

# **“I STILL HAVEN’T FOUND WHAT I’M LOOKING FOR”**

## **IS THE NEW ELECTRONIC COMMUNICATIONS CODE WORTH ALL THE BOTHER?**

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### **1. Introduction - “Stuck in a Moment You Can’t Get Out Of”<sup>1</sup>**

1.1 Nobody likes the existing Electronic Communications Code. You all probably know what Lewison J said about it in the *Geo Networks* case:<sup>2</sup>

The code is not one of Parliament’s better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. .

For good measure, he later called the drafting, “lamentable”.<sup>3</sup>

1.2 In a funny sort of way, though, the existing Code, or “Old Code” as I shall call it, seems to me to have worked. In more than 30 years on the statute books, it has bothered the Courts just half-a-dozen times.<sup>4</sup> Considering that it was meant to provide both the legislative underpinning to agreements under which telecoms Operators place their electronic communications apparatus on land and the only method by which Site Providers could enforce the removal of Operators and their electronic communications apparatus from land, you would expect the Old Code to

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<sup>1</sup> “Stuck in a Moment You Can’t Get Out Of” by U2 (Bono / The Edge / Adam Clayton / Larry Mullen, Jr.).

<sup>2</sup> *Bridgewater Canal Company Ltd. v. Geo Networks Ltd.* [2010] 1 WLR 2576, [7].

<sup>3</sup> At [26].

<sup>4</sup> *Finsbury Business Centre Ltd. v. Mercury Communications Ltd.* (Lands Tribunal Ref. 99/1993); *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd.* (1993) 69 P&CR 135 (Mayor’s and City County Court); *Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.* [2002] EWCA Civ 720; *St. Leger-Davey v. First Secretary of State* [2005] 2 P&CR 6 (CA); *Bridgewater Canal Company Ltd. v. Geo Networks Ltd.* [2011] 1 WLR 1487 (CA) and *Crest Nicholson (Operations) Ltd. v. Arqiva Services Ltd.*, *Estates Gazette* on 24<sup>th</sup> July 2015 (Cambridge County Court).

be familiar to the County Court as the Landlord and Tenant Act 1954. Not at all; the Old Code has led a very quiet life.

- 1.3 So why are we here? In December 2010, a Report was produced, entitled “*Britain’s Superfast Broadband Future*”.<sup>5</sup> It is intended to promote a key promise made by the Coalition Government, namely that the UK should have the best superfast broadband network of any country in the European Union by 2015;<sup>6</sup>

Local participation in deciding what is the most useful and appropriate communications solution for your own community is one of the themes of this strategy. We want to do more than bridge the digital divide – we want communities to have the tools to participate fully in the Big Society.

I suppose one way to avoid admitting that we missed the target to have the best superfast broadband network of any country in the European Union<sup>7</sup> is to leave the European Union.

- 1.4 The central premise of the Report is that “private sector investment [*needs to be*] freed from unnecessary barriers”. I think they might mean the Code:

5.13 The Court process is time-consuming, with cases currently taking anything up to and beyond 2 years to decide; although it is anticipated that implementation of Article 11 of the Framework Directive will shorten this. Following implementation of the Directive, a decision on rights of way will be made within 6 months. Code operators agree that remuneration for access to land should be given, and that is right, but there are some inconsistencies in the Code, which refers to both “compensation” and “consideration”, and agreeing appropriate compensation is often difficult as a result, with compensation packages varying wildly.

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<sup>5</sup> <http://www.culture.gov.uk/images/publications/10-1320-britains-superfast-broadband-future.pdf>. It was signed by the Secretary of State for Culture, Media, Sport and the Olympics and the Minister for Culture, Communications and The Creative Industries. Even I could not make that up.

<sup>6</sup> Anybody know where the sick-bag is? This and the following quote just come from the Foreword.  
<sup>7</sup> <https://www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy>. For the funding boost in the Chancellor’s autumn statement, see <http://www.bbc.co.uk/news/live/business-38028907>.

5.14 These factors create uncertainty for investment decisions. Government will therefore revisit some of these issues, as part of an overall review of the Communications Act during the lifetime of this Parliament.

5.15 We will consider whether it is appropriate to separate the grant of rights of way from the compensation element, which would at least allow companies to deploy networks more quickly. We will also be reviewing whether it is still appropriate that the County Court award compensation, or whether another body may be more suitable.

1.5 As we all now know, the Government did no such thing. It palmed the job off onto the Law Commission, which produced a Consultation Paper in 2012 and a Report in 2013.<sup>8</sup> A new Code was brought forward as part of the Infrastructure Bill, on 9<sup>th</sup> January 2015, but was withdrawn on 21<sup>st</sup> January 2015.

1.6 Here we go again. We are about to have a shiny “New Code”: I am using the version of the New Code as it stood following the Public Bill Committee hearings, so as of 1<sup>st</sup> November 2016.<sup>9</sup>

1.7 This time the Department for Culture, Media and Sport’s Explanatory Notes to the Bill state:

[14] Following formal consultation in February 2015 and further analysis work, on 17 May 2016 the government published *A New Electronic Communications Code*, setting out plans to legislate. The Bill will reform the underpinning rights that communications providers have to acquire land - moving to a “no scheme” regime that ensures property owners will be fairly compensated for use of their land, but restricts their ability to profit from the public need for communications infrastructure. In this respect, it will put the telecommunications sector on a similar footing to utilities like electricity and water, and significantly reduce the cost of providing infrastructure.

[15] The revised code will also provide new rights to upgrade and share infrastructure. The government intends infrastructure sharing to assist future deployment of technology such as 5G. Administrative changes to court processes are intended to allow for faster dispute resolution, making sure that disputes do not delay construction and maintenance of communications infrastructure.

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<sup>8</sup> Law Com. Consultation Paper N<sup>o</sup>.205 (2012); Law. Co. Report N<sup>o</sup>.336 (2013).

<sup>9</sup> [http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0087/cbill\\_2016-20170087\\_en\\_1.htm](http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0087/cbill_2016-20170087_en_1.htm)

Evidence to Public Bill Committee of the House Commons suggested that:<sup>10</sup>

... improving wayleave rights under the ECC will reduce costs for providers by 40%?

And, of course, we have that new promise as of Monday this week for delivering “gold standard full-fibre broadband”.<sup>11</sup> That phrase must mean something, as even the Treasury accepts that we lag behind in having it. Whatever it is. Although it may just be an application of the principle, if you fail to reach your objective, redefine the objective, preferably in a meaningless way.

1.8 The New Code is a very bouncing baby: 108 paragraphs long compared to modest 29 paragraphs of the Old Code - and nobody read half of those. I cannot consider the whole thing here, so I am just going to pick up on a few things that might be of interest (to me, anyway).

## **2. *Has the Essence of the Code Been Changed? - A “DNA Remix”?***<sup>12</sup>

2.1 Let us start with something that has changed, something which some people thought was an essential part of the DNA of the Old Code. The phrase “no person should unreasonably be denied access to an electronic communications network” appeared many times in the Old Code, but most importantly in the Court’s power to impose agreements on Site Providers.<sup>13</sup>

2.2 In *Geo Networks*, Sir Andrew Morritt C described this phrase as the “overriding principle” of the Code:

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<sup>10</sup> *Hansard HC Deb*, 11<sup>th</sup> October 2016, p.9, col.1, Kevin Brennan (Cardiff West) (Lab).

<sup>11</sup> <http://www.bbc.co.uk/news/technology-38051066>. 21<sup>st</sup> November 2016.

<sup>12</sup> “Tom’s Diner DNA Remix” by DNA, feat. Suzanne Vega (Suzanne Vega/ Nick Batt/ Neal Slateford).

<sup>13</sup> Paragraph 5(3): “The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order- (a) is capable of being adequately compensated for by money; or (b) is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order”.

[25] ... The Code was originally enacted as part of the privatisation of British Telecommunications and consequential expansion of the telecommunications market. It was substantially amended by the Communications Act 2003 which was enacted for the like purpose but in the light of all the technological developments in the intervening period. Thus the overriding principle proclaimed in paragraphs 5(4), 13(5) and elsewhere is that “no person should unreasonably be denied access to an electronics communications network or to electronic communications services”.

These words were interpreted to as showing that the Code should always be interpreted pro-Operator and contra-Site Provider. In the New Code, these words have gone. Does this mean a change in policy?

2.3 It would be surprising to change the policy, given the avowedly pro-Operator stance behind the legislation. And, indeed, the policy has been preserved by directing the court or any other decision taker imposing Code Powers that they must:

have regard to the public interest in there being access to a choice of high quality electronic communications services

This appears in the New Code at paragraph 20(4) (which is the equivalent of Old paragraph 5(4)) and new paragraph 51(6) (which is the equivalent of Old paragraph 13(5)). So, the new principle is applied at the same places, but is it any different?

2.3.1 It has been argued that a person was not “unreasonably be denied access to an electronics communications network” if they could gain access to an Operator’s network, even if they could not choose to gain access to a range of networks.

2.3.2 This was always, in my view, a dud point as the “Long Title” to the Telecommunications Act 1984 made it plain that the purpose of the Act was to promote competition within the industry, so the existing words should have

been read as meaning “an electronics communications network *of their choice*”, but it is nice to get it confirmed.<sup>14</sup>

2.3.3 It is a nice bit of “spin” to see that we have gone beyond telling the Court to have regard to access, so now we Court is to ensure we all have a “choice of high quality electronic communications services”. That is good for Operators wanting to saturate exiting localities with more choice or making sure they can upgrade already existing kit; not so good for pushing new broadband kit out into the boondocks.

2.3.4 I am not sure that telling the court to “have regard to the public interest” is helpful. The Old Code formula was plain that one asked whether the consumer was being “unreasonably” refused access; but here, how much regard should the Court have? What is the extent of the “public interest”? How does one balance improved network coverage or a choice of two cable operators for a couple of remote farmhouses with the loss of property rights (albeit with compensation) to be imposed on a Site Provider? It is like asking the judge to compare apples with Thursdays.<sup>15</sup>

2.4 I do not see this as a positive step in delivering the avowed policy. This drafting removes something that was an established “given” with the Old Code and make it uncertain, by taking out a clear principle and replacing it with an uncertain and unpredictable balancing act, with no indication as to what the judge is supposed to do.

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<sup>14</sup> A point made by Sir Andrew in the quote from *Geo Networks*, above.

<sup>15</sup> *Per* Lloyd-Jacob J, *passim*: see *Gareth Pearce v. Ove Arup Partnership Ltd.* (2002) 25(2) IPD 25011 at [49] (Jacob J).

- 3. New Code Powers: “Nothing’s Gonna Stop Me Now I’ve Got the Power!”<sup>16</sup>**
- 3.1 Let us move on to something that has changed a bit, but not much: the extent of Code Powers. The central tenet of the Old Code was that it conferred on an Operator the right to come onto land, if necessary by order of the Court against the will of the Site Provider, to exercise “Code Powers”.
- 3.2 Paragraph 2(1) of the Old Code conferred upon Operators’ these rights:
- 3.2.1 to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
- 3.2.2 to keep electronic communications apparatus installed on, under or over that land; or
- 3.2.3 enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator’s network.
- 3.3 That is a useful set of powers, limited by the absence of a power under the Old Code to actually *use* the apparatus once it is installed, although that power is probably implicit.<sup>17</sup> There is no point in Parliament giving Operators the power to install and maintain electronic communications apparatus if there is no power to use it - including any ability to keep it powered up...

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<sup>16</sup> “Power” by Rainbow (Richie Blackmore / Roger Glover / Joe Lynn Turner).

<sup>17</sup> When this error is made in leases, the courts usually imply a term. So, a landlord’s right to repair premises usually carries with it an implied duty to allow the landlord access to the extent necessary to facilitate the right: *Saner v. Bilton (Nº.1)* (1878) 7 Ch D 815 (Fry J); *Edmonton Corporation v. WM Knowles & Son Ltd.* (1962) 60 LGR 124 (McNair J).

3.4 The New Code paragraph 3, by contrast, replicates all those powers and adds three new explicit powers. The first two are clear enough:

3.4.1 to operate electronic communications apparatus; and

3.4.2 to connect the electronic communications apparatus to a power supply (but not saying whose supply).

All nice to have made express and explicit, but hardly worth the effort of a new Code. Unless, of course, Parliament thinks that the Old Code does not confer equivalent rights to use and power up the kit...

3.5 The third additional power in New Code paragraph 3 is an express power to “upgrade” an Operator’s electronic communications apparatus. I am not sure that is a good idea. “Upgrading” is not defined in the Code, so in accordance with the usual rules of statutory interpretation, the ordinary English meaning of the word will apply.<sup>18</sup> Thus:<sup>19</sup>

Raise (something) to a higher standard, in particular improve (equipment or machinery) by adding or replacing components:

Imagine that the permitted electronic communications apparatus under an agreement is a tower and 5 antennas, plus associated equipment. It seems to me that neither the tower nor the antennas would be “upgraded” by the addition of another antenna: the tower is not a better tower for the addition of an extra antenna; it is still the same tower. Taking an antenna off and replacing it with a better one is, perhaps, “upgrading” the antenna, but certainly not the tower. For that matter, adding a new

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<sup>18</sup> *River Wear Commissioners v. Adamson* (1877) 2 App Cas 743, 763, per Lord Blackburn (HL). “Ordinary English” is the English spoken by “an ordinary speaker of English”: *Young v. Sun Alliance & London Assurance* [1976] 1 WLR 104, 110 per Cairns LJ, who added, “giving oneself for the moment the credit of assuming that one is an ordinary Englishman”.

<sup>19</sup> *Shorter Oxford English Dictionary* (6<sup>th</sup> edition, 2007).



cabinet at ground level is not “upgrading” any existing electronic communications apparatus: it is adding new electronic communications apparatus.

3.6 On one view of life, this might not matter. There is already an existing right under the Old Code, paragraph 2, to “alter” electronic communications apparatus, which has been carried over into New Code Paragraph 3. I do not know why it was thought necessary to add this power, as all I think it is going to do is cause us lawyers to search for the intended distinction between “alteration” of apparatus and “upgrading” it, which is not in my view a distinction the draftsman intended to create.

3.7 You might say that this point is itself an example of a lawyer dancing on the head of a pin for the sake of it. You might also say that any given activity is either an “alteration” or an “upgrade”, so who cares? But I think it does matter, not least of all because there is a new prohibition against contracting out of the Code in paragraph 16(5) which applies to “upgrading”, but not to “alterations”.<sup>20</sup>

#### **4. *New Sharing Powers: “We Share the Same Skies”.***<sup>21</sup>

4.1 That upgrade/alter distinction also matters with the new provisions on sharing. One of the things that the Old Code did not make a fuss of was sharing electronic communications apparatus. Old Code paragraph 29 contained a mechanism which would have applied to prevent sharing apparatus if the Code expressly or impliedly imposed a limitation on sharing. Old 29 is impossible to understand, but it did no harm.

4.2 It did no harm for two reasons. First, on the whole, Operators just carried on regardless of whatever rights they had under the Code or under their agreements.

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<sup>20</sup> There is also an impact on the calculation of “consideration” under new paragraph 23, which I discuss below in my paragraph 6.27.

<sup>21</sup> “We Share the Same Skies” by The Cribs (Gary Jarman / Ryan Jarman / Ross Jarman / Johnny Marr).

Secondly, if another Operator wanted to come onto a site to share apparatus in the teeth of Site Provider resistance, it could acquire the rights to do so under Old Code paragraph 5. As far as I can tell, Operators have actually used that paragraph 5 power twice, once in 1993 and once in 2002.<sup>22</sup> In reality, Operators and Site Providers just negotiated their way out of any trouble.

4.3 Paragraph 16 of the New Code's got stuff in it which is plainly meant to assist Operators share their electronic communications apparatus, even though the evidence is actually that there was no problem that any Operator thought was so big, you needed to throw a paragraph 5 notice at it. Is this new power any good?

4.4 Paragraph 16 provides that a "main operator" who has entered into an agreement with a Site Provider may either **upgrade** the electronic communications apparatus to which the agreement relates, or share the use of "**such** electronic communications apparatus" with another operator, provided that:<sup>23</sup>

4.4.1 any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance; and

4.4.2 that the upgrading or sharing imposes no additional burden on the Site Provider by way of an additional adverse effect on the other party's enjoyment of the land, or causes additional loss, damage or expense to that party.

4.5 This power is not as much use as it looks, as I think the drafting is wonky. New paragraph 16(1) gives an express power for the "main operator" to upgrade and/or

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<sup>22</sup> *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd. and Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.* See footnote 4 for the references.

<sup>23</sup> New paragraph 16(5) contains a new and express "no contracting out" provision, as I have just mentioned.

share “the electronic communications apparatus to which the agreement relates” with an incoming Operator. The problem is that reference back to “the electronic communications apparatus to which the agreement relates”. It robs the paragraph of any real value, This example shows why:

4.5.1 So, the main operator who, say, owns a tower cannot use this power to add an incoming Operator’s new antenna, because that is not “upgrading” the tower, which is “the electronic communications apparatus to which the agreement relates”.

4.5.2 The incoming Operator cannot use this power to add his own antenna because, although he will be sharing the tower, he is neither upgrading the tower itself nor any other “the electronic communications apparatus to which the agreement relates” when he adds his new kit.

4.6 Of course, if the Main Operator’s Site Licence is in wide enough terms to permit sharing, there is no need to rely on this new paragraph 16. Moreover there is nothing in the New Code paragraph 100, the general “contracting out” provision, which prevents the parties on *enlarging* the Operator’s rights over those provided for in the New Code. So this paragraph might be a bit useless, but it probably does not add anything much anyway.

## **5. *The New Definition of “Land” - “Can’t You See This is a Land of Confusion?”*.<sup>24</sup>**

5.1 All Code powers, old and new, are exercisable over “land”. The Old Code did not define “land” at all, but the New Code contains a partial definition in paragraph 108(1). “Land”, in the New Code:

does not include electronic communications apparatus

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<sup>24</sup> “Land of Confusion” by Genesis (Mike Rutherford / Phil Collins / Tony Banks).

But for the exclusion for “electronic communications apparatus”, “land” would include anything and everything annexed thereto.<sup>25</sup>

5.2 Apparently, the idea from DCMS is to prevent the New Code from being asserted by Operators against other Operators.<sup>26</sup> If the policy was to prevent “blue on blue” use of the Code, it might have been simpler to have drafted a provision which said “No Operator shall assert any rights under this Code against electronic communications apparatus owned by any other Operator”.<sup>27</sup> But that would be too simple. We might have a workable Code, and where is the fun in that?

5.3 The reasons that this is a daft idea begins with the width of the definition of “electronic communications apparatus” in New Code paragraph 5(1)(d):

In this code “electronic communications apparatus” means—

- (a) apparatus designed or adapted for use in connection with the provision of an electronic communications network, ... and
- (d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.

Note that there is a distinction being drawn between “apparatus” and “structures or things”. The draftsman is telling us that there must be a difference between them.

5.4 In the general law, a “structure” is:<sup>28</sup>

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<sup>25</sup> *Melluish (Inspector of Taxes) v. BMI (Nº.3) Ltd.* [1996] AC 454 (HL); *Élitestone Ltd. v. Morris* [1997] 1 WLR 687 (HL). This cross-checks, as New Code paragraph 101 excludes this rule of annexation in respect of anything annexed to land in the exercise of Code Right, thereby continuing the policy in the existing Old Code paragraph 27(4).

<sup>26</sup> I heard it on the grapevine.

<sup>27</sup> There is talk of this also being intended to make it easier for Site Providers to deal with multiple Operators on the same site, but it does even begin to hit that conceptual target.

<sup>28</sup> *Per* Humphreys J in *Hobday v. Nicol* [1944] 1 All ER 302, 303 (KBDC); approved and followed by Russell LJ in *Carter v. Secretary of State for the Environment* [1994] 1 WLR 1212, 1219 (CA).

... anything which is constructed; and it involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which then is called a structure.

A “structure” can be very simple: “wooden poles in pairs connected by cross-struts”, erected for the purposes of carrying electricity cables are “structures”.<sup>29</sup> Structures can also include man-made geographical features, such as a railway embankments.<sup>30</sup> In general legal usage, all “buildings” are “structures”, even though not all structures are “buildings”.<sup>31</sup>

5.5 This overlap between “buildings” and “structures” is dealt with expressly by the drafting of New Code, paragraph 5(3). It reverses the general position by excludes all buildings from the definition of “structure” unless “the sole purpose of that building is to enclose other electronic communications apparatus”.

5.6 This provision is problematic. It is not uncommon for Operators’ antennas,<sup>32</sup> to be mounted on things which are “structures”, but which are themselves not properly considered as electronic communications apparatus. The most obvious examples are electricity pylons and water towers, although there are other more exotic examples I have come across, such as grain silos, overground gas mains,<sup>33</sup> canal locks, bridges and aqueducts.<sup>34</sup> In common legal parlance, for the reasons given

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<sup>29</sup> *Per Vaisey J in National Trust v. Midlands Electricity Board* [1952] Ch 380, 384.

<sup>30</sup> *The Long Eaton Recreation Grounds Co.Ltd. v. The Midland Railway Co.Ltd.* [1902] 2 KB 574, 581 *per* Sir Richard Henn Collins MR.

<sup>31</sup> *R. (Ghai) v. Newcastle City Corporation* [2011] QB 591 at [82] *per* Cranston J and, on appeal, at [22]-[26] *per* Lord Neuberger of Abbotsbury MR (“wood-drying stores, bandstands, or Dutch barns ... the pyramids or the Colosseum...” and also at [34]-[38]. Moore-Bick and Etherton LJJ agreed.

<sup>32</sup> There is a logical difficulty in taking about the Code definition of “electronic communications apparatus” without using a term of my own which shares the problems of definition. I am going to use “antennas” to mean all apparatus which is directly used for the transmission and reception of communications signals, but excluding the associated apparatus which makes them function.

<sup>33</sup> There are a number of locations I am aware of where a cable operator has attached its fibres to a raised, above-ground, gas main to cross a canal, river or railway.

<sup>34</sup> “Bridges” come in an almost unending variety of shapes and forms, many of which are used to carry cables, as a number of cable operators run their fibre alongside railway lines.

above, all of those “things” to which antennas are often attached are themselves “structures”.

5.7 None of those structures will have been “designed” for “use in connection with the provision of an electronic communications network”, but they may or may not have been “adapted” for such use. The New Code does not define “adapted”, so the word should be given its ordinary English meaning, which the *Shorter Oxford English Dictionary* gives as:<sup>35</sup>

Make (something) suitable for a new use or purpose; modify

The act of attaching an antenna to a “structure” may or may not make the structure “adapted” for “use in connection with the provision of an electronic communications network”.

5.7.1 Imagine this. An electricity pylon with an antenna bolted to the steel uprights and additional cross-members added to take the weight: this pylon is now clearly “a structure or thing adapted for use in connection with an electronic communications network”, because of the cutting of the steels to take the bolts and the addition of the cross-members.

5.7.2 Now imagine the same pylon with the same antennas merely clamped to the steel uprights. The pylon itself has now not been “adapted”: it is the same pylon as it ever was.

5.8 It is difficult to discern a coherent policy reason which would require the Court to go into how one item of electronic communications apparatus was attached to a

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<sup>35</sup> 6<sup>th</sup> edition, 2007. The list of synonyms is instructional: “modify, alter, make alterations to, change, adjust, make adjustments to, convert, transform, redesign, restyle, refashion, remodel, reshape, revamp, rework, redo, reconstruct, reorganize; customize, tailor; improve, make improvements to, amend, refine”.

“structure” in order to work out whether the structure was “land” (and so Code rights will apply) or had itself become electronic communications apparatus (and so Code rights will not apply).<sup>36</sup>

5.9 The problem may also be acute for cable operators using third party conduits. As I understand the technicalities of installation, sometimes a fibre will simply rest within an existing channel within a conduit.<sup>37</sup> Other cables may rest in, or be attached to, cable trays mounted on the side of the conduit, particularly if it is also used in part for drainage. As I understand matters, a single cable may rest in existing channels or in specifically added trays at different points in the same conduit. Where the cable is lying in an existing structure, the conduit will be “land” and so Code rights will apply; if the cable lies within a tray mounted to the conduit, the conduit will have been adapted and so will be itself electronic communications apparatus and Code rights will not apply.<sup>38</sup>

5.10 Indeed, the problem may be really profound. Case law shows that a “structure” can include an earthwork, such as an embankment supporting a motorway or a railway.<sup>39</sup> It would be a very odd result to find that the consequences of erecting a freestanding mast, bolting it to foundations laid in an embankment, was “adapting a structure for use in connection with the provision of an electronic communications network”, but

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<sup>36</sup> For an example of how much uncertainty and cost this process can cause, the law of fixtures and fittings has many examples. An excellent recent example of the complexities that industrial apparatus can cause is *Peel Land and Property (Ports N°.3) Ltd. v. TS Sheerness Ltd.* [2013] EWHC 2689 (Ch) (Morgan J). The decision was reversed by the Court of Appeal, [2014] 2 P&CR 8 (CA), but on a point of contractual interpretation which has no bearing on the part of the judgment being referred to here.

<sup>37</sup> There are some special definitions relating to “relevant conduits” in the Telecommunications Act 1984, section 98 which paragraph 102(3) carries into the New Code, but here I am referring to conduits which fall outside this special definition, such as those used to pass lines under canals or other major structures.

<sup>38</sup> To add to the complications, the definition of “Operators” now can extend to conduit providers, such as the gas or water utility companies, provided their conduits are being used to carry electronic communications apparatus, whether or not the cables belong to them. See the Communications Act 2003, sections 106-7, which it is not proposed to amend.

<sup>39</sup> See *The Long Eaton Recreation Grounds* case I referred to in footnote 30 above.

that would be natural reading of the words used in the New Code. If this is right, then a mast bolted to a motorway embankment is attached to “electronic communications apparatus”, not land, and so the New Code will not apply. An identical mast, perhaps only a few metres away, but on virgin soil, would be protected. The courts would struggle to find a way around this stupidity, but it is not clear from the language the draftsman has used whether there is any way out.

5.11 Here is another thought. If that hypothesis is right and a motorway embankment is a “structure” which can be “adapted for use in connection with an electronic communications network” at which point it ceases to be land, then how deep under that embankment do you have to dig your cable before it ceases to be annexed to a “structure” and is annexed to the land under the structure?

5.12 The second problem lies with the distinction between “structures” and “buildings” created here by the exception in New Code paragraph 5(3) that a “structure” only includes a “building” if in certain circumstances that:

“structure” includes a building only if **the sole purpose of that building is to enclose other electronic communications apparatus.**

Because the general law does not impose a rigid distinction between “buildings” and “structures”, there is bound to be some debate as to whether any given thing is properly a “building” or a “structure”. This may be a particularly acute issue for antennas mounted on things such as some bridges, water towers and grain silos, where the distinction between a “building” and a “structure” is not always obvious.

5.13 An artificial example which illustrates the point might be this. Imagine an antenna attached to Tower Bridge in a way which cuts into the steel walkways between the towers.



5.13.1 If you say Tower Bridge is a “building”, then its “sole purpose” is **not** to “enclose other electronic communications apparatus”. Because a “structure” only includes buildings with that sole purpose, “structure” must logically *exclude* buildings which have many purposes. Therefore Tower Bridge is not included within the definition of “structure” in New Code Paragraph 5(3), and so it is not capable of falling within the definition of “electronic communications apparatus”. The antenna will, therefore, be attached to “land” and the New Code will apply.

5.13.2 Take the same factual scenario and now say that you would categorise Tower Bridge as a “structure”, not a building. Now, of course, it is a structure which I hypothesise has been “adapted” for “use in connection with the provision of an electronic communications network”. That makes the whole Bridge an item of electronic communications apparatus and so it falls outside the definition of “land” and the New Code will not apply.

5.14 *Really?* What policy reason could justify such a capricious result?

5.15 This outcome even more bizarre when one bears in mind that the New Code will exclude from the security of tenure provisions in the Landlord and Tenant Act 1954 any tenancy which has as its “primary purpose” the grant of Code Rights.<sup>40</sup> Thus, an Operator with antennas bolted onto something which may not may not fall inside the Code will be unable to protect itself under that Act, even with the consent of the Site Provider, and so will have *no* statutory rights at all.

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<sup>40</sup> Schedule 3, Part 2, paragraph 1. That may now be another booby trap in the drafting: what is the “primary purpose” of a lease and from whose perspective? The primary purpose of a lease from the landlord’s perspective is usually to secure an income and/or an increase in capital values. Also, what happens if a lease does not have conferring Code rights as a primary purpose: can such a lease still have dual Code and 1954 Act protection?

6. **Cash and the Code - “Share it Fairly But Don’t Take A Slice of My Pie”**.<sup>41</sup>

6.1 We need to talk about money. As an opening observation, I want to remind you of *Amalgamated Estates Ltd. v. Joystretch Manufacturing Ltd.*, in which Templeman LJ uttered one of the great truisms of property litigation: “The court does not exist to punish a landlord for being greedy, especially as the definition of ‘greed’ varies from Shylock to Portia and from landlord to tenant”.<sup>42</sup> How Operators and Site Providers equate to Portia and Shylock, I will leave to you.

6.2 I do not want to dwell on the Old Code too much, but one needs to be reminded of where we had gotten to under the Old Code. Paragraph 7 of the Old Code provided that, where a Site Provider’s agreement to the exercise of Code Powers is dispensed with by the court, the court shall make orders for two distinct payments:

6.2.1 a payment of “fair and reasonable” “consideration” for the grant of the rights conferred, and

6.2.2 “adequate compensation” for “any loss and damage sustained”.

6.3 Paragraph 7(1) so provides:

- (a) such terms with respect to the payment of **consideration** in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court **would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order**; and
- (b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are **adequately compensated (whether by the payment of such consideration or otherwise) for any loss or damage sustained by them** in consequence of the exercise of those rights.

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<sup>41</sup> “Money” by Pink Floyd (Roger Waters).

<sup>42</sup> [1981] 1 EGLR 96, 99 (CA).

My emphasis.

- 6.4 These provisions have often said to be difficult to interpret and this perceived difficulty with them appears to be the root of the Operators' complaints about the uncertainties with the Old Code. On the face of it, these payments are obviously distinct, in that "compensation" is a payment for disruption or damage to the occupier's premises, whereas "consideration" is a payment for the grant of the right, over and above paying for any losses flowing from it: a payment of something for the taking of the land itself. That latter might seem difficult to value and quantify.
- 6.5 In the context of the general regime, there has only been one considered judgment on the subject of what "compensation" means under the Code: the decision of HH Judge Hague QC, in *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd.*<sup>43</sup> Mercury argued that Paragraph 7 had to be interpreted in accordance with compulsory purchase principles, so that (put crudely) the value to Mercury of laying its cables under LIDI's land would be disregarded.
- 6.6 Mercury was arguing for an application of the so-called *Pointe Gourde* principle.<sup>44</sup> In a sentence it is this: the calculation of compensation for the compulsory purchase of land must *exclude* any increase in value of the land acquired attributable solely to the scheme of development giving rise to the compulsory acquisition.<sup>45</sup> In other words, the land acquired is valued by reference to its value to the owner, in a world where

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<sup>43</sup> It is sometimes said that this decision has been approved by the Court of Appeal in *Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.*, but that is not really the case, for the reason Mance LJ gave at [6]. See footnote 4 for the reference.

<sup>44</sup> Named after *Pointe Gourde Quarrying and Transport Co.Ltd. v. Sub-Intendent of Crown Lands* [1947] AC 565, 572 *per* Lord MacDermott (PC).

<sup>45</sup> *Pointe Gourde* at page 572 *per* Lord MacDermott. See also *Transport for London v. Spirerose Ltd.* [2009] 1 WLR 1797, [88] *per* Lord Collins.

there is no scheme for compulsory acquisition, and not by reference to the value to the person exercising compulsory acquisition powers.<sup>46</sup>

6.7 HH Judge Hague QC refused to apply the *Pointe Gourde* principle, stating that it was “quite untenable” to apply compulsory purchase principles to the Code: “the Code must be applied without regard to compulsory purchase principles”.<sup>47</sup> He decided that the Code created its own valuation mechanism, which required him to decide what was “fair and reasonable” compensation:

6.7.1 which excludes any element of profit share or ransom, but

6.7.2 going beyond a figure which simply reflects the diminution in value of the occupier’s interest in the land.

6.8 The Judge went on to decide that such compensation was best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right to the grantee. That of course requires the use of comparables, but the Judge then took the view that what was required was not simply market value, because “fair and reasonable compensation” requires “an element of subjective judicial opinion”, depending on a Judge’s own perception of what was fair and reasonable.<sup>48</sup>

6.9 This is a useless decision and if that was how old paragraph 7 was to be operated, then paragraph 7 would be a mess. But, with all due respect to the learned Judge, a decision of a County Court is not binding authority on any other court and three subsequent decisions show that the decision in *Mercury* is wrong.

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<sup>46</sup> In *Stebbing v. Metropolitan Board of Works* (1870) LR 6 QB 37, 42 and cited by Lord Collins in *Spirerose*, Cockburn CJ said that the landowner should be compensated to the extent of his loss, “tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it”.

<sup>47</sup> Page 156. The following passage attempts to summarise pages 161-164 and 168-169.

<sup>48</sup> At 144-5.

6.10 The first is *Welford v. EDF Energy Networks (LPN) plc* a case under the Electricity Act 1989, Schedule 4, paragraph 7.<sup>49</sup> That paragraph provides that landowners should receive compensation “in respect of the grant” for the imposition of electricity wayleaves. The Court of Appeal held that “compensation” includes an element of price, upholding an award by the Lands Tribunal of £2,360.00, “in respect of the value of the wayleave”. In other words, it seems the “compensation” and “consideration” are cumulative.

6.11 Secondly, we know from the decision of the House of Lords in *Waters v. Welsh Development Agency* that, if a statute confers a power to expropriate land, Parliament is taken to have intended that the statute should be interpreted as in accordance with the established principles of compulsory purchase law.<sup>50</sup> Lord Nicholls said:

[18] ... When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to increase the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the “special want” of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.

[19] This approach is encapsulated in the time-hallowed pithy, if imprecise, phrase that value in this context means value to the owner, not value to the purchaser.

6.12 Thirdly, we have the decision in *Bocardo SA v. Star Energy UK Onshore Ltd.*, a case on the Petroleum (Production) Act 1934, which contained the same operative words as those in Paragraphs 5 and 7 of the Code.<sup>51</sup> The Supreme Court had little difficulty in either construing these words or holding that the 1934 Act was a compulsory purchase act. Of particular note is the judgment of Lord Collins, who reiterated that

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<sup>49</sup> [2007] 2 P&CR 15 (CA).

<sup>50</sup> [2004] 1 WLR 1304 (HL).

<sup>51</sup> [2011] 1 AC 380 (UKSC).

the *Pointe Gourde* principle applies to prevent the landowner from seeking a “cut” of the profits to be made from the implementation of the scheme:

[104] Put differently, the question in this case is whether the legislature intended the landowner, under whose land petroleum was discovered but who did not hold a licence to exploit the petroleum and in relation to whose land the licence-holder needed access, to have a share in the enterprise or in the prospective value of the petroleum. In my judgment the whole scheme of the legislation against the background of well-established principles of compensation for compulsory acquisition demonstrates that that was not the intention.

Applying that to the Code, it is very clear that Site Providers under the Old Code cannot extract value from the Operator’s ability to make profits from its apparatus, or indeed to share any existing masts or cables, in the same way that Bocardo was unable to extract any value from the fact that its land contained the most favourable point for the extraction of oil.

6.13 I am not going to rehearse all the points on why the Old Code is to be construed as a compulsory purchase statute. I have already addressed this Conference on the arguments back in November 2012 and, more importantly, the Law Commission’s Consultation Paper on the Code came to the same conclusions for the very same reasons.<sup>52</sup>

6.14 Turning now to the New Code:

6.14.1 it is not obvious that the problem posed by *Mercury* was one that needed fresh legislation to sort out. What it needed was an Operator and a Site Provider willing to take a case to the Court of Appeal to get this confirmed.

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<sup>52</sup> Law Com. Consultation Paper N<sup>o</sup>.205 (2012), particularly Part 6 and paragraph 1.39.

6.14.2 But, as we have some new legislation, it is a shame that the draftsman has chosen to fiddle about with the existing words of paragraph 7, which have been interpreted once and wrongly, so producing a new formula which is untried. The draftsman could have simply imported *all* of the well-established machinery for assessing compulsory purchase compensation to be found in the Compulsory Purchase Act 1965, the Acquisition of Land Act 1981 and the Land Compensation Acts 1961-73, not just bits of it as he has done in New Code Paragraph 84.

Why reinvent the wheel and risk it turning out to be the same shape as a 50-pence piece?

6.15 Let us see what the draftsman has done, starting with “compensation” under New Code Paragraph 23. Whilst it would have been nice to see an *express* recognition in paragraph 23 of the compulsory nature of the acquisition of rights, I do not believe that this adds much. New Code paragraph 23(3) provides:

The market value—

- (a) must be assessed on the basis of the value of the right or agreement to the relevant person, and
- (b) must not be assessed on the basis of the value to the operator of the right or agreement or having regard to the use which the operator intends to make of the land in question.

This is *Pointe Gourde*. These words make it clear that the Court is valuing the land over which the Code Powers have been imposed from the perspective of the Site Provider alone, disregarding the value of the land to the Operator. If there was a problem with Old Paragraph 7, which I doubt, this solves it.

6.16 The Site Providers get a benefit - of sorts - with an express assumption that the seller is “willing”, even though the right to consideration only arises because he is *not* willing: paragraph 23(2). This is not much of a *quid pro quo*. Old Paragraph 7(1)(a)

so provides already and, in any event, it is an essential assumption in all CPO and, for that matter, “Red Book” valuations.<sup>53</sup> Not disregarding the fact that the sale is by compulsion would reduce the value of the land to a nominal sum, very close to zero, because the land could be acquired at less than market value. So, to require the court to assess compensation on the basis that there was not a hypothetical open market sale would reduce the compensation to whatever nominal sum the Operator might choose to pay.<sup>54</sup>

6.17 An additional advantage for the Operator is found in New Code paragraph 23(4)(a), which directs that, when assessing “consideration”:

The market value [*of the land being acquired*] must be assessed on the assumption that-

(a) there is more than one site which the operator could use for the purpose for which the operator intends to use the land in question (whether or not that it actually the case) ...

This provision might be aimed at removing what, in compulsory purchase law and valuation, is sometimes called “key value”.

6.18 As I have said, the basis of compulsory purchase is to give the landowner the value of his land, but for the intervention of the acquiring party and the scheme it is promoting. Part of that value, the “key value” as it is sometimes called, is the ability of the landowner to sell to others outside the scheme. Lord Nicholls explained this concept in *Waters v. Welsh Development Agency*:<sup>55</sup>

[64] One last point should be noted before returning to the present case. This concerns so-called “ransom” value or, less pejoratively, “key” value. I have already mentioned that under the “value to the owner” principle or the *Pointe Gourde* principle,

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<sup>53</sup> *FR Evans (Leeds) Ltd. v. English Electric Co. Ltd.* (1977) 36 P&CR 185 (Donaldson J).

<sup>54</sup> The problem has arisen in on the drafting of rent review clauses in cases such as *Law Land Co.Ltd. v. Consumers Association* [1980] 2 EGLR 109 (CA) and *Sterling Land Office Developments Ltd. v. Lloyds’ Bank plc* [1984] 2 EGLR 135 (Harman J). In both cases, the Court effectively redrafted the clause to provide for an assumed open market transaction where both parties were deemed willing.

<sup>55</sup> [2004] 1 WLR 1304. *Batchelor v. Kent County Council* (1989) 59 P&CR 357, 361 (CA).



whichever nomenclature is preferred, the pressing need of an acquiring authority for the subject land as part of a scheme should be disregarded when assessing its value for compensation purposes. The value of the land is not the price a “driven” buyer would be prepared to pay. But a strip of land may have special value if it is the key to the development of other land. In that event this feature of the land represents part of its value as much for purposes of compensation as on an actual sale in the open market.

[65] The intersection of these two principles was identified neatly by Mann LJ in *Batchelor v. Kent County Council*: ‘If a premium value is “entirely due to the scheme underlying the acquisition” then it must be disregarded. If it was pre-existent to the [scheme] it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence ...’.

- 6.19 If that “key value” was the conceptual target, then the draftsman has landed a very accurate shot, with no “collateral damage”. If new Paragraph 23(4) means what I think it is meant to mean, it prevents Site Providers from arguing that their site has an advantage or special benefit *for an Operator* which can be used to increase the sum payable as “consideration”, but still preserving its value for other purposes.
- 6.20 That analysis is perfectly consistent with a policy of preventing the Site Provider from making any gain from the compulsory acquisition of their Site for Code Purposes. The Site Provider’s land now has no such advantage, because there is deemed to be “more than one site which the operator could use for the purpose for which the operator intends to use the land in question”. This is consistent with the clear policy underlined by the importation of *Pointe Gourde* by new paragraph 23(3).
- 6.21 New paragraph 23(4)(a) is also apt to preserve the right of a Site Provider to receive consideration for the loss of any development value or other value to him which derives from the use of the land for any purpose other than for Code purposes. This is all getting a bit abstract, so here is an example. Imagine that the *only* tall building in a town which is suitable for locating a mast is a modern residential block. Imagine also that the owner has a reasonable prospect of being able to erect an additional, and valuable, penthouse on the existing roof of the building, which plan will be thwarted if an Operator plonks a mast on the roof.

6.21.1 The Site Provider cannot enhance his payment of “compensation” from the Operator by reference to the fact that there is only one tower in town, as there is deemed to be “more than one site which the operator could use”, even though this is counter-factual (or “post-truth”). There is no ransom value in the actual roof, as there is a perfectly good non-existent roof the Operator can use - at least for valuation purposes.

6.21.2 But the Operator cannot rely on the fact of the hypothetical roof to remove that element of “consideration” which reflects the loss of the development rights. The hypothetical roof is deemed to be “one that the operator could use” for *his* purposes, but that is all one is told to assume. If the Operator chooses to erect his mast on the actual building which has development value, he must pay for the privilege because the deemed alternatives have no characteristics, other than being land the Operator could use.

6.22 I have heard it said that the Site Provider can increase the value of his site under New Code Paragraph 23 by stating his intentions to obtain planning permission so that he can himself erect some telecoms infrastructure, such as a mast, without himself being an Operator. It is said that this will circumvent the assumptions in the new paragraph 23.

6.23 I struggle to see how this proposition works:

6.23.1 The market who will want to take advantage of this infrastructure will be predominantly Operators. There may be some others in the market, such as non-Code broadcasters, but let us assume they do not exist for the moment.

- 6.23.2 All Operators can acquire the site (including the infrastructure) by using the New Code.
- 6.23.3 The New paragraph 23 directs the valuation to be on the bases that:
- 6.23.3.1 the Operator's use of the land (including the mast) is to be disregarded under paragraph 23(3) and
  - 6.23.3.2 there is deemed to be other sites available which the Operator could use.
- 6.23.4 Why, then, would the existence of a planning permission (or, for that matter the existence of an actual mast) affect values in this way?
- 6.23.4.1 There is deemed to be other sites available which the Operator "could use", so neither the planning permission and existing mast add any value to the existing site.
  - 6.23.4.2 Nor can it be said that the planning permission and/or the mast will create competition between Operators for the site. Because all Operators can acquire a site on terms which disregard the effect of the Code on the value of the land and on the basis of other sites being available for them to use, they will not pay any more for the existing planning permission and mast anyway. Thus, there is no hypothetical Operator who will outbid the actual Operator because they can all bid on the same terms, namely that there are alternative sites.

6.24 That point about other Operators in the market having Code powers illustrates an interesting point on new paragraph 23(4)(b):

The market value [*of the land being acquired*] must be assessed on the assumption that-

...

(b) paragraphs 15 and 16 (assignment of code rights and upgrading and sharing of apparatus) do not apply to the Code right or any electronic communications apparatus to which the code right could apply.

I do not understand this provision.

6.25 If the court is to disregard the fact that an Operator who is paying “consideration” under new paragraph 23 has the rights to assign, share and upgrade, the logical consequence of that disregard is that the value of those rights are to be “regarded” when undertaking the valuation. So, if those rights have a value and that value is to be “regarded”, the Site Provider should have a right to see some of that value. That does not sound consistent with the policies of encouraging the speed of the roll-out of broadband, etc., and reducing the associated costs, by encouraging the sharing of electronic communications apparatus. In fact, it looks wholly contrary to that policy.

6.26 Moreover, it is internally inconsistent with new paragraph 23(3)(b), which directs the court to disregard “the value to the operator of the right or agreement” and “the use which the operator intends to make of the land in question”. The value of the right to use the site to the Operator, especially if it is a mast site, may well include the ability to allow other Operators to share its electronic communications apparatus. Moreover, if one disregards the “use which the operator intends to make of the land in question”, that use will include gaining income from sharing the site, so it is to be disregarded under this paragraph.

- 6.27 The same points can be made in respect of the right to “upgrade”, and draws into sharp relief the conceptual muddle caused by distinguishing between “upgrading” and “altering” which I have already referred to.<sup>56</sup>
- 6.28 If we assume that the rights to share and upgrade are to be given a value under paragraph 23(4) which is conceptually different from the value which is to be disregarded under paragraph 23(3), what is it? Is it the draftsman’s intention to disregard the value of the site to the Operator for its own network uses, but to allow the Site Provider to “rentalise” the value to the Operator of allowing other Operators to make use of its electronic communications apparatus? Possibly. But, by the same logic, that would mean that the value to the Operator of the apparatus it initially installs is to be disregarded, but the latent value of the right to upgrade the apparatus later is to be *regarded*. That seems to flatly contradict the purpose of conferring a new right to “upgrade”, in addition to continuing the policy of including “alterations” as a Code Power.
- 6.29 Here is where the effect of other Code powers comes back in. If the Site Provider can “rentalise” the value of, say, the right to upgrade, does that right even have a value. There is nothing to stop an Operator from using new paragraph 19 to dispense with a Site Provider’s consent to permit additional apparatus being added to an existing Site.
- 6.29.1 If it uses paragraph 19, then the Operator pays consideration under paragraph 23(3) which disregards the value to the Operator of the new apparatus.

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<sup>56</sup> See my paragraph 3.5 *et seq.*, above.

6.29.2 So, the only immediate value to the parties of the right to “upgrade” is that it saves them both the cost, aggravation and delay of making an application under paragraph 19.

6.29.3 So, the value to the Operator which can be “rentalised” and shared with the Site Provider under paragraph 23(4)(b) is at best the avoided cost and delay associated with having to exercise its rights under the New Code?

6.29.4 That is a strange way to promote the roll-out of superfast broadband.

6.30 The same logic is more difficult to apply to sharing rights, because of that definition of “land”. If an incoming Operator wishes to erect its own apparatus on the Site Provider’s “land”, the same argument as above applies. The only additional saving to the incoming Operator is only the avoided costs of its own application under paragraph 19. However, if it wishes to locate its own antenna on the Main Operator’s existing mast, it cannot use this argument, because the mast is not “land”. Logically, it becomes cheaper of the Main Operator when acquiring the site and paying consideration under new paragraph 23(4) if it cannot or will not share the apparatus going onto the Site, but will only share the Site itself. In view of the policies behind the new Code, this makes no sense.

6.31 There are two other minor problems with paragraph 23. First, the assumption of the deemed alternative Site in paragraph 23(4)(a) is going to be problematic. I have already heard tell of Site Providers’ agents preparing to run an argument that the deemed alternative Site has characteristics which make it less attractive than the

actual Site, therefore arguing that the Operator will pay more under paragraph 23 for the actual Site, as the deemed alternative Sites are not so good.<sup>57</sup>

6.32 This is really daft, because the whole point of the alternative Site is that it is an abstract concept, which is intended to reinforce that the actual Site is to be valued without reference to the value to the Operator. It does not exist and has no characteristics. A simple drafting tweak would avoid many pointless arguments about this.<sup>58</sup>

6.33 Another small issue is the references to “market value” in new paragraph 23. It may be that the existing value of any given Site includes some element of value referable to its attractiveness to Operators. It is probably the case that a few square metres of the roof of an office building has no value other than for a Code Operator.<sup>59</sup> So, when assessing comparables, at least to begin with, the valuers may have some arguments as to how best to strip out of “market value” the value of the Site for Code purposes which are now to be formally disregarded. I do not see a drafting solution to this, as it is essentially a valuation consequence of the existing “market” having departed from the old Code’s disregard of the value of the Site to the Operator.

6.34 Now, a few words about a provision that was in the Old Code and has found its way into the New Code. Both codes provide for compensation for “injurious affection”. This sounds smutty, but it is *not* something you will get into trouble for Googling on a work laptop.

6.35 Compensation for “injurious affection” is payable to landowners whose land is not acquired by compulsion, but whose land or rights thereover are adversely affected or

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<sup>57</sup> This is a variation of the planning permission argument I mention in paragraph 6.22 above.

<sup>58</sup> The easiest tweak is probably to amend paragraph 23(4)(a) to state that the alternative Sites are also deemed to be identical to the actual Site for all purposes.

<sup>59</sup> Theoretically, there might be a non-Code broadcaster, but if the roof is big enough for two...

“injured” by the acquisition of adjacent or adjoining land. The classic example of “injurious affection” is a homeowner who lives near a railway line, the land for which is compulsorily acquired. The homeowner is to be compensated for the devaluation of his land which is consequential upon the exercise of compulsory acquisition power, even though his land is not taken.<sup>60</sup> This head of compensation is an essential part of any CPO system, precisely because a landowner can be adversely affected by something happening near to their land, but not on it, which they have no right to stop.

6.36 Old Code paragraph 16 provided for compensation for injurious affection and this is replicated in New Code paragraph 85. I do not think I have ever heard of any claim being made under old paragraph 16; it will be interesting to see if anyone braves a claim under New paragraph 85. Somehow, I doubt it.

6.37 Lastly, three cheers for the draftsman in this respect. Some of you may recall that the 2015 draft of the New Code, the one which was abandoned in January 2015, contained a bizarre power enabling the Secretary of State to promulgate regulations to change the basis on which consideration was to be assessed and, indeed, to repeal parts of the proposed New Code relating to the assessment of compensation. I was reminded of the old Groucho Marx joke: “Those are my principles, and if you don’t like them... well, I have others”.<sup>61</sup> This daft power has been removed. Good.

## **7. *Getting Possession from Operators - “Should I Stay or Should I Go?”*<sup>62</sup>**

7.1 The last thing I want to mention is the new mechanism for getting Operators off land. Ignoring the “Special Regimes”, the Old Code had two methods of removing

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<sup>60</sup> *Sisters of Charity of Rockingham v. R.* [1922] AC 315 (PC); *Bolton Metropolitan Borough Council v. Waterworth* [1981] 2 EGLR 7 (CA).

<sup>61</sup> The attribution is disputed: [https://en.wikiquote.org/wiki/Talk:Groucho\\_Marx](https://en.wikiquote.org/wiki/Talk:Groucho_Marx).

<sup>62</sup> “Should I Stay or Should I Go?” by The Clash (Topper Headon / Mick Jones / Paul Simonon / Joe Strummer).



Operators, in paragraphs 20 and 21. They are not the most fabulously well-drafted provisions, but as many commentators have said, they can be made to work.<sup>63</sup> And work they do: Operators vacate Sites week in, week out and there has only ever been one single reported case on these paragraphs in 32 years.<sup>64</sup>

7.2 Paragraphs 20 and 21 have now become paragraphs 27 to 43, and new obligations to reinstate have been introduced. The essential division of the Old Code was that paragraph 21 applied to claims for the removal of apparatus at the end of an agreement and paragraph 20 conferred an alternative right to have apparatus removed during the term of an agreement to facilitate redevelopment. These have been amalgamated into a rather complicated and very slow two-step process.

7.3 The basic provision is that Operators can no longer be the subject of a claim for their removal under the Code for no reason other than that their existing agreement has terminated by effluxion of time.<sup>65</sup> New Code rights can only be terminated in accordance with their terms **and** for cause, including Operator default or the Site Provider's intention to redevelop the Site.<sup>66</sup>

7.4 Operators also now get a minimum of 18 months' notice, which is a very significant change to the existing 28 days notice periods in paragraphs 20(2) and 21(3).

7.5 On the face of it, that it all very sensible. In practice, almost all Operators voluntarily withdraw from Sites within 18 months, more or less, when old paragraphs 20 or 21

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<sup>63</sup> There are a number of commentaries out there, including my talk to this Conference in 2013, the *Blundell* lectures of 2012 by Ms. Alicia Foo and Mr. Wayne Clark and the two Law Commission Reports.

<sup>64</sup> *Crest Nicholson (Operations) Ltd. v. Arqiva Services Ltd.*: see footnote 4 for the reference and hats off to Mr. Wayne Clark for heroically arguing this case on a basis diametrically opposed to his own many publications. Sometimes, that is what an excellent advocate has to do - and keep a straight face whilst doing it.

<sup>65</sup> Old Code paragraph 21(1); New Code paragraph 30(4).

<sup>66</sup> New paragraphs 29(1)(b) **and** 30(4). I am going to come back to the ground for termination in new paragraph 30(4)(d) below in my paragraph 7.12.

are invoked, so the longer notice period is sensible and to be welcomed. So too is the additional and new concept in paragraph 32, which enables either party to a “Code Agreement” to force the renegotiation of the terms of an agreement which, but for the security conferred by new paragraph 29(2), would have expired by effluxion. This machinery works very well under the Landlord and Tenant Act 1954, being the difference between an “unopposed renewal” and an “opposed renewal” and works beautifully there.

7.6 So it all good? No. A small point first: the New Code imposes a double deadline on Operators, who need to both serve a counternotice and then commence proceedings within the set periods.<sup>67</sup> This is the same machinery as used to apply to tenants under the 1954 Act and was removed on the recommendations of the Law Commission as being too onerous and prone to go wrong.<sup>68</sup> The saving grace for Operators here is that failure to do either is not terminal, as the Site Provider still has to get an order to remove them under new paragraph 36(3)(b).

7.7 There are three bigger points. The first is on the new termination for redevelopment ground, paragraph 30(4)(c):

that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;

The problem is the reference to “intends”.

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<sup>67</sup> New paragraph 31(1).

<sup>68</sup> The Law Commission’s recommendations were made in Law Com. N<sup>o</sup>.208 in 1992 and given effect to 11 years later by *The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003*, (SI 2003/3096). Presumably, the delay was caused by us not having super-fast broadband.

- 7.8 In law, “intention” has developed a bespoke meaning, which derives from the famous judgment of Asquith LJ in *Cunliffe v. Goodman*.<sup>69</sup> This definition has two limbs: the person with the stated intention has to have a settled desire to do whatever he intends to do and he also has to have “a reasonable prospect of being able to bring about, by his own act of volition”, without “too many hurdles to overcome, or too little control of events”.
- 7.9 This test works fine in the context of the 1954 Act, section 30(1)(f), where there is plenty of case law which tells landlords how to successfully plan their campaigns to obtain possession. However, that section dictates when the landlord’s plans must be ready to be implemented: “on the termination of the current tenancy”.<sup>70</sup>
- 7.10 Under New Code paragraph 30(4), there is no equivalent to those words, so there is no reference point by which to decide *when* the Site Provider has to make good its “intention”: next week? Next Year? Next ten years? “A reasonable time”? Perhaps the “12<sup>th</sup> of Never”? This is just poor drafting. A court could rescue this either by implying in the words “within a reasonable time”, or by implying a reference to the notice provision: either implication would make the drafting workable, albeit at the cost of piling uncertainty upon uncertainty for no discernable policy reason. Both alternatives could be supported by analogies with cases decided under differing provisions of the 1954 Act.<sup>71</sup>

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<sup>69</sup> [1950] 2 KB 237 (CA). The case was actually concerned with the Landlord and Tenant Act 1927, but was approved as appropriate for section 30(1)(f) in *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* [1959] AC 20 (HL), *per* Viscount Dilhorne. This definition now applies generally: see, *inter alia*, *R. v. Saik (Abdulrahman)* [2007] 1 AC 18 (HL); *Attorney-General v. Times Newspapers Ltd.* [1989] 1 FSR 457 (Morritt J); and *R. (on the application of Extreme Oyster) v. Guildford Borough Council* [2013] EWHC 2174 (Admin) (Turner J).

<sup>70</sup> “that **on the termination of the current tenancy** the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding”.

<sup>71</sup> *Method Development Ltd. v. Jones* [1971] 1 WLR 168 (CA), *London Hilton Jewellers Ltd. v. Hilton International Hotels Ltd.* [1990] 1 EGLR 112 (CA) and *Edwards v. Thompson* (1990) 60 P&CR 222 (CA), would all support the implication of “a reasonable time”.

7.11 Here is a brief diversion. The same “intention” test applies now to the test for whether the Site Provider’s agreement to the exercise of Code Powers should be dispensed with: new paragraph 20(5). How that is meant to work without a defined time frame is, frankly, beyond me. This is *terrible* drafting.<sup>72</sup>

7.12 I move onto the second problem. A new ground for seeking termination of a Code agreement is:<sup>73</sup>

that the operator is not entitled to the code agreement because the test under paragraph 20 for the imposition of the agreement on the site provider is not met.

The paragraph 20 test is for dispensing with a Site Provider’s agreement to the imposition of an agreement: it is the replacement for paragraph 5. There are three conditions for the imposition of an agreement under new paragraph 20:

7.12.1 prejudice caused to the Site Provider is capable of being adequately compensated by money; **and**

7.12.2 the public benefit likely to result from the making of the order outweighs the prejudice to the Site Provider, having regard to the public interest in access to a choice of high quality electronic communications services; **but**

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<sup>72</sup> There is no notice period to provide a frame of reference, so perhaps the period in just “a reasonable time” - whatever that is? In cases on redevelopment break clause cases under the 1954 Act, the Court takes as the time frame for the possibility of redevelopment (as it is *not* an intention test) the length of the lease sought: *National Car Parks Ltd. v. Paternoster Consortium Ltd.* [1990] 1 EGLR 99 (Sir Nicolas Browne-Wilkinson V-C), *Becker v. Hill Street Properties Ltd.* [1990] 2 EGLR 78 (CA) and *Davy’s of London (Wine Merchants) Ltd. v. City of London Corporation* [2004] 3 EGLR 39 (Lewison J). Paradoxically, if that approach was applied to the Code, it would encourage Operators to seek shorter agreements, with all that follows for the ability to get a return on the investment.

<sup>73</sup> New Code paragraph 30(4)(d).

7.12.3 the court may not make an order under if it thinks that the Site Provider “intends” to redevelop all or part of the Site and could not reasonably do so if the order were made.

7.13 That last provision, which is in new paragraph 20(5) is already a separate ground for seeking an order for the termination of an agreement under new Paragraph 30(4)(c), so it is not obvious how and why these two cumulative tests should apply in paragraph 30(4).<sup>74</sup>

7.14 More importantly, I cannot quite see why this new ground exists. The first condition is, in reality, meaningless: the day-in, day-out function of a court system is to adequately compensate, with money, prejudices which people are caused, in every imaginable circumstances and no few which are not. Because paragraph 20 applies cumulatively, the issue of the public benefit outweighing the prejudice to the Site Provider of continuing to have the agreement imposed only arises if the prejudice is one which cannot be compensated. This provision is just ink on paper.

7.15 The third problem is a big one for Site Providers. It is the sort of problem which ought to make potential Site Providers think very carefully about entering into an agreement with a Code Operator. New paragraphs 29-30 provide that a Code Agreement can only be terminated in accordance with its terms and for cause.<sup>75</sup> If the Site Provider can make out its grounds for termination, the court must make an order under new paragraph 31(4) for the termination of the existing right.

7.16 So far, so good. Once the Site Provider has proved his ground under paragraph 30(4) and got his order under paragraph 31(4) he has seen a lot of time pass. He has to give 18 months notice, although the Operator who challenged the notice has

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<sup>74</sup> A simple drafting fix would be to make paragraph 30(4)(d) exclude paragraph 20(5) from the imported test.

<sup>75</sup> New paragraphs 29(1)(b) **and** 30(4).

to have started a claim within three months, but given the delays in the court process, 18-24 months will have gone by.

7.17 Which is why the Site Provider will be ecstatic to see that getting this paragraph 31(4) order entitles him to serve a notice under new paragraph 39(2), giving the Operator notice to vacate within a “reasonable period”. The current drafting of paragraph 39(6) does not say whether or not that period has to have expired first, but in any event, the Site Provider then has to start a *new claim* for the removal of the apparatus. More costs; more delays; more lawyers’ fees (every cloud, etc.).<sup>76</sup>

7.18 There is a small glimmer of light: the Site Provider who is forced to seek an order under paragraph 39 has a right to compensation for any losses suffered in the period after the termination order under paragraph 31(4) came into effect, but before it was enforced by the making of an order for removal of the apparatus under paragraph 43(1).

7.19 And finally: one of the joys of the Old Code was finding the provision which actually conferred security of occupation on Operators: it was buried deep in paragraph 21(9). The New Code is a little better, but not much. Now security is conferred by the combined effect of paragraphs 29(2), 30(4) and 39(1). Good drafting.

## **8. Conclusion - “Same As It Ever Was”:<sup>77</sup>**

8.1 Drawing together all of those strands I have had a chance to discuss today together leads me to a pretty clear conclusion. Most of the New Code does not do anything much that the Old Code did not do, but the things that it does which are new have not

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<sup>76</sup> There is a parallel system in place for forfeiting long residential leases in the Commonhold and Leasehold Reform Act 2002, sections 166-8. It works after fashion, but it is an expensive and time-consuming pain in the *reddendum* for landlords to operate.

<sup>77</sup> “Once in a Lifetime” by Talking Heads (David Byrne / Brian Eno / Chris Frantz / Jerry Harrison / Tina Weymouth).

been thought through - or drafted - as well as they might have been. I for one do not expect the New Code to actually deliver on the government's expressed policies. The New Code is not a radical departure from the Old Code and certainly no better drafted. More importantly, neither Operators nor Site Providers saw it as being in their commercial interests to use the Old Code, preferring a commercial approach to uncertain litigation. There is nothing in the New Code that it likely to make them change their approach.

8.2 Personally, I think that the proposed New Code is genius. Consider this:

8.2.1 Everybody was agreed that the Old Code was badly drafted.

8.2.2 The previous government had announced a policy to get the "best super-fast broadband in the EU" by 2015 and had failed to either deliver on the policy or keep us in the EU. An excuse might be needed.

8.2.3 The Operators were complaining that their site acquisition costs were too high because of the Old Code and that was hindering their roll-out of the "best superfast broadband in the EU", even though the evidence was plain that none of them were actually asserting their Code rights to acquire sites *and* that, on the proper analysis, the Code provided them with a power to acquire sites without reference to the value of the land to them. Another excuse might be needed.

8.2.4 Therefore "something must be done".<sup>78</sup>

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<sup>78</sup> A fallacy identified by Sir Humphrey Appleby in the 1988 "Yes, Prime Minister" episode, "Power to the People" (Jonathan Lynn / Anthony Jay), as "(1) We must do something. (2) This is something. (3) Therefore, we must do this".

8.2.5 Having a New Code is doing “something”, therefore we must have a New Code.

8.2.6 The New Code does not genuinely advance the existing position under the Old Code and has some new drafting howlers, such as the definition of “land”. Some of it is going to be impossible to apply with any certainty (or all all).

8.3 So, we will have a New Code which will get some positive headlines for HM Government, without achieving anything of real substance: same as it ever was; same as it ever was. Both Jim Hacker MP *and* Sir Humphrey Appleby would be proud.<sup>79</sup>



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Many of the ideas in this paper have emerged from discussions with my fellow “Code Warriors”. Some of the ideas I have, frankly, just stolen from them; other ideas are mine, but have been coolly appraised by my fellows as “just bonkers”. I am particularly grateful for the kindness, generosity and tolerance shown to me by Ms. Alicia Foo of Pinsent Masons LLP, Ms. Emma Chadwick, Ms. Charlotte Coleman and Mr. Duncan McLuckie all of Winckworth Sherwood LLP; Mr. Steven Clarke of MBNL Ltd., Ms. Mariko Newell of Hutchinson 3G UK Ltd., Mr. Glen Sinclair of EE Ltd., Mr. Wayne Clarke of Falcon Chambers, Ms. Thekla Fellas of Fladgate LLP and Ms. Jane Fox-Edwards of Allen & Overy LLP. The many and varied sins of omission and commission in this paper are all of my own making.