## **The Terms of the Code Agreement**

1. As you are all already aware, rights of Code operators over land are conferred by what are termed by the Code as *"Code Agreements"*. These agreements carry with them a significant degree of statutory protection from termination. You are also aware that Code Agreements can be imposed by the Tribunal upon a landowner against its will, and for very modest consideration. Those advising site-providers will therefore need to look very carefully at the terms with which those site-providers can be burdened.

2. In this part of the seminar I therefore intend to discuss the following issues:

   (1) What rights and obligations can be imposed by a Code Agreement?

   (2) What test must the Tribunal apply in deciding what rights and obligations to impose?

### **The Starting Point: What Counts As A Code Agreement?**

3. There is no comprehensive definition of a "Code Agreement" in the code. However Para 29(5) of Part 5 the Code states that:

   > *"(5) An agreement to which this Part of this code applies* [i.e. Part 5] *is referred to in this code as a "code agreement"*

4. To discover which agreements Part 5 applies to we have to consider Paras 29(1)-(4):

   > *"(1) This Part of this code applies to an agreement under Part 2 of this code, subject to sub-paragraphs (2) to (4)."*

5. The Sub-paragraphs (2) and (3) referred to exclude from the definition of Code Agreements leases, where:

(a) the primary purpose of the lease is not to grant Code Rights, and

(b) Part 2 of the Landlord and Tenant Act 1954 (or its Northern Irish equivalent[1]) applies, whether or not the those leases are contracted out of the security of tenure provisions of the 1954 Act.

6. You will note that this exclusion presupposes that a lease whose primary purpose is the conferral of Code Rights would be capable of being a Code Agreement.

7. So, noting this exception, we must now turn to Part 2 of the Code (that is, Paras 8 to 14).

8. Part 2 of the Code is entitled *"Conferral of Code Rights"* and sets out how Code Rights may be conferred by written agreements between a Code operator and the occupier of land, and who else may be bound by such an agreement[2]. So (at least by implication) an agreement *"under Part 2 of this code"* – that is, a Code Agreement - is an agreement which successfully confers Code Rights by purporting to do so, and by complying with the other requirements of Part 2.

9. Para 11 sets out a number of requirements of such an agreement. Drawing all these points together, we find that a Code Agreement has the following characteristics:

- It must, by definition, confer one or more Code Rights.

- It may only be conferred on an operator by an agreement between the occupier of the land and the operator[3]: para 9

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[1] The Business Tenancies (Northern Ireland) Order 1996

[2] Part 2 also deals with who can be bound by an agreement. On category of person who can be bound is a person who agrees to be bound. Such an agreement must also be in writing and, within the parlance of the Code, is probably also to be termed a 'Code Agreement'. However, this does not affect the issues dealt with in this paper.

[3] A point which has caused CTIL's claim in CTIL v. Compton Beauchamp [2019] UKUT 107 to fail. That case is subject to appeal and has caused some other CTIL cases (including CTIL v. Keast [2019] UKUT 116) to be stayed pending the outcome of the appeal.

- It must be made in writing: para 11(1)(a)

- It must be signed by the parties (or on their behalf): para 11(1)(b)

- It must state for how long the Code Right is exercisable: para 11(1)(c)

- It must state the period of notice (if any) required to terminate the agreement: para 11(1)(d)

10. As you also will know, Para 3 defines the expression "Code Right" as a right, for the statutory purposes:

*"(a) to install electronic communications apparatus on, under or over the land,*

*(b) to keep installed electronic communications apparatus which is on, under or over the land,*

*(c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,*

*(d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,*

*(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,*

*(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,*

*(g) to connect to a power supply,*

*(h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or*

*(i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus."*

11. So, drawing all these strings together (and subject to the exception for business tenancies not granted primarily to confer Code Rights) a:

a) written agreement;

b) between the occupier of land and a code operator;

c) signed by them both (or on their behalf);'

d) for a defined duration,

e) which confers at least one of the Para 3 list of Code Rights,

is a Code Agreement, whatever its other characteristics.

12. The Code provides that provisions of an agreement which is a Code Agreement are void to the extent that they prevent or limit:

    (i) The assignment of the agreement to another operator (except for conditions of the agreement making assignment conditional upon the provision of a guarantor): Para 16

    (ii) The upgrading or sharing of the electronic communications equipment to which it relates: Para 17

    So, whether the parties intended it or not, a Code Agreement will necessarily permit sharing, upgrading or assignment.

13. Since Part 2 does not prohibit the inclusion of anything else in a Code Agreement, an operator and a landowner are free to include anything else they like. As long as it confers at least one Code Right, and satisfies the other requirements of Part 2, it is a Code Agreement. It is subject to the various provisions and protections of the Code, and will have the various other characteristics of a Code Agreement, such the security of tenure provided by the statutory continuation provisions of Part 5.

**So what Code Agreements can a Tribunal impose?**

14. So far everything is simple. The parties are free to agree anything they like and, if they agree to confer a Code Right in a suitable written

agreement, that agreement will attract the consequences of being a Code Agreement. If the agreement requires the site-provider to send a birthday card to the operator on the anniversary of the erection of the communications mast that is no problem, and that obligation will continue until the agreement is determined in accordance with Part 5. Of course, since this is a consensual process, there is no injustice in permitting the parties to agree to any obligation they like.

15. More potential complexity and/or injustice may arise because, as we also know, *"Code Agreements"* can also be imposed by order of the Tribunal, against the will of the site-provider. By definition, the site-provider is not agreeing to be bound by the obligations within the agreement and the agreement represents a significant interference with his freedom to contract (or not), and the free use of his land. In this context, the all-important questions become:

    (1) Exactly what rights and obligations can a Tribunal *impose* within a Code Agreement?

    (2) What tests must the Tribunal apply when deciding whether to do so?

    Can the Tribunal <u>impose</u> an obligation on the site-provider to serve the birthday cards?

**<u>Summary of the compulsory regime</u>**

16. First, a very brief summary of the statutory provisions which deal with the imposition of Code Agreements:

    (1) Part 4 gives the Tribunal a power to impose *"an agreement on a person by which the person confers or is otherwise bound by a code right"*: Para 19(a)

(2) The power arises where *"an operator requires a person (a "relevant person") to agree to confer a code right on that operator"*: Para 20(1)[4]

(3) The operator must first give the relevant person a notice in writing *"setting out the code right, **and all of the other terms of the agreement** that the operator seeks"* and stating that the operator seeks its agreement: Para 20(2)

(4) If no agreement occurs within 28 days, the operator may apply to the Tribunal for an order which *"imposes on the operator and the relevant person an agreement between them which … confers the code right on the operator"*: Paras 20(3) & 20(4)

(5) The Tribunal is not bound to impose an agreement in the precise terms of that sought by the operator. It may "*impose an agreement which gives effect to the code right sought by the operator **with such modifications as the court thinks appropriate***": Para 23(1)

(6) If the Tribunal does make such an order, it *"takes effect for all purposes of [the] code as an agreement under Part 2 of this code between an operator and a relevant person":* Para 22.

**The tests which the Tribunal must apply**

17. Paragraph 21 imposes two preconditions upon the making of an order which the Tribunal must find are met in order for any order to be made at all[5]:

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[4] Para 20 also deals with the power to cause other persons to be bound by code agreements. The concept of the 'relevant person' therefore includes (a) occupiers of the land, who can confer rights, and (b) those who the operator might also wish to be bound by the rights, such as a site-owner who is not in occupation. But it is only the occupier who can confer, and be compelled to confer, the code rights: see CTIL v. Compton Beauchamp Estates (ibid).

[5] As Nicholas Taggart has addressed, it is also precluded from making an order if it the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order was made (para 21(5)).

(1) That the *"prejudice caused to the relevant person by the order is capable of being adequately compensated in money"*[6];

(2) *"that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person"* having regard to *"the public interest in access to a choice of high quality electronic communications services"*

18. As already indicated, the Tribunal is not bound merely to make an order imposing the exact agreement which was sought by the Code operator in its Para 20 notice, or alternatively dismiss the application altogether. By Para 23(1) the Tribunal may: *"impose an agreement which gives effect to the code right sought by the operator* ***with such modifications as the court thinks appropriate****".* So, if the Tribunal considers that some of the operator's proposed terms are not "appropriate", or it is "appropriate" to include some other terms, then the Tribunal must modify the agreement accordingly, before (if it is satisfied that the two preconditions are then met) granting the order which imposes it on the site-provider. I will come back to the criteria against which 'appropriateness's is to be judged.

19. Moreover, by Para 23(2) the Tribunal:

> *"**must** require the agreement to contain such terms as the [Tribunal] thinks **appropriate**, subject to sub-paragraphs (3) to (8)".*

20. Sub-paras 23(3) and 23(4) require the Tribunal to includes terms, in any agreement it imposes, as to the payment of consideration, which is to be determined in accordance with Para 24.

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[6] Of this, the Deputy President has said: *"It may be better not to speculate on what type of prejudice would be incapable of adequate compensation by money and to leave it to individual cases to provide examples, but there may be cases in which aesthetic or personal considerations meant that compensation for any diminution in financial value did not provide adequate recompense for the prejudice that the building owner might suffer."* EE & Hutchison 3G UK Ltd v. Islington [2018] UKUT 361

21. By Sub-para 23(5) the Tribunal must also include those terms which the Court *"thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right"* to occupiers of the land, to those with interest in it, or to those who are from time to time on it (regardless of whether they will be made parties to the agreement).

22. By Sub-para 23(7) the terms of the agreement must specify how long the Code Rights are exercisable.

23. By Sub-para 23(8) the Tribunal is required to consider whether to make the agreement terminable (and, if so, in what circumstances), and whether to include lift-and shift provisions.

**So, apart from those provisions actually conferring the para 3 Code Rights, and those which the Tribunal is required to impose, what *else* might be contained in an imposed Code Agreement?**

(1) Further "implicit" Code Rights

24. Firstly, although we have a defined list of "Code Rights" within Para 3 of the Code, it is right to note that this list may not be absolutely exhaustive of the possible rights which can be conferred upon Code Operators, applying the usual principles of statutory interpretation.

25. Express powers which are granted to a body by Parliament will also carry with it further implicit powers where these can be can be fairly regarded as incidental to, or consequent upon, the grant of the express power, and if the exercise of the implicit power can be reasonably and properly said to meet the purpose of the express power: see A-G v. Great Eastern Railway Co (1880) 5 App Cas 473 per Lord Selborne at 478 and Lord Blackburn at 481.

26. So, for example, in CTIL v. University of London [2018] UKUT 0356 (in relation to which permission to appeal has been granted) the tribunal

held that the right in para 3(a) *"to install electronic communications apparatus on, under or over the land"* would include an implied Code Right to enter land on which an operator might want install equipment upon, in order to carry out preparatory surveys to see whether they did, in fact, wish to install equipment there, if that was not already within the scope of the Code Rights listed in Para 3.

27. However, this principle of statutory interpretation is not a charter for a Tribunal to identify and grant to operators any further power which the Tribunal thinks might be useful, or which might assist an operator's business:

> *"The authorities… show that a power is not incidental merely because it is convenient or desirable or profitable":* Hazell v. Hammersmith & Fulham [1992] 2 AC 1 per Lord Templeman at p. 31.
>
> *"It is not sufficient that such a power be sensible or desirable. The implication has to be* ***necessary*** *in order to make the statutory power effective to achieve its purpose"*: Ward v. Commissioner for Police of the Metropolis [2006] 1 AC 23, per Baroness Hale PSC at [24].

(2) Other "terms" of the Agreement

28. We know that the Agreement can (indeed must) include other terms, beyond those which explicitly confer the code rights themselves, because the relevant provisions which I have summarised above expressly require the Tribunal:

(a) to include terms which are "appropriate" to protect users of the site.

(b) to include certain specific terms (as to consideration, as to duration, and such as ensure "least possible loss and damage" to a range of people); and

(c) to consider including other terms (break options and lift and shift).

29. But what else might be included as a "term" of the agreement? Does the Tribunal have jurisdiction to impose any and all obligations on the parties it thinks "appropriate" by the terms of the agreement?

30. Of course, in contractual parlance a "term" of an agreement may refer to absolutely any provision of a contract. In CTIL v. Keast [2019] UKUT 116 Judge Elizabeth Cooke accepted CTIL's submission that the expression *"terms"* is not restricted when it is used within the Code. She held that, so long as the Tribunal properly exercises its obligations to include such terms as it thinks *"appropriate"* and to impose the agreement with such modifications as it thinks *"appropriate"*, there are no other jurisdictional restrictions on what a Code Agreement which is being imposed may include by way of its provisions – that is, its *"terms"*.

31. The agreement sought by CTIL in Keast (which is its standard form agreement) seeks to impose *"terms"* of the following nature:

   i. Warranties and a covenant for quiet enjoyment by the Respondent.
   ii. The right for the Claimant to install and run a generator indefinitely.
   iii. The right to compel the Respondent to enter into agreements with third parties and to restrict his rights to negotiate with them.
   iv. The right to restrict the Respondent's access to the site.
   v. Obligations on the part of the Respondent to maintain the condition of his farm and to protect the site from interference.
   vi. The obligation of the Respondent to notify the Claimant of various matters.
   vii. Covenants by the Respondent not to interfere with the site or to authorise any interference.
   viii. A restriction on the Respondent's ability to develop other parts of his property.

32. Judge Cook held that all of these were theoretically capable of being imposed as part of the *"terms"* of a Code Agreement, although she expressed doubts about whether, applying the *"appropriateness"* test, they would *in fact* be imposed by the Tribunal[7].

33. So, if Judge Cook is correct, since the expression *"terms"* is capable of encompassing a contractual provision of any sort or effect, and since the Code does not impose any further express limitation on what may constitute a *"term"* of the agreement, a Code operator may ask the Tribunal to grant any right over the landowner, or impose any obligation on the landowner, and the Tribunal may grant or impose all of them where it thinks that is *"appropriate"*. Of course, it may be doubtful that the Christmas Card term would be considered appropriate, but it is not outside the power of the Tribunal to impose it if it thinks otherwise.

**Can that be correct?**

34. Judge Cook held that if the draftsman of the Code had intended the expression *"terms"* to have a more limited meaning than 'a provision of the agreement' the draftsman would have said so. That itself seems somewhat optimistic, given the Delphic drafting of the Code.

35. However, that view also presupposes that the single and ordinary relevant meaning of the word "terms" is: "any provision of a contractual agreement". Of course, there is another contractual sense in which the word "terms" is used. The word is also used in the sense of: "the terms upon which a contractual right may be exercised". When used in this more limited sense, the word refers to the preconditions for the exercise of a contractual right, and the parameters within which the right may be exercised. So, for example, a right of access may be granted upon "terms" that it is only exercisable upon giving notice.

[7] Since the issue of jurisdiction was being determined as a preliminary issue, she did not have to rule on the appropriateness of any of the terms.

36. Judge Cook did not select between these two possible meanings, in deciding what the draftsman of the Code meant. She simply adopted the wide meaning as the starting point, and then noted that the draftsman had not imposed any further constraints upon that wide meaning. If she had sought to select between these two potential meanings of the word "terms", she would have found considerable help from the other provisions of the Code.

37. Firstly, because the Code requires the Tribunal to ensure some terms are included in any Code Agreement which it imposes, and the Code requires the Tribunal to consider including others, we can examine the common characteristics of all those terms to which the Code expressly refers. All of the terms expressly referred to in the Code are, in fact, good examples of 'terms' in the narrower sense: the parameters of the exercise of Code rights, or the conditions for their exercise. They are terms which provide that the operator can exercise the Code Rights:

- Only for the specified duration of the agreement (or until notice is given);

- In return for paying consideration for the rights ;

- Subject to those limitations which are necessary to protect others from damage;

- Subject to the right of others to require the equipment to be lifted and shifted.

38. Secondly, at Para 12 of the Code, the draftsman has actually used the word "terms" in the more limited sense of 'the parameters within which the Code rights may be exercised, and the conditions for their exercise'. That provision states:

*"A code right is exercisable only in accordance with the terms* ***subject to which*** *it is conferred."*

39. Thirdly, and perhaps most fundamentally, if the expression *"terms"* is used in the Code in an unrestricted sense, this leads to the conclusion that the Tribunal may confer rights on an operator through the *"terms"* of the Code Agreement, which are outside the scope of those rights which, by Para 3 of the Code, are capable of being *"conferred"* as Code Rights. In other words, if an operator requires a power which is outside Para 3, it can simply call it a *"term"* of the agreement and the operator can have the right conferred by the Tribunal anyway. This interpretation seems deeply at odds with the general principle of statutory interpretation (referred to by Judge Cook) that, where there is any ambiguity, the construction chosen will be the one that interferes least with private property rights: see R (Sainsbury's) v Wolverhampton City Council [2011] 1 AC 437.

40. Fourthly, the decision in Keast represents a somewhat fundamental widening of the apparent ambit of the Code in terms of imposing rights and burdens. For example, looking back at the list of Code Rights within para 3 (and, indeed, those *"terms"* of Code Agreements the nature of which is actually discussed in the Code), it can be observed that only one of them even arguably represents a right to make someone else do anything: the right to require someone to lop trees (set out in Para 3(i)). Neither does Para 3 include any right to impose restrictions on the other property of the landowner (or of 3rd parties) other than those restrictions that might necessarily arise as a by-product of the grant of code rights, and the universal obligation placed upon a grantor not to derogate from his grant.

41. However, Judge Cook has held that the Tribunal has the jurisdiction to:

- Make the occupier of land give a warranty that it has title to grant the agreement (which it is actively seeking not to grant).

- Make the landowner (and its successors) maintain land around the cell site in a particular condition.

- Prevent the landowner from building on any of the rest of his (43 acre farm) without first giving notice, and then only in particular circumstances.

42. The view of Judge Cooke in Keast is also hard to reconcile with the view of the Deputy President expressed in CTIL v. University of London [2018] UKUT 0356. One of the arguments advanced by CTIL was that para 23(1) of the Code enabled the Tribunal to confer additional rights which were not code rights. Para 23(1) says:

> *"(1) An order under paragraph 20 may impose an agreement which* ***gives effect to*** *the Code right sought by the operator with such modifications as the court thinks fit."*

43. It was said that the power to "give effect to" the Code Rights included the power to confer additional rights. This was rejected by the Deputy President, who stated (at [79]):

> *"I do not accept that this is the effect of paragraph 23(1), which seems to me to be concerned with modifying the rights sought by the code operator rather than augmenting the list of Code rights by a power to impose non-Code rights."*

44. Perhaps slightly more consistent with the very wide view of what the *"terms"* of an imposed Code Agreement might contain is the Deputy President's decision in EE v. Islington LBC [2019] UKUT 53. In that case Jonathan Wills, for Islington, sought to persuade the Tribunal that it could not impose an agreement which granted a lease to EE – that is, a an agreement the terms of which created and conferred an interest in

land upon EE. The Tribunal held that the *"terms"* conferring a Code right to occupy land could have the effect of conferring a lease. The Deputy President appears to have been influenced by the fact that the draftsman clearly acknowledge that a lease could, in some circumstances be a Code Agreement, at least if it is made by agreement (since only some leases conferring Code Rights are excluded from the definition of a Code Agreement). But, it is also clear the case that an operator and occupier of land can enter into forms of agreement which a Tribunal could not impose. For example, a Code Agreement entered into voluntarily under Part 2 need not include any provisions for adequate consideration, whereas one imposed by the Tribunal can do so. So the fact that the parties can, by agreement, create a lease which confers Code Rights and is a Code Agreement, does not tell you that the Tribunal can impose such a lease.

45. In fact, it is not unusual for Parliament to grant compulsory powers to undertakers over landowners which are more constrained in their scope than the undertakers could voluntarily agree with the landowner. See, for example, the limitations on the scope of a 'necessary wayleave' under the Electricity Act 1989.

46. Neither is there any need for the Code to be interpreted so as to grant exclusive possession to a code operator (so as to create an estate in land). That has not been found to be necessary for other statutory undertakers, and wayleaves are created by many statutory schemes as a way of permitting statutory undertakers to make use of land, without granting them any interest or estate in that land. Moreover, if there were a need for an operator to acquire estates interests in land, the Communications Act 2003 (as amended) includes specific, but limited, powers of compulsory acquisition in order to do so[8].

[8] See s. 118 and Schedule 4,

47. At some point the Court of Appeal will look at this issue (possibly in Keast). The Tribunal has so far generally demonstrated an approach to the Code of identify its broad policy as being pro-operator and then (despite its references to the correct approach to statutory interpretation) selecting an interpretation which best serves that purpose. That is not a correct approach to statutory interpretation:

> *"When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in Black-Clawson International Ltd v. Papierwerke Waldhof-Aschattenburg AG [1975] AC 591, 613, "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used"*[9]

48. It is not for the Tribunal to fill any gaps which operators identify in the legislation in relation to the powers they can compulsorily acquire under the Code: *"the proper course is to apply to Parliament for further powers"*[10]. If Code Operators require further rights they must seek a (further[11]) amendment of the Para 3 list of Code Rights.

49. I very much doubt that the Court of Appeal will adopt the same, somewhat "free-wheeling", approach to the interpretation of this legislation.

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[9] Williams v. Central Bank of Nigeria [2014] AC 1189 per Lord Neuberger at [72],
[10] Attorney General v. Mersey Railways [1907] AC 415 per Lord Macnaghten at p. 417.
[11] The list of Code Rights was expanded with the implementation of the new Code from that which pertained under the old Electronic Communications Code.

**Conclusions**

50. So, as the law stands, an operator can seek to include anything it likes within the provisions of an agreement which it seeks to impose by serving a notice under para 20. The landowner is then left with the following responses:

 (i) It may argue that further terms must be included on the grounds that they are *"appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right"*

 (ii) It may ask the Tribunal to include (and the Tribunal must consider including) a break clause and/or lift and shift provisions.

 (iii) It may argue that some of the *"terms"* which the operator is seeking are not *"appropriate"*.

 (iv) It may argue that the agreement, as a whole (that is, after such modifications):

  (a) subjects it to *"prejudice"* which is not *"capable of being adequately compensated in money"*[12]; or

  (b) *"that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person" having regard to "the public interest in access to a choice of high quality electronic communications services"*

51. Of course, to argue any of the above the landowner will have to subject itself to the costs risks of Tribunal proceedings. As things stand, the

[12] Of this, the Deputy President has said: *"It may be better not to speculate on what type of prejudice would be incapable of adequate compensation by money and to leave it to individual cases to provide examples, but there may be cases in which aesthetic or personal considerations meant that compensation for any diminution in financial value did not provide adequate recompense for the prejudice that the building owner might suffer."* EE & Hutchison 3G UK Ltd v. Islington [2018] UKUT 361.

Tribunal has not yet adopted any costs policy akin to that which applies in relation to s. 84 of the Law of Property Act 1925, in which a 'cost neutral' approach is adopted in relation to unsuccessful, but not unreasonable, objections[13].

52. For the moment, if there is any remaining hope for landowners who fear that wide-ranging rights will be imposed upon them, it perhaps lies in the following observation of Judge Cook in Keast as to the approach which the Tribunal will take in deciding whether or not any proposed term is *"appropriate"*:

> *"Clearly in deciding what it thinks appropriate the Tribunal will have very careful regard to the overall scheme of the Code, which provides for the imposition of Code rights and other terms on occupiers of land at a rate of consideration far lower than was payable under the old Code. The Tribunal will have in mind the need to be fair to both parties, and what is "appropriate" is likely to be influenced by the basis of consideration that it can impose. It may be considered inappropriate to impose on a site provider certain obligations intended to facilitate the provision of the operator's network when the consideration receivable by the site provider is to be unrelated to the value of that network."*[14]

53. Of course that presupposes that the site-provider is willing to incur the costs-risks of arguing before the Tribunal that a term of the proposed agreement is inappropriate, or that the Tribunal will not simply assume that any term which is not actively objected to must be appropriate. Given the extensive use of standard-form agreements granting to operators all the code rights within Para 3 on very favourable terms, and given the refusal of the Tribunal in EE v. Islington [2018] UKUT 361 even to hear submissions on terms which had not previously been identified by the site-provider as objectionable in the manner in which the Tribunal

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[13] And in making any costs order the Tribunal is specifically required to have regard "in particular" to the extent to which any party is successful in the proceedings.
[14] At paragraph 57.

had directed[15], at least the latter possibility seems to be somewhat optimistic.

54. The conditions would seem to have been created for operators to negotiate for, or to acquire almost by default, very wide powers over sites and to impose potentially very wide-ranging obligations and restrictions upon site-providers. It will be interesting to see how this situation plays out in practice and (perhaps) in the higher courts.

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[15] The terms were identified in a schedule, rather than in an amended draft agreement.