BRIEFCASE
QUARTERLY REAL ESTATE CASE UPDATE

June 2022

BRYAN CAVE LEIGHTON PAISNER BLP

KEY CASES

"SUBJECT TO CONTRACT" LABEL NOT ALWAYS CONCLUSIVE

The phrase "subject to contract" creates a strong presumption that the parties do not want to be bound but it is still a question of fact.

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CAN A TENANT'S CROSS-CLAIM DEFEAT A LANDLORD'S OPPOSITION TO A LEASE RENEWAL?

A landlord successfully opposed renewal under the 1954 Act on ground (b) (rent arrears) and also ground (f) (redevelopment), despite alleged tenant cross-claims.

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UPPER TRIBUNAL REITERATES THAT SERVICE CHARGE CONSULTATION DISPENSATION APPLICATIONS ARE ALL ABOUT PREJUDICE, EVEN IN URGENT CASES

The Upper Tribunal has provided useful guidance on how to approach an application for dispensation from the statutory consultation requirements in an urgent works context.

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OLD RESTRICTIVE CONVENANTS CAN, AND DO, BITE

The court considered whether the beneficiary of a restrictive covenant had unreasonably refused consent to develop on neighbouring land.

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SUPREME COURT RULES ON RIGHTS OF "IN SITU" TELECOMS CODE OPERATORS TO SEEK NEW CODE RIGHTS

The Supreme Court has ruled that Telecoms Code operators who are already in occupation of a site can acquire new Code rights.

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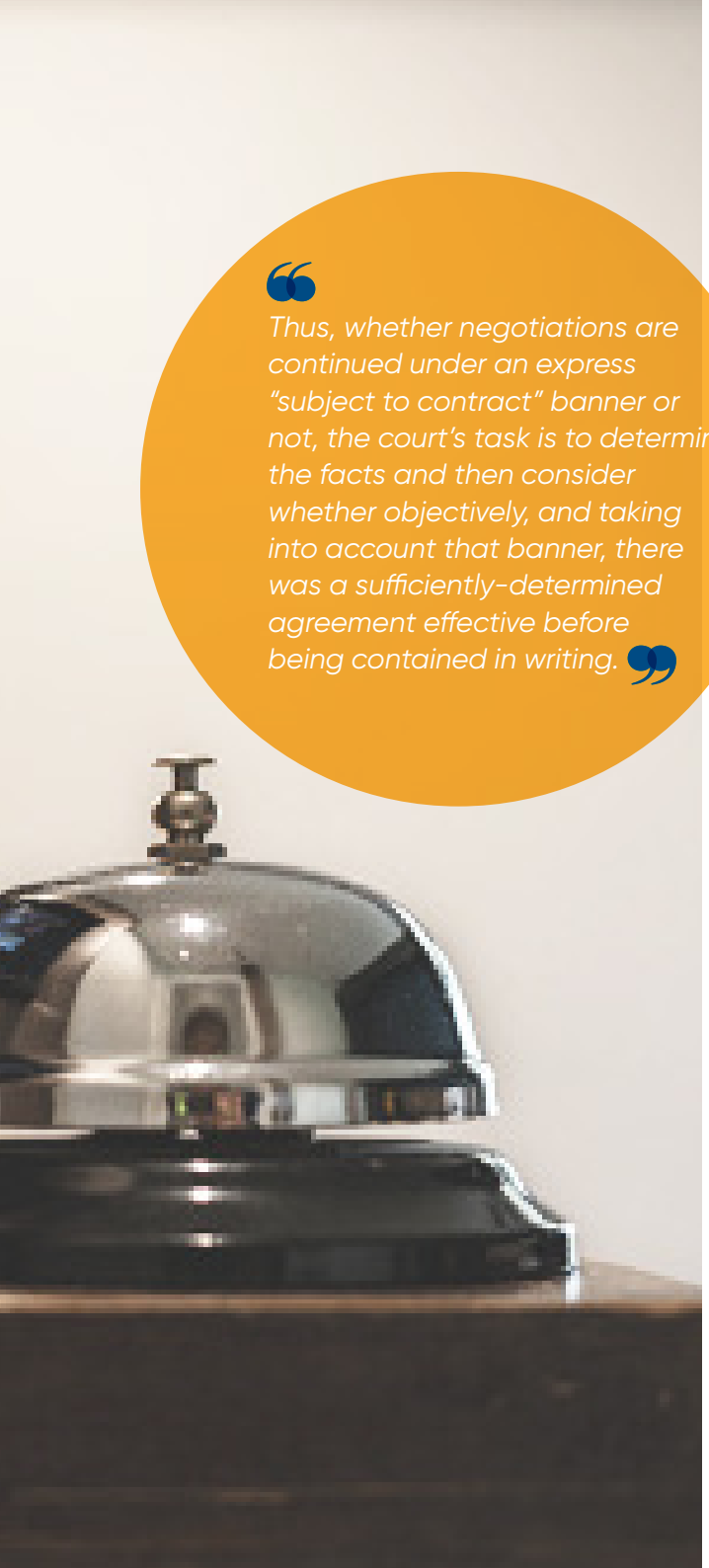


> *Thus, whether negotiations are continued under an express "subject to contract" banner or not, the court's task is to determine the facts and then consider whether objectively, and taking into account that banner, there was a sufficiently-determined agreement effective before being contained in writing.*

CASE 1

JOHNSON -V- SPOONER & ANOTHER [2022] EWHC 735 (CH)

"Subject to contract" label not always conclusive

AUTHOR: VICTORIA BLANCHARD

WHAT WAS IT ABOUT?

- Mrs Johnson invested £150,000 in a new business - the George Hotel on the Isle of Wight – a 50/50 joint venture with Mr Spooner. Relations soon broke down between the business partners, and Mrs Johnson's shareholding in the business was in dispute.
- Mrs Johnson claimed that she and Mr Spooner owned one share each in the business. Mr Spooner counter-claimed that by oral agreement and an exchange of emails headed "subject to contract", Mrs Johnson had agreed to sell him her share, notwithstanding that the parties had not formally documented the agreement following their discussion and exchange of "subject to contract" emails.
- Although the negotiations for the sale of Mrs Johnson's share were expressly "subject to contract", the court had to consider the facts and then determine whether objectively, and taking into account the "subject to contract" banner, there was a sufficiently-determined and binding agreement to sell Mrs Johnson's share to Mr Spooner, effective before being contained in writing.

WHAT DID THE COURT SAY?

- On the evidence presented, Mrs Johnson had agreed to sell her share to Mr Spooner.
- Whether there was a binding contract required consideration of both words and conduct in order to determine whether the parties intended to create legal relations and had agreed all essential terms. In this case, sums had been paid over pursuant to the agreement and the court determined that the parties' conduct indicated that a binding agreement had been reached, in spite of the use of "subject to contract" in their email exchange.
- Where negotiations are "subject to contract" and work begins and/or services are rendered (or in this case payment made) pursuant to those negotiations before execution of the contract, the commencement of works or services rendered is a relevant factor to be taken into account in deciding whether there is a binding contract, but is not definitive.

WHY IS IT IMPORTANT?

- The case reinforces the message that the "subject to contract" label is not conclusive.
- Where terms are agreed "subject to contract" the court will not easily find that the parties have waived their reliance on that banner. However, where all the essential terms were agreed and substantial services performed and/or payment made pursuant to that agreement, a court may find that there is a contract either on the terms originally agreed "subject to contract" or those terms as varied by a subsequent agreement.

CASE 2

MILESTAR LIMITED -V- (1) NARENDRA GANDESHA & (2) HOMERTON HOLDINGS LIMITED - CLAIM NO H10 CL117

Can a tenant's cross-claim defeat a landlord's opposition to a lease renewal?

AUTHOR: CASSANDRA FLEMING

WHAT WAS IT ABOUT?

- The case concerned the lease renewal of Milestar's retail premises, held under three leases. The landlord and tenant companies are both owned by members of the same family and the case involved a number of disputes between them.
- The landlords served section 25 notices opposing the renewal of Milestar's leases under the Landlord and Tenant Act 1954, on the grounds of (1) Milestar's persistent delay in paying rent due under the lease (section 30(1)(b)), and (2) the landlords' intention to redevelop the premises (section 30(1)(f)).
- With respect to ground (b), whilst it was not in dispute that Milestar had not paid rent under the leases for some time, it claimed that such rent was not considered "due" for the purpose of ground (b) because it had a number of cross-claims against the landlords, which should take effect as an equitable set-off of the rent arrears under the leases. Thus any notice based on rent being due would be ineffective. The tenant's cross claims included, amongst other items, an entitlement to an account of rents received by the landlords for an adjoining property, of which the tenant is beneficial owner.
- With regard to ground (f), in considering, objectively, whether the landlords' intended redevelopment was capable of achievement, there was an argument over the landlords' chance of successfully obtaining planning permission.

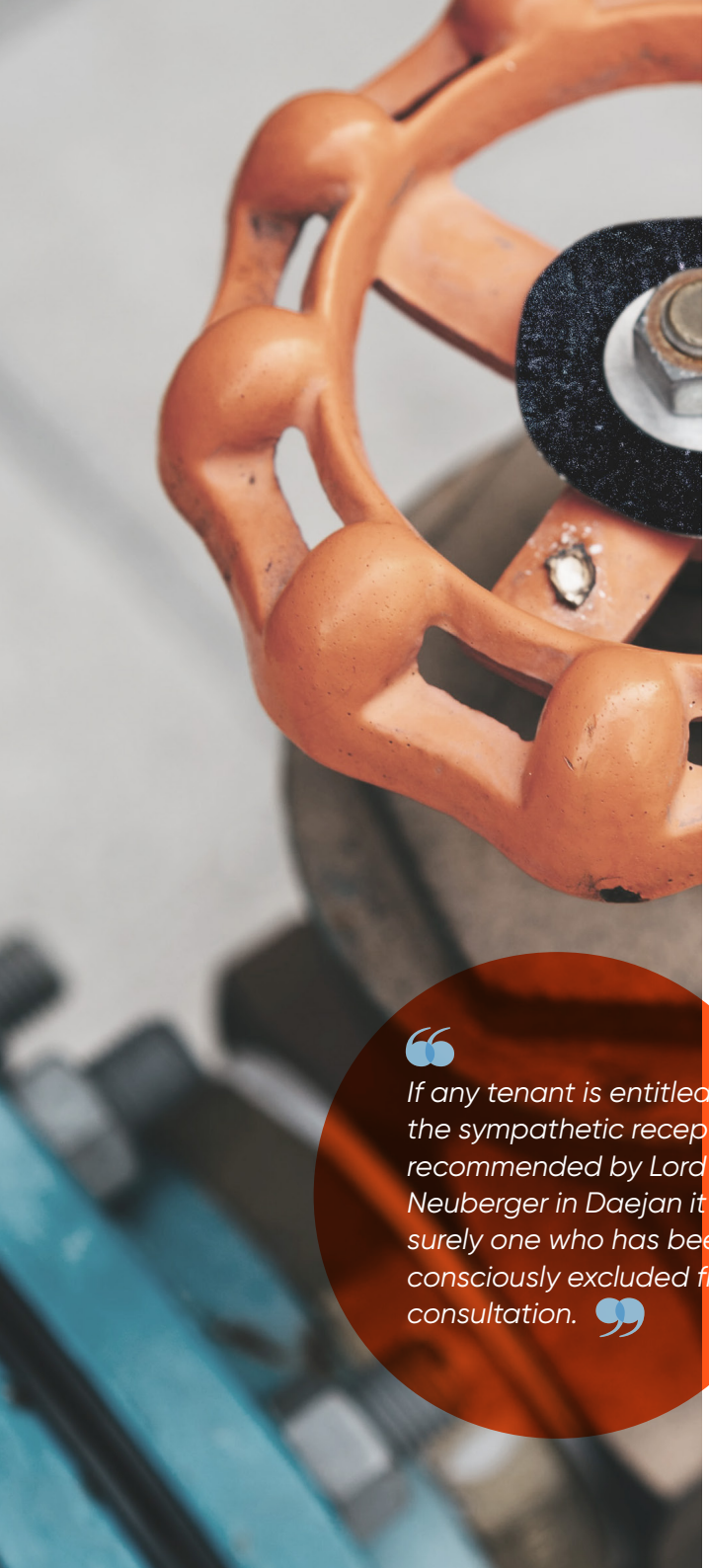
WHAT DID THE COURT SAY?

- Ground (b) – the Judge did not consider that the tenant's alleged cross-claims had a sufficiently close connection to the relevant leases, and did not go "to the heart of the relationship of landlord and tenant", and so they could not give rise to an equitable set off in these lease renewal proceedings. However, even if there was a sufficiently close connection to create an equitable set off, the Judge held that rent would still be considered to be "due" for the purpose of ground (b) (although the tenant would likely have a defence to any court claim for those arrears), so the landlords successfully established their ground (b) opposition.
- Ground (f) – little weight was placed on the tenant's planning expert, who had also been employed as its consultant to oppose the landlords' planning application. The judge questioned his independence and described his dual role as "a clear conflict", preferring the more "balanced and independent" report of the landlords' planning expert. The landlords therefore also successfully established their ground (f) opposition.

WHY IS IT IMPORTANT?

- Whilst this county court judgment does not set a binding judicial precedent, it serves as a warning to tenants that even a legitimate cross-claim may not save them from a landlord's ground (b) opposition to lease renewal. If a 1954 Act lease renewal is approaching, a tenant would be well advised to pay all rents due, even if under protest, and issue separate proceedings for any potential "cross claim".
- It may be tempting to instruct an existing consultant as an expert in a separate litigated claim, however the safest course would be to instruct a separate expert for any litigation, who is more likely to be perceived as balanced and independent.

> *"I reject the contention that the existence of a cross-claim means that rent is not due in the first place. The proper analysis is that the rent is due, but a cross-claim acts as a defence."*



> *If any tenant is entitled to the sympathetic reception recommended by Lord Neuberger in Daejan it is surely one who has been consciously excluded from consultation.*

CASE 3

MARSHALL -V- NORTHUMBERLAND & DURHAM PROPERTY TRUST LIMITED [2022] UKUT 92 (LC)

Upper Tribunal reiterates that service charge consultation dispensation applications are all about prejudice, even in urgent cases

AUTHOR: ALEX SELKA

WHAT WAS IT ABOUT?

- A residential landlord carrying out urgent boiler works applied for retrospective dispensation from the service charge consultation requirements under section 20 of the Landlord and Tenant Act 1985, which was granted by the First Tier Tribunal (FTT).
- Mr Marshall, a long leaseholder of one of the flats in the building, appealed the decision to the Upper Tribunal (UT) in light of prejudice caused to him as a result of the landlord's failure to consult with him.
- The UT allowed the appeal and set aside the FTT's decision but maintained that dispensation, albeit with conditions, was appropriate in the circumstances. The conditions included limiting the amount the landlord could recover from leaseholders for the works.

WHAT DID THE COURT SAY?

- The UT heavily relied on the key principles set down and explained by Lord Neuberger in the Supreme Court case of Daejan Investments Ltd v Benson [2013] UKSC 14. The tribunal must consider the prejudice (if any) caused by the departure from consultation, treat tenants sympathetically and remind landlords that even in urgent situations they are seeking an indulgence from a tribunal at the expense of another party.
- Dispensation was granted, on condition that: (a) the landlord could only recover 85% of the works cost, because a competitive tender (which was missing in this case) would likely have resulted in a lower overall cost of works; and (b) the leaseholder was reimbursed his costs.

WHY IS IT IMPORTANT?

- Tribunals must not assume an absence of prejudice simply because works are urgent.
- Landlords are reminded that they must consult with every tenant.
- Leaseholders are to demonstrate with evidence a credible case of prejudice and the tribunal must give that due consideration.
- Where remedial works are needed landlords are entitled to choose a higher quality solution with a longer expected lifespan over a cheaper, short term option.
- Proper consultation facilitates a competitive tender process and where this is missing it could result in a higher overall cost, which should not be passed on to tenants.

CASE 4

CHARLES DAVIES-GILBERT-V- (1) HENRY GOACHER & (2) STEVEN CHESTER [2022] EWHC 969 (CH)

Old restrictive covenants can, and do, bite

AUTHOR: ANNA ICETON

WHAT WAS IT ABOUT?

- Mr Davies-Gilbert is the owner of a large Estate in the South Downs, part of which has the benefit of a restrictive covenant preventing construction on certain neighbouring land without his consent (such consent not to be unreasonably withheld).
- The Defendants each own parcels of neighbouring land that are burdened by the restrictive covenant. When they wished to each construct a detached residential dwelling on their land, they had to apply for Mr Davies-Gilbert's consent to do so, which he refused on the basis that the Defendants' proposed construction would (a) have a negative effect on the amenity value of his Estate and (b) threaten the future use and commercial value of his neighbouring land (mostly factors associated with its potential development).
- The Defendants claimed that Mr Davies-Gilbert's refusal was unreasonable and commenced the building work (some of which they claimed was not covered by the covenant).

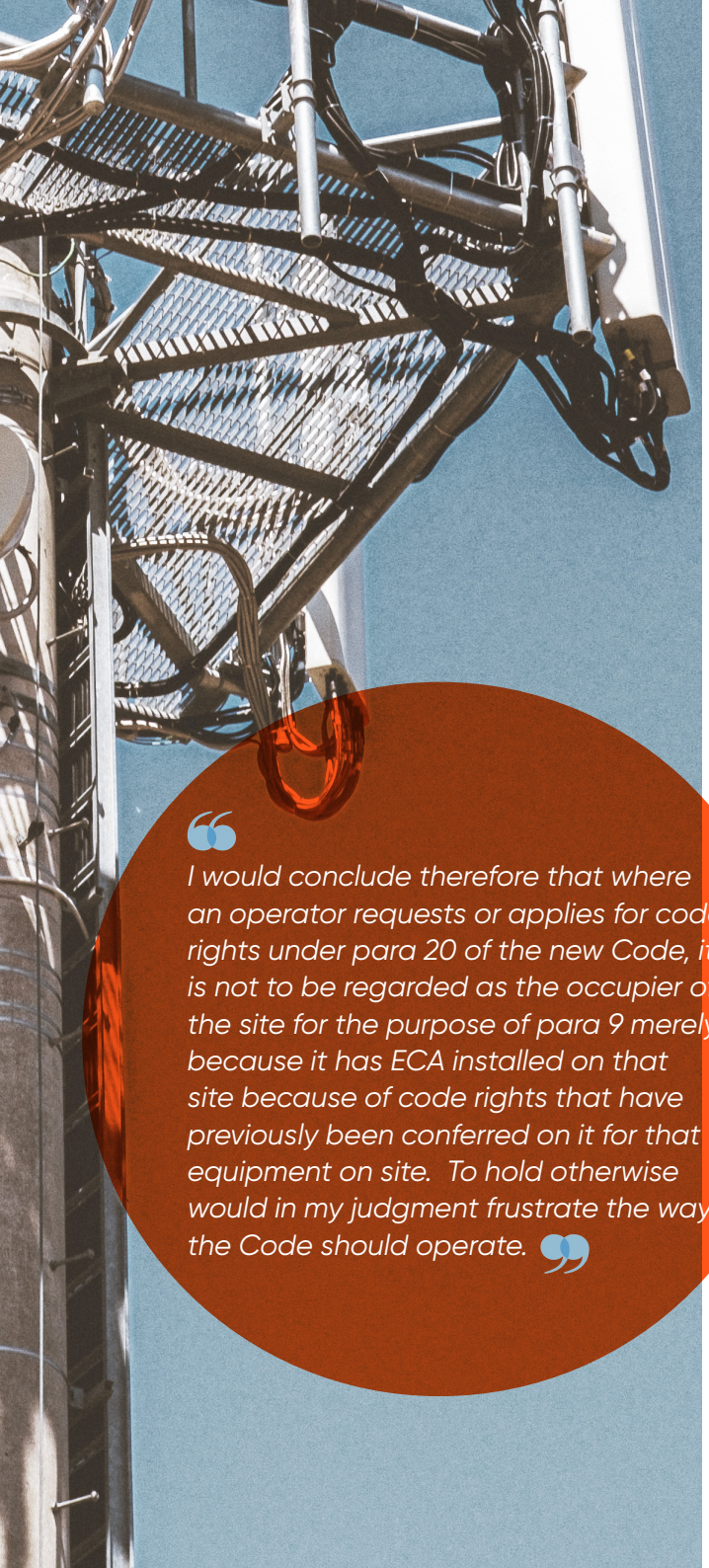
WHAT DID THE COURT SAY?

- Mr Davies-Gilbert's first reason for refusing consent was the detrimental impact of the Defendants' proposed developments on the amenity of his entire Estate, not just the land that benefitted from the restrictive covenant. A covenantee cannot reasonably rely on matters that affect land without the benefit of the covenant, therefore this reason for refusing consent was considered to be irrelevant or "bad", and could not itself justify a refusal to consent to the Defendants' application.
- The second reason for refusing consent was considered to be freestanding. The Judge was satisfied that there was a risk of overlooking from the Defendants' properties onto Mr Davies-Gilbert's land and, even if minimal, this would affect the value of his land and could impact any future development. This was a relevant consideration for Mr Davies-Gilbert to have taken into account and the view he reached, refusing consent on this basis, was reasonable and not tainted by irrelevant considerations.
- Accordingly, the court found that Mr Davies-Gilbert had reasonably refused consent, that his second reason was reasonable and would not be disregarded because his first reason was a "bad" one. The court gave a declaration to that effect and granted an injunction to prevent any further works by the Defendants.

WHY IS IT IMPORTANT?

- The Judgment highlights the importance of covenant beneficiaries and their advisors carefully analysing and testing all potential bases to refuse consent and the reasons for doing so at the time.

> *"...it does not follow that simply because a person has taken into account an irrelevant consideration, whether as part of their overall reasoning or their reasoning on a specific issue, that their reasons are automatically bad. The consideration taken into account must have been part of the considerations actively considered as part of the reason complained of. It does not follow that because a reason given is bad that all reasons given are bad."*



> *I would conclude therefore that where an operator requests or applies for code rights under para 20 of the new Code, it is not to be regarded as the occupier of the site for the purpose of para 9 merely because it has ECA installed on that site because of code rights that have previously been conferred on it for that equipment on site. To hold otherwise would in my judgment frustrate the way the Code should operate.*

CASE 5

CTIL –V- COMPTON BEAUCHAMP ESTATES LTD; CTIL -V- ASHLOCH LTD & AP WIRELESS II (UK) LTD AND ON TOWER UK LTD -V- AP WIRELESS II (UK) LTD

Supreme Court rules on rights of "in situ" Telecoms Code operators to seek new Code rights

AUTHORS: LAUREN KING AND PERRY SWANSON

WHAT WAS IT ABOUT?

- The Digital Economy Act 2017 introduced a "new" Electronic Communications Code, with enhanced Code rights for telecoms operators entering into new Code agreements, and also made provision for the transition of "old" Code agreements to be carried forward under the new Code.
- Paragraph 9 of the new Code provides that a (new) Code right in respect of any land can only be conferred on a Telecoms Code operator by an agreement between the **occupier** of the land and the operator. But what about the position of operators who are already in occupation of land pursuant to an "old" Code agreement or otherwise, who wish to acquire new or enhanced Code rights?
- The Court of Appeal held that in these circumstances, the operator would be precluded from applying for new Code rights because they would be both the operator and occupier for the purpose of paragraph 9 (and a party cannot enter into an agreement with itself), and in any event the new Code does cater for the modification and/or renewal of existing Code agreements, albeit only once they have expired.
- The operators appealed to the Supreme Court.

WHAT DID THE COURT SAY?

- In the first telecoms case to reach the Supreme Court, it was held that operators who wish to acquire new or additional Code rights, who, for historic reasons are already occupying the site, should not be considered to be the "occupier" for the purpose of the conferral of new Code rights.
- This means that rights conferred on an operator at the commencement of a Code agreement can be supplemented (as opposed to modified or varied) during the term of that Code agreement by an application (by that operator) for new Code rights.

WHY IS IT IMPORTANT?

- This is an important development for Telecoms Code operators, who generally seek long fixed-term Code agreements to justify the cost of installing electronic communications apparatus pursuant to that agreement, but who also wish to be able to supplement their Code rights as and when required by the demands of new and improved technology.
- Operators will no longer need to "future proof" Code agreements by seeking to include (and pay for) extensive rights at the outset of an agreement, when there is the opportunity to do so during the term, should this become necessary.
- However, modifications, variations and renewals of existing Code agreements must still be dealt with under Part 5 of the Code, at the expiry of those agreements (unless the agreement is protected by the 1954 Act, in which case the operator must apply to the County Court to renew its lease under Part 2 of the 1954 Act).

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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