rights which telecommunication operators can rely on to facilitate the creation and operation of communications networks. There was an "old" code, contained in Schedule 2 to the Telecommunications Act 1984. The Old Code was repealed by way of section 4 of the Digital Economy Act 2017 ("DEA 2017"). Section 4 of the DEA 2017 inserted a "new" Code (set out at Schedule 1 of the DEA) into the Communications Act 2003 as schedule 3A. The New Code came into force on 28 December 2017. Agreements entered into with Telecommunications companies after this date will be governed by the New Code.

4 UNDERSTANDING THE CURRENT ARRANGEMENT

4.1 The scenario states that there are no written terms which is somewhat unusual given the costs an operator will incur setting up a site. Clearly, Brian should have sought the consent of Jill before agreeing to allow Eulogy onto the site, but perhaps he did not realise the implications.

4.2 Although the agreement is said to be unwritten, it is critical to determine if this is indeed the case. It may be that there was no "formal" tenancy, but an agreement, and this can significantly change the rights of Eulogy in respect of any new agreement. It is also important to try and establish what terms were agreed with Eulogy before they went onto the site, in particular, whether it was agreed that they would occupy the site for a fixed period of time, or whether it was a rolling arrangement.

4.3 It would be preferable to establish the tenant's understanding of the arrangement first, before speaking to Eulogy to seek to understand what they say is the basis of their occupation.

4.4 The nature of Eulogy's current status will dictate whether it is entitled to the new Code Agreement it has requested (presumably just informally at this stage). It should not be assumed, just because Eulogy assert a right to a new Code agreement, that it is entitled to do so and, even if it is entitled to do so, that the rent and other terms proposed are fair and are likely to be imposed by the Tribunal in the event of dispute. However, before any consideration is given to the proposed terms, we need to be clear whether there is an entitlement to a new Code agreement.

AN ORAL AGREEMENT

- 4.5 Assuming the agreement was agreed orally and there are no written terms it cannot be a code agreement (either under the New or Old Code) because such agreements must be in writing (para.11)
- 4.6 Schedule 2 to the DEA 2017 provides that an agreement which is *in force* (our emphasis) between an operator and any person, at the time that the New Code comes into force (and whose terms do not provide for it to cease to have effect at that time) will be a "Subsisting Agreement".
- 4.7 However, as set out above, as there is no written agreement, the tenancy cannot be a *subsisting agreement* within the meaning of the transitional provisions and therefore the transitional provisions do not apply.¹
- 4.8 As such, if the agreement was oral, irrespective of the status of that agreement (tenancy at will, periodic etc.) there is no subsisting agreement for the purposes of the Code and Eulogy are entitled to request a new Code Agreement under paragraph 9.

WRITTEN AGREEMENT

- 4.9 If there was a written agreement, it would have pre-dated the New Code which came into force on 28 December 2017. As it was a written agreement, it could be a code agreement (but under the Old Code) and as such it could be a subsisting agreement.
- 4.10 We have to assume that any written agreement between Brian and Eulogy has the protection of the 1954 Act because there is no evidence of any agreement being contracted out.
- 4.11 In *Ashloch (Cornerstone Telecommunications Infrastructure Ltd (Appellant) v. Ashloch Ltd and another (Respondents))*, the Supreme Court confirmed that where an operator is in occupation pursuant to a continuation tenancy by virtue of section 24 of the 1954 Act it must use the process for renewal in the 1954 Act. However, a continuation tenancy under section 24 only arises where the fixed term of a 1954 Act tenancy has come to an end. Where a tenant is in occupation under a periodic 1954 Act tenancy with no fixed term, it is not continuing by virtue of section 24, it is continuing by virtue of its periodic status; the agreement is simply ongoing until terminated by either party. This was not addressed in *Ashloch* because it was not pertinent to the facts in that case.
- 4.12 If the written agreement had an initial term, which has now expired, its occupation would continue by virtue of section 24 of the 1954 Act and per *Ashloch*, Eulogy are only entitled to seek a new agreement by exercising their rights to renew pursuant to the 1954 Act.
- 4.13 If the written agreement did not have an initial fixed term, and has not been terminated by either party, it is continuing as a periodic tenancy. The New Code precludes an operator serving notice to renew its Code rights whilst a Code Agreement is continuing.

¹ On Tower (On Tower UK Ltd (formerly know as Arqiva Services Ltd) v AP Wireless II (UK) Ltd)

As such Eulogy would not be able to renew its rights unless or until the periodic tenancy was terminated.

- 4.14 A periodic tenancy protected by the 1954 Act can be terminated by the landowner by serving a hostile section 25 notice or by the tenant by serving a notice to quit. It has yet to be decided by the Court whether an operator can seek to improve its position by terminating its Code agreement and then seeking renewal under the Code.
- 4.15 An operator could seek to argue that it was entitled to act in this way because the Code provides for its Code agreement to continue notwithstanding the termination of the contract/lease. However, whilst this is clear from the drafting of the New Code in the case of termination by a land owner, the position is not as clear when termination has been effected by the operator; there is not a corresponding termination provision for operators.
- 4.16 The commentary suggests that the most straight forward interpretation of the New Code is that if an operator terminates its contractual agreement its Code agreement would automatically terminate at the same time and, as such, it could not rely on the rights of renewal within the Code. This accords with the findings by the Supreme Court in the 2022 appeals that parties should be held to their original bargain whilst that original agreement subsides and should not be allowed to modify the agreement until such time as the contractual term has ended.

5 REQUESTING A NEW AGREEMENT

- 5.1 An Operator can apply for a New Code agreement, or renewal, by serving a paragraph 20 notice on the Relevant Person setting out the code rights sought and all proposed terms of the new agreement. If the Relevant Person does not respond within 28 days then the Operator can apply to Court under Part 4 of the Code. The Operator will need to show that the paragraph 21 test is satisfied for the Court to grant a new code agreement, and that the Relevant Person does not have a defence under para 21(5) or on the grounds of National Security.
- 5.2 If Eulogy are required to renew under the 1954 Act procedure, they will need to serve a section 26 notice on the competent landlord s.44(1) of LTA 1954², setting out their proposals for a new tenancy. The landlord has 2 months to serve a counter-notice if it objects to granting a new lease, but it can only serve such notice if it can rely on one of the grounds in the act, for example redevelopment. If it does not object to granting the tenancy, but objects to the terms, either party can apply to the court to determine the terms.

6 STRATEGY

- 6.1 It is likely on the information that we have that the agreement was oral and that Eulogy are entitled to request a new Code agreement. If the Estate's primary objective is to remove Eulogy, then it will need to consider whether it can satisfy either the grounds

² It will have an interest in reversion expectant on the termination of the relevant tenancy. The interest will be either a fee simple, or a tenancy which will not come to an end for more than 14 months.

in the Code for refusing such a request (redevelopment under para 21(5) and/or National Security grounds).

- 6.2 If the Estate is content for Eulogy to remain on site, but wants to improve upon the terms requested, a valuation exercise should be undertaken to establish what rent would likely be achieved under a new Code agreement. Negotiations can then be undertaken. Eulogy may seek to assert pressure on the Estate by serving notice pursuant to paragraph 20 as set out above, but it is unusual for an operator to issue Tribunal proceedings whilst negotiations are progressing in circumstances where it is already on site.
- 6.3 The Estate's position may be improved if there was a written agreement with a fixed term as the rent that could be achieved under a 1954 Act renewal will typically be higher because the new lease granted will still benefit from the rent being assessed in accordance with section 34 of the LTA 1954 (ie. "open market" criteria). This is because the agreement does not become subject to the New Code until it is actually granted pursuant to an order of the Court or by agreement.
- 6.4 Therefore, before the Estate decides whether it wishes to remove Eulogy, we recommend speaking to Brian to try and establish more definitively whether there was anything in writing. In the event that the Estate wants to remove Eulogy irrespective of the rent, it could seek to terminate the Eulogy's occupation by seeking to terminate its occupation. However, such notice will likely trigger Eulogy to exercise its rights to renew and so the Estate will still need to satisfy the test at para 21 above.

7 UNLAWFUL SUB-LETTING

- 7.1 We should flag that it is likely that in allowing Eulogy on to site, Brian breached the terms of his tenancy and as such the Estate may have a claim against him for damages, or be able to forfeit Brian's lease in the event that the tenancy contains forfeiture provisions. This should be considered as part of any ongoing negotiations with Brian.