



Electronic Communications Code 2017: 3 years on and what have we learned?

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Introduction

- A little bit of history!
- Key features of the new Code
- What happens on expiry of a Code agreement:
 - Renewal;
 - Removal

A little bit of history!

- Brought into force by the Digital Economy Act 2017 on 28 December 2017
- Replaced the Code originally introduced by the Telecommunications Act 1984:
 - “.....one of the least coherent and thought-through pieces of legislation on the statute book...” – *Lewison J (Bridgewater Canal Company Limited v Geo Networks Limited [2010])*

Key features of the New Code

- “No-scheme world”
 - *EE Limited and Hutchinson 3G UK Limited v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 0053*

Key features of the New Code

- Code Operator
 - an electronic communications operator to whom a direction applies under Section 106(3)(a) of the Communications Act 2003
 - <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-code/register-of-persons-with-powers-under-the-electronic-communications-code>

Key features of the New Code

- Agreement relating to land
 - “does not include electronic communications apparatus”
- Electronic communications apparatus:
 - Apparatus designed or adapted for use in connection with the provision of an electronic communications network
 - “other structures or things designed or adapted for use in connection with the provision of an electronic communications network”

Key features of the New Code

- Effects of the New Code can be retrospective
- Transitional provisions –
 - Schedule 2 of the Digital Economy Act 2017

Termination of Code Agreements

- Was the agreement entered into under the old Code or the new Code?
- If it was entered into under the old Code, was it inside or outside the security of tenure provisions of the Landlord and Tenant Act 1954?

Termination of Code Agreements – new Code

- Termination provision – part 5 of the new Code
- Statutory continuation – on expiry or contractual termination of a Code agreement that agreement statutorily continues unless and until determined in accordance with the provisions of the Code (paragraph 30)

Termination of Code Agreements – new Code

- Termination by landowner:
 - Not less than 18 months' notice expiring on or after the contractual expiry of the agreement
 - Specifying one of the 4 grounds set out in paragraph 31 of the Code

Termination of Code Agreements – new Code

- Grounds for termination by landowner:
 - Substantial breach of obligation;
 - Persistent delay in payment;
 - Landowner proposes to redevelop
 - Operator does not meet paragraph 21 test

Termination of Code Agreements – new Code

- Redevelopment ground (paragraph 31(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”
 - *EE Limited and Hutchison 3G UK Limited v Trustees of the Meyrick Estate [2019] UKUT 164*
 - *S Franses Ltd v The Cavendish Hotel (London) Limited [2018] UKSC 62*

Termination of Code Agreements – new Code

- Operator does not meet paragraph 21 test (paragraph 31(4)(d)):
 - Prejudice caused can be adequately compensated in money;
 - Public benefit outweighs any prejudice caused
- Court must have regard to the public interest in access to a choice of high quality electronic communications services
- *CTIL v University of the Arts London [2020] UKUT 248*

Termination of Code Agreements – new Code

- Effect of landowner's notice – the Code agreement will end on expiry unless:
 - Within 3 months from the date of service the operator serves a counter-notice; and
 - Within 3 months of the date the counter-notice is given the operator applies for a court order under paragraph 34 of the Code
- If the court determines that the landowner has made out one of the grounds it must order that the Code agreement ends.

Termination of Code Agreements – new Code

- If the court decides that the landowner has not made out one of the grounds it can make one of the following orders (paragraph 34):
 - That the operator can continue to exercise its rights in accordance with the existing agreement for a specified period;
 - That the terms of the existing agreement are varied in relation to an existing Code right or to confer an additional Code right;
 - Removal of a Code right where the agreement confers more than one Code right;
 - Termination of the Code agreement and that the parties enter into a new Code agreement.

Removal of apparatus

- If the court decides that the landowner has made out one of the grounds and orders that the Code agreement must end this does not automatically entitle the landowner to require removal of the electronic communications apparatus from his land.
 - If the operator does not remove its apparatus voluntarily the landowner will need to seek another court order to enforce removal under part 6 of the Code.
 - If an order for removal is obtained and the operator still does not comply the landowner must apply for a further order allowing it to do so!

Termination of Code Agreements – Old Code

- Was the agreement within or outside the Landlord and Tenant Act 1954?
- Agreement excluded from the security of tenure provisions of the 1954 Act - under the transitional provisions both part 5 and part 6 of the new Code apply

Termination of Code Agreements – Old Code

- Agreements within the Landlord and Tenant Act 1954
 - Termination is governed by the 1954 Act – part 5 of the new Code does not apply.
 - Operator cannot apply for a new agreement under Part 4 of the new Code – *CTIL v Ashloch Ltd [2019] UKUT 388*
 - Agreement can be terminated only by service of a section 25 or section 26 notice.
 - Failing agreement the operator can apply to the court for a new lease and the landlord can only oppose renewal on the grounds in the 1954 Act
 - Lease when granted will not be one to which the 1954 Act applies:
 - S43(4) LTA 1954 – Act does not apply to a tenancy the primary purpose of which is to grant Code rights and which is granted after 28 December 2017

Termination of Code Agreements – Old Code

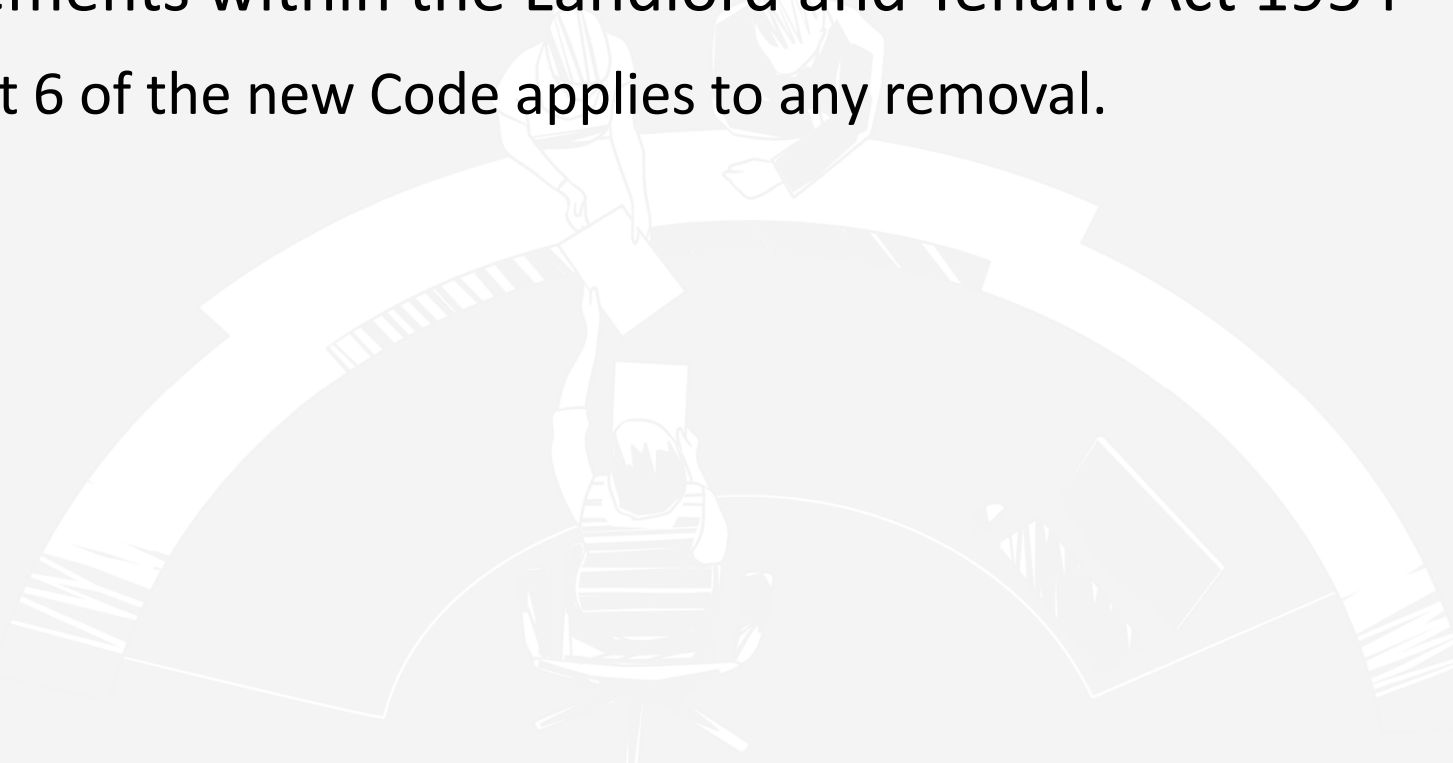
- Agreements within the Landlord and Tenant Act 1954
 - Usual 1954 Act renewal principles apply
 - Court can order terms having regard to the terms of the existing agreement
 - Departures from those terms must be justified and fair in all the circumstances – *O’May v City of London Real Property Co Ltd [1983] 2 AC 726*
 - Rent will be determined in accordance with section 34 LTA 1954 – open market rent
 - No assumption of a “no-scheme” world
 - *Vodafone v Hanover Capital Limited 2020 WL 04926139*

Termination of Code Agreements – Old Code

- Agreements within the Landlord and Tenant Act 1954
 - *Vodafone v Hanover Capital Limited*
 - Site was a small area of hardstanding formerly part of a car park;
 - Parties had agreed all terms except rent and break clause;
 - Even though the “no scheme” world assumption does not form part of the valuation exercise it would form the backdrop for any negotiations;
 - However, when reaching a conclusion the court could take into account the demand for the site from other operators – something they could not do under the new Code

Termination of Code Agreements – Old Code

- Agreements within the Landlord and Tenant Act 1954
 - Part 6 of the new Code applies to any removal.



Termination of Code Agreements – Old Code

- Agreements excluded from the Landlord and Tenant Act 1954
 - *Arqiva v AP Wireless (UK) Limited [2020] UKUT 195*
 - Following expiry of contracted out lease in 2016 Arqiva continued to occupy as a tenant at will without any written agreement
 - No written agreement meant no “subsisting agreement” when the new Code came into force
 - Tribunal had no jurisdiction to impose rights under part 4 of the new Code in favour of an operator who was in occupation (*CTIL v Compton Beauchamp Estates [2019] EWCA Civ 1755*)
 - Result – the operator had no Code rights and was not entitled to acquire any



Commercial Landlord and Tenant update

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14th January 2021

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How conclusive is “conclusive”?

Sara & Hossein Asset Holdings Limited -v- Blacks Outdoor Retail Limited [2020] EWCA Civ 1521.

“...a certificate as to the amount of the total cost and the sum payable by ... (the tenant) ... and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive”

“... not to exercise or seek to exercise any right or claim to withhold rent or any right or claim to legal or equitable set-off or counterclaim (save as required by law)”

How conclusive is “conclusive”?

PLC drafting:

“...except in the case of manifest error, the Service Charge Statement shall be conclusive as to all matters of fact to which it refers.”

“The Tenant must pay the Annual Rent and all other sums payable under this Lease in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).”

Pretty vacant?

Capitol Park Leeds -v- Global Radio Services Limited [2020]
EWHA 2750 (Ch)

“... an empty shell of a building which was dysfunctional and unoccupiable...”

Neighbours...should be there for one another...

Duval -v- 11-13 Randolph Crescent Limited [2020] UKSC 18



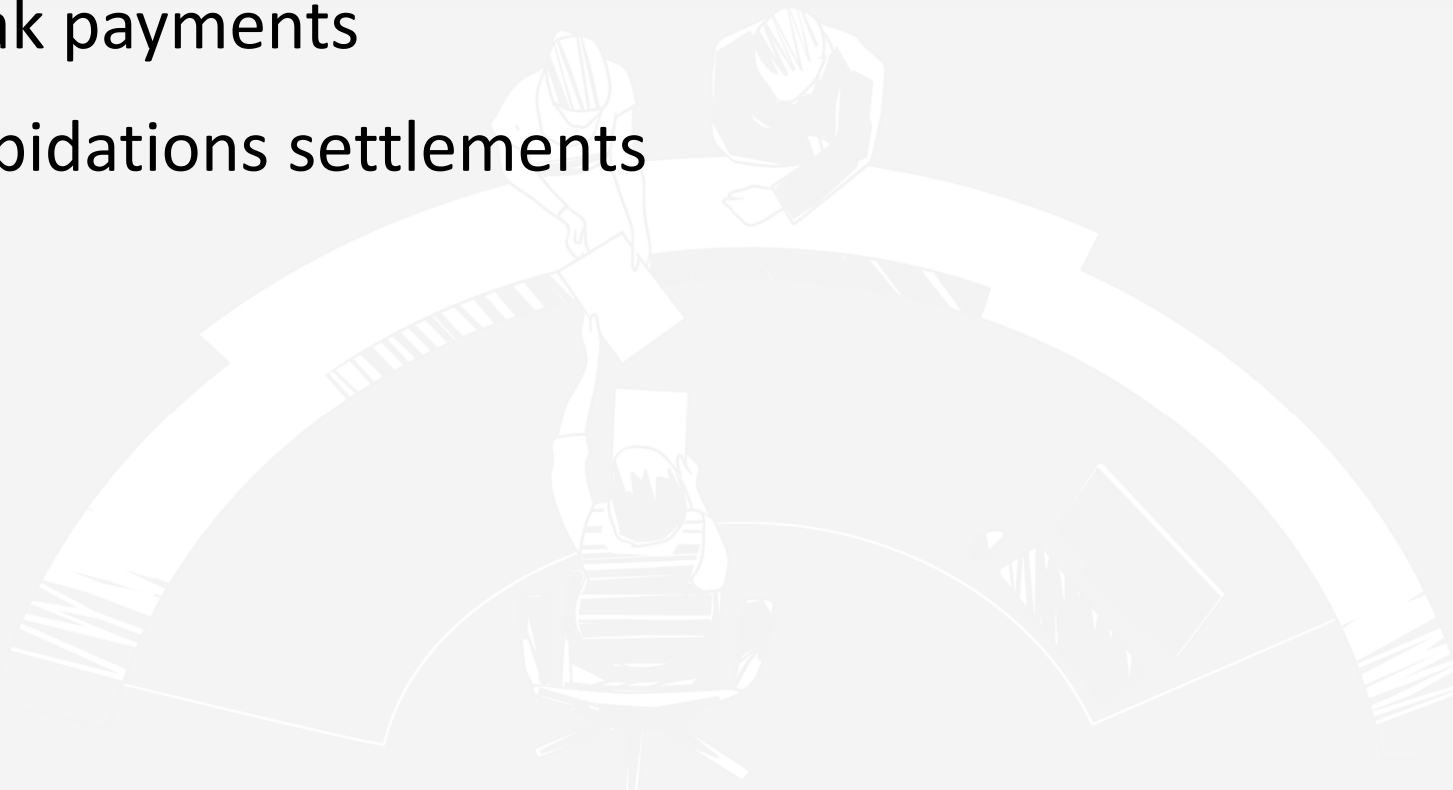
Neighbours...should be there for one another...

Duval -v- 11-13 Randolph Crescent Limited [2020] UKSC 18

“...every lease of a residential unit in the Building hereafter granted by the Landlord ... shall contain ... covenants of a similar nature to those contained in ... this Lease AND at the request of the Tenant and subject to payment by the Tenant of (and provision beforehand of security for) the costs of the Landlord ... to enforce any covenants entered into with the Landlord by a tenant of any residential unit in the Building of a similar nature to those contained in ... this Lease”

HMRC Revenue and Customs Brief September 2020 (RCB12)

- Break payments
- Dilapidations settlements



HMRC Revenue and Customs Brief September 2020 (RCB12)

- All sums payable by either party under or in connection with this Lease are exclusive of any VAT that may be chargeable
- A party to this Lease must pay VAT in respect of all taxable supplies made to that party in connection with this Lease on the due date for making any payment or, if earlier, the date on which that supply is made for VAT purposes

Any questions



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