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Case No: LC-2024-147

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A NOTICE OF APPEAL

18 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – Jurisdiction – Paragraph 33(1) of the Code – Meaning of "an operator … who is a party to a code agreement" – whether assignee of the benefit of a licence which is a subsisting code agreement is such a party – whether assignee must first have covenanted with the site provider to perform the licence obligations

ELECTRONIC COMMUNICATIONS CODE – Paragraph 33(1) of the Code – Meaning of "an operator … who is a party to a code agreement" – purported assignment of lease of site – whether assignee discharged burden of proving title to lease

BETWEEN:

AP WIRELESS II (UK) LIMITED

Appellant

-and-

ON TOWER UK LIMITED

Respondent

Lubbards Lodge (322), land lying to the west of Burlington Gardens, Hullbridge, Hockley, SS5 6BD
Sandbach (348), Meadowley and Fields Farm, 150A and 150B Congleton Road, Sandbach, CW11 4TE
Blackwell Grange (365), telecommunications site, Blackwell Grange Golf Course, Darlington, DL3 8QL
Ampthill (332), Manor Farm, Millbrook Road, Houghton Conquest, Bedford, MK45 3JL

Mr Justice Fancourt
Hearing dates: 15-16 October 2024
The Rolls Building, Court 21
Decision date: 18 December 2024

Mr Toby Watkin KC and Mr Wayne Clark for the appellant
Mr Kester Lees KC for the respondent

Cases referred to in this decision:

Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 86

Bexhill UK Ltd v Razzaq [2012] EWCA Civ 1376

Budana v Leeds Teaching Hospital [2018] 1 WLR 1965

Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd [2019] UKUT 338 (LC)

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2022] 1 WLR 3360

Vodafone Ltd v Potting Shed Bar and Gardens Ltd (formerly known as Gencomp (No 7) Ltd) [2023] EWCA Civ 825; [2024] 1 WLR 141

Gravesham Borough Council v On Tower UK Ltd [2024] UKUT 151 (LC)

Introduction

1. In *Vodafone Ltd v Potting Shed Bar and Gardens Ltd (formerly known as Gencomp (No 7) Ltd)* [2023] EWCA Civ 825; [2024] 1 WLR 141 ("*Gencomp*"), the Court of Appeal had to decide whether a concurrent lessee of a site of electronic communications apparatus was "a party to a code agreement", within the meaning and for the purposes of Part 5 of the Electronic Communications Code ("Part 5" and "the Code" respectively). The agreement in question was a tenancy that had previously been made in writing between the site owner as lessor and an operator as lessee. The effect of the concurrent lease was that the concurrent lessee became the landlord of the operator under the tenancy for the duration of the concurrent lease.

2. It decided that a concurrent lessee of the lessor's interest does become a party to the code agreement, in place of the lessor, as also would an assignee of the operator's interest as tenant of a site. That was because, put shortly, the concurrent lessee and the assignee of the lease each "stood in the shoes of" the original party to the code agreement for all relevant purposes. Nugee LJ, giving the only reasoned judgment of the court, explained that the benefit and burden of the code agreement passed to the concurrent lessee, under landlord and tenant law, just as the benefit and burden of the covenants in a lease (other than personal covenants) pass to an assignee of the original tenant or landlord.

3. Although, as a matter of the general law, that would not make a concurrent lessee or the assignee a "party" to the original agreement, and although the Code does not expressly deem such a person to be "a party to the code agreement", it was necessary, to make the Code work in the way that it was clearly intended to work, for such a person to be treated as "a party to the code agreement" for the purposes of Part 5.

4. Nugee LJ said that it was not obvious what the answer to the problem would be if the code agreement in question had been a licence rather than a tenancy. If it had been a licence, the concurrent lease would not, as a matter of the general law, have made the concurrent lessee the licensor, or given it the benefit of the obligations owed by the licensee. But the Court did not need to decide that question in order to dispose of the appeal before it.

5. This Tribunal now has to decide a similar question, which is whether an assignee of the benefit of a licence agreement is to be treated as a party to that code agreement. This was raised as a preliminary issue ("the First Issue") in three references before the First-tier Tribunal (Property Chamber) ("the FTT"). AP Wireless II (UK) Limited ("APW"), the site provider in all three cases, contends that the FTT was wrong to decide that On Tower UK Limited ("On Tower"), the assignee of a licence agreement in each case, was a party to each code agreement and so was a person with standing to apply in each case for a new agreement under para 33 of the Code.

6. It should be noted, parenthetically but importantly, that the First Issue cannot now arise in relation to licences entered into on or after 28 December 2017. That is because para 16(4) of the Code (which applies only to agreements made on or after that date and not retrospectively) makes the burden of all code agreements, whether leases, licences or wayleaves, pass on an assignment, and para 16(5) (which applies similarly) provides for release of the original party. That means that the conclusion in *Gencomp* would apply equally upon an assignment of the licensee's interest.
7. Nevertheless, code agreements were and still are often made as long-term licences or wayleaves, and the draftsman of the Digital Economy Act 2017, which brought the new Code into force, with transitional provisions, clearly recognised that "subsisting

agreements", as the Code calls them, would continue for some considerable period. The three cases before the FTT were cases of pre-28 December 2017 licences and so are subsisting agreements.

8. The FTT decided in all three cases that since On Tower had wholly replaced its assignor as the operator on each site, as evidenced by payment of a licence fee to and its acceptance by APW, it was appropriate to treat On Tower as the operator who was the party to the code agreement, in place of the assignor.

9. APW contends that the FTT was wrong, and that – applying the general law and the *ratio* and reasoning in *Gencomp* – it is only in a case where the assignee of a licence has covenanted with the site provider to perform the obligations of the licensee in the code agreement in full, for the remainder of the period of the agreement, that it can be treated as the party to the code agreement for the purposes of Part 5 in place of the assignor.

10. If APW succeeds on its appeal on the First Issue, On Tower has two alternative arguments on the question of whether in law it was bound by the obligations of the licence agreements, and so "stood in the shoes of" the original licensees and fell to be treated as a party to those agreements. The first of these arguments (based on para 12(1) of the Code) was upheld by the FTT as an alternative basis for its decision; the second, which relies on the benefit and burden principle, was rejected by the FTT. I will refer to these as "On Tower's Alternative Arguments".

11. There is a separate issue for decision in this judgment, which is whether the FTT was correct to conclude in a different case before it that On Tower had adduced sufficient evidence of its interest as tenant under a code agreement, such that it had standing to invoke the provisions of Part 5 in that case ("the Second Issue"). The Second Issue was raised as a preliminary issue in two different references before the FTT, and APW appeals the decision in one of those cases, where it was held that On Tower had sufficiently proved its status.

The facts and procedural background

12. The facts in relation to the three licences in the First Issue are as follows, so far as they were established by documents before the FTT or by agreement.

13. <u>Sandbach</u>

- This licence was granted by Mr N Thornhill to Orange Personal Communications Services Ltd ("Orange") on 11 March 1997. It is unclear from the documents in evidence for what period the licence was granted, but a previous licence, which the 1997 licence replaced, had been granted for 5 years and thereafter from year to year until terminated by 12 months' notice. In that earlier licence, there was no restriction on assignment. From references in subsequent documents, it can be inferred that the 1997 licence was on similar terms. The terms were then varied, with an increase in the licence fee, by a supplemental agreement dated 2 November 2000 made between Mr Thornhill and Orange.

- A deed of assignment dated 8 August 2012 made between Orange as assignor and Everything Everywhere Ltd ("EE") and Hutchison 3G UK Ltd ("H3G") assigned to EE and H3G what was then referred to as "the lease", subject to payment of the rents and performance of the lease obligations.

- On 1 March 2019, EE and H3G assigned the property comprised in "the lease" by a Land Registry form TR1 To Arqiva Ltd ("Arqiva"), subject to a covenant by Arqiva by way of indemnity only to pay the rent and perform the terms of the lease.

- Finally, Arqiva assigned its rights, title, interest and benefit in and to the agreement (and many other such agreements) to Arqiva Services Ltd ("On Tower") by deed of 26 September 2019 ("the 2019 block transfer"), subject to a covenant by On Tower by way of indemnity only to pay the rent and perform the obligations in the agreement. There were no licences to assign, no deed of covenant made with the site provider, and the site provider was not party to any assignment.

- Notices dated 30 September 2021 pursuant to para 33 of the Code were served by On Tower on Mr and Mrs Thornhill, as proprietors of the site, on 2 October 2021, seeking a new 15-year lease of the site from 8 October 2022 at a much reduced rent.

- On 31 October 2022, APW became the registered proprietor of the site. APW notified On Tower's agents of the change of landlord on 1 November 2022. It asked for confirmation of the amount of rent payable and the identity of the legal entity that APW should bill for the rent. On the same day, the Thornhills' solicitors appear to have notified Orange that it should pay all future rent to APW, and on 2 December 2022 APW sent On Tower's agents a rent authority letter. This (and numerous chasers) were not acknowledged on behalf of On Tower, but it appears from the correspondence that On Tower did pay the rent due from 31 December 2022 to APW.

- The FTT was provided with a copy of an invoice from APW to On Tower for the rent due on 29 September 2023 and a rent payment advice from On Tower to APW dated 6 December 2023 for the December 2023 rent.

- In this case, it was therefore apparent to the FTT that Mr Thornhill and APW were both willing to accept On Tower as being the person who was in occupation of the site as operator and by whom the rent under the agreement should be paid. On Tower correspondingly accepted that it should pay the rent for the site. It was paying it to Mr Thornhill at the date of the transfer and then paid it to APW, pursuant to Mr Thornhill's direction. But there was no contractual obligation as between On Tower and Mr Thornhill or APW.

- On Tower made a reference to the FTT on 30 May 2023, pursuant to its 2021 notice and para 33(5) of the Code, for an order for a new lease under para 34 of the Code.

- In its written submissions, which the FTT directed should be filed in place of a pleaded response to the reference, APW stated that On Tower was not "a party to a code agreement" within the meaning of para 33 and so its reference should be struck out.

14. Blackwell Grange

- This licence was granted by Blackwell Grange Golf Club Ltd ("the Club") to T-Mobile (UK) Ltd ("T-M") on 5 July 2007 for a term of 15 years at a fee of

£6,500 p.a., subject to review. The terms of the agreement required every assignee to covenant directly with the grantor to observe the terms of the agreement, and required the Club's consent to an assignee other than a group company.

- On 9 May 2008, the Club consented to the assignment of the agreement to T-M and H3G jointly, and the assignment was effected by deed of 13 June 2008 to which the Club was not a party. The assignees made the usual covenant with the assignor to perform the obligations in the agreement by way of indemnity only, but there was no covenant with the Club.

- By 2014, the site owner's interest had become vested in Darlington Borough Council and on 10 June 2015 it gave T-M and H3G licence to assign the agreement to Arqiva. Arqiva covenanted with the Council and with the assignors to pay the rents and perform the obligations in the agreement. The assignment was effected by deed on the same day.

- The benefit of the agreement was then further assigned by Arqiva to On Tower under the 2019 block transfer, to which the Council was not a party. On Tower covenanted with Arqiva by way of indemnity only to perform the obligations in the agreement. No licence from the Council or APW appears to have been applied for (probably because On Tower was then a group company of Arqiva), and no covenant was made by On Tower with the site provider to comply with the obligations in the agreement.

- Prior to the 2019 block transfer, the Council had notified Arqiva's agents on 24 June 2019 that all future rents should be paid to APW, to which it had transferred ownership of the site. A rent authority letter was sent by APW to Arqiva on 13 September 2019 and on the same day Arqiva confirmed that APW should bill it for the rent. In this instance, therefore, APW's interest as site provider preceded On Tower's interest in the agreement. There were however two invoices from APW to On Tower before the FTT, dated 5 July 2023 and 13 November 2023, which show that APW had recognised by 2023 that On Tower was the person with the benefit of the agreement that should pay the rent, and it was common ground that On Tower had indeed paid rent to APW.

- There was, however, no deed by which On Tower agreed with APW to pay the rent or perform the obligations of the licence agreement.

- On 14 July 2022, On Tower served notice on APW pursuant to para 33 of the Code, seeking a new agreement commencing on 23 January 2023, for a term of 15 years at a much lower rent.

- On Tower applied to the FTT on 30 May 2023, pursuant to the notice and para 33(5) of the Code, for an order for a new 15-year lease under para 34 at a much reduced rent. In its written submissions, APW stated that On Tower was not "a party to a code agreement" within the meaning of para 33 and so its reference should be struck out.

15. <u>Lubbards Lodge</u>

- Following the decision of the FTT on the First Issue and the Second Issue, this Tribunal allowed an appeal against the FTT's earlier decision that the Lubbards Lodge agreement was a licence. It held that in law the agreement created a lease.

At the date of the hearing, it was not known whether On Tower would seek to appeal that decision. As things stand, pending any further appeal, the Lubbards Lodge agreement is outside the scope of the First Issue, because it is a lease not a licence. My treatment of the First Issue in relation to a licence of Lubbards Lodge is therefore contingent on the FTT's conclusion being reinstated. Considering a third property does in any event provide a slightly different pattern of facts, which helps to inform the decision on the issues before me.

- The agreement in this case was made between David Pinkerton and Andrew Pinkerton and Orange on 21 January 2002 for a term of 20 years at a rent of £4,000 p.a., subject to review. It allowed Orange to share the site with group companies, and (with the owners' consent) with an unconnected party, but there was no restriction at all on assignment of the benefit of the agreement.

- By 19 October 2019, APW had become the site owner and EE and H3G the occupiers. On that date, APW granted licence by deed to EE and H3G to assign the agreement to Arqiva. Arqiva was a party to the deed and covenanted with APW that while the agreement was vested in it, it would pay the rents and observe and perform the covenants on the part of the assignors. In the deed of assignment, made on the same day, Arqiva covenanted in similar terms with EE and H3G but by way of indemnity only.

- On 24 October 2019, Arqiva wrote to APW asking for permission to assign the agreement to On Tower (which at that time was part of the Arqiva group). There does not appear to have been a deed permitting this later assignment, which was completed by deed on 15 November 2019 (to which APW was not a party), in which On Tower gave Arqiva the usual indemnity covenant.

- On 17 August 2022, On Tower gave APW notice pursuant to para 33 of the Code seeking a new agreement from 24 February 2023. It then applied to the FTT under para 33(5) on 30 May 2023 seeking a new agreement for a term of 15 years, at a much reduced rent. APW denied that On Tower was a party to a code agreement and sought to strike out the reference.

- The documents before the FTT established that APW became the site owner on 22 June 2017. It sent a rent authority letter to EE's agents on 26 June 2017, who responded to say that all future payments would be made to APW. There are two invoices for rent from APW to On Tower dated 21 January 2023 and 13 November 2023, and a rent payment advice from On Tower to APW dated 6 December 2023.

- There was no specific evidence of demand by APW or payment of rent by On Tower to APW before the date of the para 33 notice or the application, but it was not in dispute that On Tower paid rent to APW. Unlike Arqiva, however, On Tower had no contractual liability to pay rent – though, if the agreement was a lease not a licence, it became subject to the obligations in the lease with effect from the date of the assignment.

16. In general terms, the position in each of the three cases considered by the FTT was that the benefit of each of the licences had lawfully been assigned to On Tower, but On Tower itself had not agreed with the site provider, or with its predecessor in title, to perform the obligations of the licensee in the code agreement. In one case, its immediate predecessor, Arqiva, had covenanted with Darlington Borough Council (a predecessor of APW) to pay the rent and perform the obligations in the agreement; but On Tower did not do so. In another case, Arqiva had covenanted with APW to perform the obligations of the licensee,

but On Tower did not. Nevertheless, in all three cases, APW had demanded and/or accepted rent or licence fees from On Tower over a period of years.

17. The Judge in the FTT was troubled by the idea that an operator in undisputed occupation of the site for Code purposes, to which the benefit of the code agreement had been assigned a number of years previously and which without dispute had been paying the licence fee to the site provider, was not the relevant party to the code agreement for Part 5 purposes. It was the Judge who requested information about payment of rent or licence fees by On Tower to APW in each of the three cases. The documents to which I have referred above in summarising the facts of each case were then produced to the FTT. These showed (not that it was in dispute) that APW had accepted On Tower as the lawful operator on each of the sites, that APW expected On Tower to pay the licence fees, and that On Tower did pay them to APW.

18. On that basis, the FTT concluded that On Tower was in each case a party to the relevant code agreement, and that its para 33 notices and its applications to the FTT for a new code agreement were valid.

19. To understand the decision of the FTT and the arguments on this appeal, it is necessary to refer to the relevant provisions of the Code in some detail.

The relevant provisions of the Code

20. The Code (introduced by the Digital Economy Act 2017 to replace a previous version, which the Electronic Communications Act 2003 had substituted for the Telecommunications Code in Schedule 2 to the Telecommunications Act 1984) is a statutory scheme that overlies, but does not entirely replace, the general law of contract and landlord and tenant.

21. There is an important distinction between agreements made before 28 December 2017 and agreements made on or after that date. For subsisting agreements, certain provisions of the Code that apply to agreements made after that date ("new agreements") do not apply, and transitional provisions in Schedule 2 to the 2017 Act make provisions that are different in certain respects for their continuation and termination from the provisions that apply to new agreements. The Government accepted the Law Commission's recommendation that new rights conferred on operators, e.g. to share apparatus and assign code rights to other operators, should not apply retrospectively to subsisting agreements. In other respects, however, in particular the continuation of code agreements that expire or are terminated, subsisting agreements and new agreements are treated alike.

22. The starting point with the Code is the concept of "code rights", which can be agreed or can be conferred by the court (which in England and Wales means the FTT or this Tribunal). These can be shared and assigned, and various persons are bound by and have the benefit of them. There is a clear distinction between code rights and the agreement by which they are conferred. A person with the benefit of code rights does not necessarily have the full benefit of the agreement that conferred them. "Code rights" are defined in para 3 of the Code (as amended) as comprising 12 different kinds of right in relation to land and any operator. They include rights:

    - to install electronic communications apparatus on, under or over land;
    - to keep such apparatus on, under or over land;
    - to inspect, maintain, repair and upgrade such apparatus;

- to carry out works on land in connection with the installation, maintenance or upgrading of such apparatus; and

- to enter the land for various purposes in connection with such apparatus.

23. These rights are conferred on "operators", who are persons who have been approved by Ofcom to provide electronic communications networks or infrastructure systems for the use of electronic communications network providers, and in whose case the Code has been directed to apply. There is therefore a defined class of operators: a person who has not been given an Ofcom licence and had the Code applied to them cannot be an operator.

24. Part 2 of the Code is concerned with conferring code rights, who is bound by them, and their exercise. Para 9(1) provides that:

> "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

Although, as stated, code rights can be conferred by the court, under Part 4 of the Code, the order of the court takes effect as an agreement under Part 2 made between the parties (paras 20(4), 22).

25. Para 10 in Part 2 makes provision for who is bound by code rights. It is of importance to the resolution of Issue 1 and was central to the arguments in *Gencomp*, and accordingly I set it out in full:

> (1) "This paragraph applies if, pursuant to an agreement under this Part or Part 4A, a code right is conferred on an operator in respect of land by a person ("O") who is the occupier of the land when the code right is conferred.
>
> (2) If O has an interest in the land when the code right is conferred, the code right also binds—
>
> (a) the successors in title to that interest,
> (b) a person with an interest in the land that is created after the right is conferred and is derived (directly or indirectly) out of—
> (i) O's interest, or
> (ii) the interest of a successor in title to O's interest, and
> (c) any other person at any time in occupation of the land whose right to occupation was granted by—
> (i) O, at a time when O was bound by the code right, or
> (ii) a person within paragraph (a) or (b).
>
> (3) A successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement by which O conferred the right.
>
> (4) The code right also binds any other person with an interest in the land who has, pursuant to an agreement under this Part or Part 4A, agreed to be bound by it.
>
> (5) If such a person ("P") agrees to be bound by the code right, the code right also binds—
> (a) the successors in title to P's interest,

(b) a person with an interest in the land that is created after P agrees to be bound and is derived (directly or indirectly) out of—

(i) P's interest, or

(ii) the interest of a successor in title to P's interest, and

(c) any other person at any time in occupation of the land whose right to occupation was granted by—

(i) P, at a time when P was bound by the code right, or

(ii) a person within paragraph (a) or (b).

(6)A successor in title who is bound by a code right by virtue of sub-paragraph (7)(a) is to be treated as a party to the agreement by which P agreed to be bound by the right."

It is clear from para 10 that there are various persons who are bound by code rights but that this does not make them parties to the agreement itself. Only a successor in title to the interest of O or P is treated as a party to the agreement.

26. Para 11 in Part 2 states that an agreement under Part 2 must be in writing and be signed by or on behalf of the parties to it. That applies also to any variation of an existing agreement. Accordingly, an agreement for the purposes of the Code – and therefore a "code agreement" as defined in para 29 – cannot be an informal agreement, or one that arises by implication from the conduct of an occupier of a site and an operator.

27. Para 12, which is headed "Exercise of code rights", states:

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

(2) Anything done by an operator in the exercise of a code right conferred under this Part or Part 4A in relation to any land is to be treated as done in the exercise of a statutory power."

The remaining sub-paragraphs then specify circumstances in which sub-paragraph (2) does not apply.

28. Part 3 of the Code contains the new provisions relating to assignment of agreements, rights to upgrade and rights to share apparatus. It renders void an agreement to the extent that it prevents or limits assignment of the agreement to another operator (para 16(1)), and provides (para 16(4)) that:

"From the time when the assignment of an agreement under Part 2 of this code takes effect, the assignee is bound by the terms of the agreement."

29. Importantly, para 16 is excluded in relation to subsisting agreements (Para 5 of Schedule 2 to the 2017 Act). Accordingly, while there is no distinction between leases, licences and wayleaves which are new agreements, so far as transmission of the burden of obligations in the agreement is concerned (so that, contrary to the general law, an assignee of a licence agreement is bound by the burdens of that agreement), the distinction remains in the case of subsisting agreements. By virtue of s.3 Landlord and Tenant (Covenants) Act 1995 (replacing the doctrine of privity of estate), the assignee of a lease is bound by the burden of tenant covenants in the lease; however the same does not apply to the assignee of the

benefit of a licence. Under the general law, the benefit but not the burden of a contract may be assigned: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 86 ("*Lenesta Sludge*").

30. Part 4 of the Code provides for the court to impose an agreement, by which a person confers a code right on an operator. It enables an operator, without restriction, to give someone a notice setting out the code right that the operator seeks and stating that they seek that person's agreement to the terms proposed. This is material because, APW argues, even if On Tower is precluded from serving notices under Part 5, if it is not "a party to a code agreement", it still has the right under Part 4 to seek equivalent code rights. Indeed, as decided in *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2019] UKUT 338 (LC) and *Gravesham Borough Council v On Tower UK Ltd* [2024] UKUT 151 (LC), it is only in circumstances in which an operator does not have Part 5 rights that they can give notice under Part 4 to acquire new rights.

31. Where an operator gives notice under para 20 of Part 4 and then applies to enforce it, the court can make an order for an agreement only if two conditions are satisfied. First, that prejudice caused to the recipient of the notice is capable of being adequately compensated by money. Second, that the public benefit (sc. benefit from access to a choice of high quality electronic communications services) likely to result from an agreement outweighs the prejudice to the recipient. The court is precluded from making an order under para 20 if the recipient intends to redevelop the land to which the code right would relate (para 21).

32. Part 5 of the Code addresses the continuation, termination, modification and renewal of "code agreements". These are defined in Part 5 as being an agreement under Part 2 of the Code other than business tenancies where the primary purpose of the lease is not to grant code rights. (For subsisting agreements, this exclusion is modified, and instead what is excluded is business tenancies where there is security of tenure under Part II of the Landlord and Tenant Act 1954, as well as business tenancies without security of tenure where the primary purpose of the lease is not to grant code rights.)

33. For code agreements, as defined, Part 5 provides for the agreement to continue, where the site provider is bound by a code right as a result of the agreement, so that the operator may continue to exercise the code right (para 30); and for the site provider who is a party to a code agreement (but not the operator) to have the right under para 31 to terminate the agreement by notice to the operator who is a party to the agreement. The notice must state a ground for termination. Para 31(1) states:

> "A site provider <u>who is a party to a code agreement</u> may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator <u>who is a party to the agreement</u>."

34. The effect of such a notice is that the agreement terminates on the date specified unless the operator gives a counter-notice within 3 months and then applies to the court within a further 3 months for relief. The court will then decide whether the site provider has established their ground for termination. These grounds include the following:

> "(a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;

(b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;
….."

If no ground for possession is established, the court will make a different order under para 34 to modify, extend or renew the code agreement.

35. In addition, Part 5 gives both the site provider and the operator who is a party to a code agreement the right by notice to require the other to agree to modify the code agreement, or to terminate it and replace it with a new agreement. Para 33 provides (so far as material):

> (1) An operator or site provider who is a party to a code agreement by which a code right is conferred by or otherwise binds the site provider may, by notice in accordance with this paragraph, require the other party to the agreement to agree that -
>
> (a) the code agreement should have effect with modified terms,
>
> (b) … the agreement should no longer provide for an existing code right to be conferred by or otherwise bind the site provider,
>
> (c) the code agreement should –
>
> (i) confer an additional code right on the operator, or
>
> (ii) provide that the site provider is otherwise bound by an additional code right, or
>
> (d) the existing code agreement should be terminated and a new agreement should have effect between the parties which –
>
> (i) confers a code right on the operator, or
>
> (ii) provides for a code right to bind the site provider.
>
> ……
>
> (5) Where this paragraph applies, the operator or the site provider may apply to the court for the court to make an order under paragraph 34.
>
> ……"

In context, the operator and site provider referred to in subsection (5) must be the operator and site provider who are parties to the code agreement, as stated in subsection (1).

36. There is no doubt that the Code carefully distinguishes between code rights and code agreements, and equally between persons who have the benefit or burden of code rights and those who are parties to a code agreement. It is clear that in Part 5 it is only an operator or a site provider who is a party to a code agreement who can give or receive a Part 5 notice and apply to the court for relief. Similarly, in Part 3, as it applies to a subsisting agreement, it is only an operator who is a party to a subsisting agreement in relation to apparatus installed under land who has the right to upgrade the apparatus or share its use with another operator: Para 17(1), (2), as substituted in the case of subsisting agreements by para 5A of Schedule 2 to the 2017 Act, itself inserted by s.58(4) of the Product Security and Telecommunications Infrastructure Act 2022.

37. The expression "a party to a code agreement" is not defined in the Code, save that "code agreement" is defined as explained above. Any lawyer would understand the expression "a party to an agreement" to mean a person who is a contracting party, not someone to whom certain contractual rights have been assigned or someone who, by some means, has assumed one or more of the obligations in the contract. The general meaning is extended by para 10 of the Code, but to a limited extent only, as explained above.

38. The way that Part 5 is intended to operate strongly implies that it is the current operator, if in lawful occupation of the site in place of the original licensee, who should be able to respond to a notice to terminate, or propose changes to the code agreement. Part 5 is concerned with the future of the agreement at a time when it is due to end, and after that time. Where a previous lessee or licensee has assigned all their interest in the code agreement, it is not easy to see why they should be regarded as having the only interest in such future matters under the Code, at the expense of the assignee. I say "only interest" because no one has suggested, and it cannot have been intended, that all the successive site providers and operators are, cumulatively, parties to a code agreement for the purposes of Part 5. There can be only one (or two or more who are jointly that person).

39. This provides a clue about the intended meaning of the words in issue, because if there can only be one site provider or operator who is a party to a given code agreement, where there may have been successive assignments of both parties' interests, it is necessary to have reasonable clarity about which person from time to time is the site provider or operator who is the party to the agreement. Otherwise, the operation of Part 5 – which extends and protects the operator's rights in the site – would become uncertain.

40. It is also material that Part 5 applies to new agreements which are licences as it does to subsisting agreements. In relation to new agreements, on assignment of the benefit of the agreement, the burden of the agreement also passes to the assignee operator (para 16(4) of the Code). The assignor is exonerated from further liability under the agreement, upon notice in writing being given to the other party to the agreement (para 16(5)). The position is therefore clear with new licence agreements: the assignee takes the benefit and burden of the agreement upon assignment and so stands in the shoes of the assignor from that time.

41. These provisions do not apply to subsisting licences. An assignee of a subsisting licence will therefore not stand in the shoes of the assignor in the same way, unless they have agreed or covenanted to be bound (or are by some other means bound) by the burden of the agreement. Nevertheless, following an assignment the assignor no longer has the benefit of the agreement, and so may have no legitimate interest in the statutory continuation, variation or renewal of the agreement. The terms of paras 33 and 34 of the Code contemplate that the parties will seek to negotiate a resolution of the issues raised in a notice, which would concern the assignee rather than the assignor. Indeed, in some cases, the assignor may cease to be an operator (so that they can no longer be "an operator who is a party to a code agreement"), or may have ceased to exist by the time that a notice to terminate or a notice to agree different terms is served.

The decision in Gencomp.

42. The facts in *Gencomp* were that shortly before expiry of a subsisting 15-year lease of a site to an operator, the landlord's successor in title granted a concurrent lease of the reversion to APW. The operator served para 33 notices on each of the concurrent lessor and the concurrent lessee but contended that it was the notice on the concurrent lessor that was valid, as APW was not a party to the code agreement. APW contended that it was a party, by virtue of the concurrent leasehold interest vested in it.

43. The Court of Appeal concluded that APW was right, and that it was the relevant person on whom the operator had to serve any para 33 notice. The *ratio decidendi* of the decision seems to me to be that:

- Although APW was not "a party to the code agreement" in the meaning that the general law would give those words, the Code does not use them to refer only to the original parties to the agreement;

- Para 10(3) of the Code does not exclusively identify others who are to be treated as "a party to a code agreement";

- Those who stand in the shoes of the original parties, in terms of benefit and burden of the agreement, are to be treated for the purposes of the Code as the parties to the code agreement in substitution for the previous parties;

- A concurrent lessee of a landlord's reversionary interest in a site is a party to a code agreement (by analogy with the position of an assignee of a code agreement which is a lease) for the purposes of the Code.

The reasoning for the decision is strongly based on the fact that these additional parties to the code agreement "stand in the shoes of" the original parties for all relevant purposes: see at [66]-[68] of the decision.

44. An assignee of a licensor's interest in a site is a different case, for which the Code makes express provision. Such a person, who is not under the general law bound by the burden of the licence agreement, is bound by the code rights: para 10(2)(a) of the Code. Being bound by the code rights and entitled to the benefit of the licence terms, the licensor does in reality then stand in the shoes of the licensor, and so it is unsurprising that the Code, by para 10(3), expressly provides that such a person is to be treated as a party to the agreement. There is, however, no equivalent provision in the Code in relation to an assignee of an operator's interest under a licence agreement.

45. Nugee LJ, who gave the only reasoned judgment of the Court, pointed out, at [58], that:

> "… code agreements are intended to be long term agreements, continuing despite the expiry of their contractual terms, and capable of surviving both a change of site provider and a change of operator. One would expect that the provisions of the Code which depend for their application on a person being a party to the agreement would also be capable of continuing to apply despite a change in the identity of the site provider or operator."

It would not, therefore, serve the purpose of the Code if the identities of the parties to a code agreement were limited to the original parties save only for the case of the additional person identified in para 10(3) of the Code.

46. It is for that reason that Mr Lees KC, who appeared before this Tribunal for On Tower, argued that it must be intended that the assignee of a licence agreement, who is interested in the site as operator to the exclusion of the original party to the licence agreement, is to be regarded as the operator who is party to a code agreement for the purposes of Part 5.

47. The judgment of Nugee LJ does not support that conclusion, however, at least without a material extension of its reasoning. An assignment of a licence agreement does not make the assignee subject to the burden of the agreement, unless they undertake to perform the

obligations on the part of the licensee. Para 16 of the Code does not apply to subsisting agreements; and there is no provision in the Code equivalent to para 10(2)(a) making a successor to the original licensee bound by the obligations of the agreement. An assignee will not be subject to the burden of the agreement, and thereby "stand in the shoes of" the assignor, in the sense identified in *Gencomp*, unless it is bound by the obligations of the assignor.

48. Nugee LJ referred to the Law Commission report, which itself refers to the desirability of assignments "where one Code Operator comes to stand in the shoes of another Code Operator" (para 3.17), and opines that "A change of Code Operator in itself should in most cases be immaterial to the Site Provider" (para 3.20). His Lordship referred also to the right approach to construing the Code, summarised by Lady Rose JSC in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] 1 WLR 3360 ("*Compton Beauchamp*") at [106] as:

> "… to work out how the regime is intended to work and then consider what meaning should be given to the word 'occupier' so as best to achieve that goal".

(The issue in *Compton Beauchamp* was whether an operator occupying the site could be the "occupier" within the meaning of the Code, or whether the "occupier" was necessarily someone other than that operator.)

49. Giving his concluding reasons for the decision in *Gencomp*, Nugee LJ said at [75]:

> "Applying that approach, it seems to me that the regime is intended to work in such a way that the person currently entitled to the benefit and burden of the agreement as operator, and the person currently entitled to the benefit and burden of the agreement as site provider, are parties to the agreement and can exercise the rights conferred by Part 5 of the Code. That can in my judgement be achieved by construing paragraph 10(3) as not intended to define exhaustively who is to be treated as a party to the agreement. On that basis APW, being currently entitled to both the benefit and the burden of the Lease by virtue of the Concurrent Lease, is to be regarded as a party to the agreement..."

The First Issue

50. The question for me is whether, applying Lady Rose's approach to construing the Code, and despite the fact that On Tower is not obligated to APW to perform the burden of any of the three agreements, it is nevertheless to be regarded as a party to each of the code agreements.

<u>The FTT's decision</u>

51. The FTT first addressed and rejected On Tower's benefit and burden argument, on the basis that the burden of the agreement, in no case, was "inextricably linked" to the enjoyment of a particular benefit under the agreement. Payment of a licence fee in return for all the benefits of the agreement was not enough, nor were any of the benefits in the nature of conditional rights.

52. The FTT therefore turned to the principle to be extracted from *Gencomp*, in particular that an assignee of a lease was to be treated as a party to the code agreement and the observation that para 10 of the Code did not prevent that conclusion. It turned to para 33 of the Code and said:

> "The obvious point to make is that there is absolutely no reference to benefit and burden as far as the operator is concerned. For the reasons I have given, the gloss on Paragraph 33 advanced by the Respondent is based on obiter dicta from **Gencomp** and does not appear anywhere in the statutory wording. The only reference to burden is that "a code right …. otherwise binds" the site provider.
>
> In my judgement there is no requirement to read into Paragraph 33, to make it work, words to the effect that its provisions only apply where an assignee has taken all the benefits and all the burdens of the original contracting party.
>
> To the extent that it is necessary to do so I follow mutatis mutandis the approach of Nugee LJ at paragraph 75 of **Gencomp** and construe paragraph 33(1) as not intended to limit the category of operator to be treated as a "party to a code agreement". On that basis the claimant being currently entitled to the benefit, as assignee, of the agreements listed at paragraph 6 above, is to be regarded as a "party to a code agreement" with the results that it can invoke paragraph 33.
>
> Construing paragraph 33 in that way provides for, as the Law Commission (339 para 3.17) put it, "one operator comes to stand in the shoes of another code operator" without the necessity of becoming the subject of all the burdens of the original agreement as required under the General Rule. Such a construction does no violence to the wording of paragraph 33."

53. It is true that there is no reference to benefit and burden in para 33, but the conclusion that certain persons stand in the shoes of the original parties to the agreement because they had the benefit and burden of the agreement, and so are parties to a code agreement, was part of the essential reasoning in *Gencomp*. Further, I agree with Mr Watkin KC and Mr Clark, who appeared for APW, that APW is not seeking to read anything into para 33 to make it work: rather, they rely on the words of para 33 as they stand, and argue that there is no requirement to qualify them, beyond what *Gencomp* decides. It is On Tower which seeks to extend the principle in *Gencomp,* or, in the language used by the FTT, "read something into" the language of Part 5, namely that a person who has only the benefit and not the burden of the agreement can be treated as a party to the agreement.

54. There was, materially, no finding that On Tower was subject to the burden of the licence agreements. Nor indeed was that alleged in On Tower's statements of case. If the FTT took any comfort from the presence of rent invoices and payment advices that it had asked to see, it did not explain what this was. That is understandable, because no case was advanced before the FTT that On Tower had voluntarily assumed liability under the terms of the licence agreements or that APW was estopped from contending that On Tower was not a party to the agreements.

55. The FTT was in my view wrong in reasoning that the conclusion of Nugee LJ at [75] of his judgment justified the conclusion that a person with the benefit (only) of a licence agreement fell to be treated as a party to it. It does not go that far. The relevant question here is whether, and in what circumstances, someone who is <u>not</u> standing in the shoes of the licensee for all purposes can be treated as a party to the agreement. *Gencomp* does not decide as part of its *ratio* that someone in that position cannot be a party to a code agreement, but its reasoning gives no real support for the proposition that they can.

56. Having considered the different argument of On Tower based on para 12(2) of the Code, the FTT returned to the First Issue and said:

> "In the circumstances of the references before me it is common ground although the agreements have come to an end, code rights continue to be binding on the Respondent site provider. Paragraph 32 provides that in those circumstances the code agreement continues, and the operator continues to exercise code rights. Code rights continue because the code agreement continues. It must follow that an operator continuing to exercise code rights does so under the continuing code agreement. Therefore, the operator must be a "party to the code agreement".

57. This reasoning wrongly equates the enjoyment of code rights with being a party to a code agreement. While it is true that the code agreement is continued because the code rights are being exercised, and that the operator could not enjoy the code rights absent a continuing code agreement, it does not follow that the operator is a party to the agreement.

58. It follows that the FTT's decision cannot be upheld for the reasons that it gave. The reasoning of the FTT being flawed, it is necessary to consider the matter afresh.

APW's arguments (in summary) in support of the appeal

59. APW relies on the reasoning in *Gencomp* to support its appeal, on the basis that On Tower does not have the benefit and burden of any of the licence agreements and so does not stand in the shoes of the original licensee for all relevant purposes, in the way described in *Gencomp*.

60. APW contends that, as a matter of the general law, a person does not become a party to an agreement if the benefit of that agreement is assigned to them. They become the owner of a chose in action – the rights conferred by the agreement – but are not thereby subject to the burden of the obligations in the agreement that bind the assignor: (see per Aikens LJ in *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376 at [44] ("*Bexhill v Razzaq*")). The burden of a contract is not generally assignable: *Lenesta Sludge*.

61. Second, although the terms of the Code provide that a successor in title to the interest of the original site provider is treated as being a party to the code agreement (para 10(3)) and *Gencomp* decides that in other circumstances a person is treated as a party to the code agreement for the purposes of Part 5, that should only apply where the person "stands in the shoes of" the original party because they both have the benefit of the agreement and are subject to its burdens. An assignee of the benefit of a licence agreement conferring code rights is not in that position, and so is not to be treated as a party.

62. Third, such a person does not become a party because they choose to pay the licence fee to the site provider and the site provider chooses to accept the fee from the assignee. That is so even if the site provider demands the fee from the assignee. Neither the voluntary discharge of an obligation by an assignee nor the fact that the site provider chooses to look to the assignee for payment puts the assignee fully in the shoes of the assignor. The assignee is not thereby obliged to pay future instalments of licence fee, nor obliged to perform other obligations (if any) in the agreement.

63. Fourth, if Part 5 of the Code is to operate satisfactorily, there must be clarity about which operator is a party to the code agreement and which site provider is a party to the code agreement. A site provider and an operator need to know whether they can serve notices under Part 5 and on whom to serve them. There cannot be more than one such party, unless there are several persons who are operator or site provider jointly. There is only clarity as to whether an assignee is a party if they have the full benefit and burden of the

agreement, but not if they have only some of the benefits and some of the burden, or the entire benefit but not the burden. Substitution only happens, under the Code, if the assignee stands in the shoes of the assignor for all purposes.

64. Fifth, the FTT went wrong in equating enjoyment of the benefit of code rights with being a party to the code agreement. There is nothing inconsistent with the operation of the Code in an operator enjoying code rights but not being the party to the code agreement; indeed, the Code expressly provides for this.

65. Sixth, para 31 of the Code does not work unless the operator who is a party to the code agreement bears the burden of the agreement. That is because two of the grounds for termination of a code agreement are that it ought to come to an end as a result of (a) substantial breaches by the operator of its obligations under the agreement, or (b) persistent delays by the operator in making payments to the site provider under the agreement. If the operator were a person who was not subject to the obligations or liable to make payment under the agreement, those grounds would be unavailable to the site provider, even if there were significant breaches by someone of the terms of the code agreement.

On Tower's arguments (in summary) against the appeal

66. The argument of On Tower, advanced by Mr Lees, was as follows.

67. First, the Code draws no distinction between agreements that are leases and agreements that are licences or wayleaves, save where it expressly does so, e.g. in para 29 of the Code. That is true in relation to subsisting agreements and new agreements.

68. Second, given industry practice over many years and the intention that subsisting agreements would not be affected by the reforms, the Code should not be interpreted so as to give different effect to subsisting licences from the effect given to subsisting tenancies. In particular, it was intended that the parties could make use of Part 5 of the Code to terminate, vary or renew subsisting agreements. There is no provision excluding subsisting licences from Part 5 and no difference in treatment.

69. Accordingly, third, so long as the benefit of all code rights under the agreement are vested (by assignment) in the current operator, that operator will be a party to a code agreement. The FTT was therefore right to say that, where code rights are continued under para 30(2) of the Code notwithstanding the end of the licence or lease, that they do so because the code agreement is continued. If the operator is exercising code rights under the (continuing) agreement, the operator must be a party to that agreement, which is the code agreement.

70. Fourth, Part 5 of the Code does not operate sensibly, in the way that Parliament must have intended, if – despite the incoming operator having performed the licence agreement for a long period of time – any notices to terminate, vary or renew the agreement had to be served on or by the outgoing operator, who may have had nothing to do with the site for years, or ceased to exist, or ceased to be an operator as defined in the Code. Even if the outgoing operator still exists as such, but removed from the site many years ago, it would be nonsensical for the site provider to have to serve a para 31 or para 33 notice on the outgoing operator, rather than on the incoming operator, and equally nonsensical that the incoming operator could not itself serve notice under para 33 to vary or renew the code agreement but that the outgoing operator could do so.

71. Fifth, on a more granular level, there are provisions of Part 5 that do not work as obviously intended if the operator who is a party to the code agreement is interpreted as being the assignor of the benefit of the agreement.

(1) Where a notice to terminate under para 31 of the Code is served by the site provider, the assignee operator might have no knowledge of it and so be unable to serve a counter-notice under para 32. The assignee operator would then lose their right to continue to use the site, possibly without any forewarning. It would leave the operator having to apply under Part 4 of the Code for new code rights, and possibly under para 27 for temporary code rights, before the site provider took enforcement measures under Part 6 of the Code seeking removal of its apparatus. Further, a subtly different test from the test under Part 5 applies under Part 4 for acquiring new code rights, which could prejudice the operator.

(2) Para 34(13) of the Code requires the court, when an application has been made to it, to decide which order to make from the list of possible orders in para 34. In doing so, it is to have regard among other things in particular to "the operator's business and technical needs". If the operator for these purposes is the assignor, who may be in business elsewhere, no longer in business or defunct, it is either impossible to take its business and technical needs into account or the court will be taking into account needs that are irrelevant to the site in question. It is obvious that the business needs in question must be the business needs of the operator lawfully on the site in place of the assignor.

72. APW submitted that the solution to this potential difficulty is at all times in the hands of the assignee, which can execute a unilateral deed of covenant, purporting to be made with the site provider, and agreeing to perform the obligations in the code agreement (if it has not previously done so), thereby subjecting itself to the burden of the licence agreement. APW accepts that any assignee who does so becomes the operator who is a party to the code agreement. Mr Lees pointed out that this would not in fact make the operator subject to the burden of the code agreement itself but rather subject to the equivalent burden under a freestanding obligation. I do not think that that matters. The question is not whether the operator is, under the general law, a party to the agreement, but whether it is, under the Code, to be treated as such. Mr Lees also argued that this is not something that the Code contemplates as necessary, and that it should therefore not impliedly be required in order to make Part 5 work satisfactorily.

Discussion

73. The arguments are finely balanced: each has something to be said for it. It is difficult to identify an interpretation of the Code that is wholly consistent with all its provisions, and that also makes commercial sense and provides clarity for its practical application. The need for certainty for operators and site providers alike can be said to support APW's case, on the basis that, in the main, each operator and site provider will know which operator has the benefit of the agreement and whether it has covenanted with the site provider to perform the burden of the agreement. Commercial good sense, on the other hand, tends to support On Tower's case, on the basis that an operator lawfully in place, which has enjoyed the benefit of the agreement for some time and paid the licence fee to the site provider, is clearly the operator principally interested in the termination, variation and renewal provisions of the Code, not the operator that assigned away all rights to use the site years previously.

74. Having weighed all the arguments and having regard to the evident purpose of Part 5, it seems to me that the better interpretation is that the Code requires to be treated as operator who is a party to a code agreement an operator who is a lawful assignee of the benefit of a licence agreement, who occupies the site as the operator in place of the assignor, and who has assumed the primary responsibility for complying with the terms of the licence agreement (including paying the licence fee), whether or not the operator has made a deed of covenant with the site provider.

75. Given the proposals of the Law Commission and the structure of the Code as a whole, it must have been the intention of Parliament that someone in that position (whether a lessee or a licensee) is to have the benefit of the Part 5 regime, unless they are specifically excluded by para 29 of the Code or by the transitional provisions in Schedule 2 to the 2017 Act. That is certainly how Part 5 is intended to work, for subsisting and new tenancy agreements (if they fall within Part 5) and also in relation to new licences. It is difficult to imagine that Parliament intended something significantly different in relation to subsisting licence agreements without expressly so providing. The draftsman would have understood that subsisting code agreements were often licences or wayleaves, not leases, and were granted for long or medium duration: see *Gencomp* at [58], cited in para 43 above. Being licences and not leases, they would not fall to be dealt with pursuant to Part II of the Landlord and Tenant Act 1954 and would have been understood to be subject to Part 5. It must therefore have been envisaged that the machinery of Part 5 would easily and sensibly apply to subsisting agreements that were licences.

76. If a licence agreement does not restrict assignment of the benefit of its terms (as many do not), or permits assignment with consent of the licensor, the full benefit of the agreement can be assigned (consistently with the policy of the Code for new agreements), and the assignee operator would effectively step into the shoes of the licensee. That would be so, without having to make a new contract or covenant with the site provider, if the assignee operator had assumed primary responsibility (as between them and the assignor) for the obligations of the agreement. It would be contrary to the evident purpose of the Code for the site provider, in such circumstances, to continue to deal with the assignor and for the lawful assignee to have no control, by means of Part 5, over the continuation, variation and renewal of the agreement. It is the lawful assignee operator in situ that is intended to have the benefit of continuation under para 30 of the Code and who is therefore likely to be affected by a notice to terminate or a notice proposing to remove code rights; it is they who will want the ability to obtain more code rights or a new agreement at a lower licence fee.

77. Who is to be treated for the purposes of the Code as a party to a code agreement is a different question from whether, under the general law, the assignor is a party to the licence agreement or remains liable under its terms. The fact that under Part 5 an assignee is treated as a party to the code agreement does not mean that the assignor is not liable under the agreement as a contracting party (where para 16(5) of the Code does not apply) or that the assignee has displaced the assignor for all purposes of the general law. It means that, for the purposes of the application and operation of the provisions of the Code, the assignee is deemed to be a party to the code agreement in place of the assignor.

78. Many commercial licence agreements permit assignment with the licensor's consent and stipulate for a covenant to be made by the assignee with the licensor to comply with the obligations on the part of the licensee. The facts of Lubbards Lodge and Blackwell Grange in this case exemplify that. Although the final assignment to On Tower did not need consent, because On Tower was at the time a company in the same group as Arqiva, the assignment to Arqiva did. Arqiva made a deed of covenant with APW or its predecessor in title. It would be odd, in such a case, that for the purposes of the Code the lawful

assignment to Arqiva made it the relevant party to the agreement for the purposes of the Code but the lawful assignment to On Tower under the same agreement terms did not.

79. Some commercial licence agreements do not stipulate for a covenant to be made by an assignee with the licensor (the Sandbach agreement is an example of that). Even in those cases, however, as a matter of standard practice between commercial entities, one would expect to see the assignee covenant with the assignor to perform the obligations for the remainder of the agreement, possibly by way of indemnity only (which means that the assignor cannot compel performance of the assignee's obligation but can claim to be indemnified against failure by the assignee to perform, thereby making the assignee, as between the two of them, primarily liable to perform the obligations of the licensee). That is illustrated by the facts of all three cases in issue on this appeal: even though On Tower was at the time a company in the same group as Arqiva, it covenanted with Arqiva to perform the licensee's obligations for the remainder of the term of the licence. This is standard conveyancing practice. Since all operators are commercial entities, this is the paradigm case that Parliament and the Law Commission are likely to have had in mind: lawful assignments by commercial parties, where the assignee assumes the responsibility to perform the agreement and effectively replaces the assignor as the interested party under the agreement.

80. There may of course be cases in which the assignment, though lawful, has not been notified to the site provider – or where, perhaps within a group of companies, the assignor continues to pay the licence fee. No interpretation of the Code – not even APW's preferred interpretation – can provide total clarity in every case (for reasons that I will explain).

81. Where the assignment is lawful, it does not seem to me that there should be any difference in the result, so far as the operation of Part 5 is concerned, between a case where the assignee has covenanted with the site provider or its predecessor in title to perform the obligations in the agreement (which APW accepts makes the assignee a party to the code agreement) and a case where the assignee has covenanted with the assignor to perform them. In both cases, it is the assignee who has formally taken over from and "stands in the shoes of" the assignor in connection with the code agreement and its continuation, variation or renewal. Although the terms of the assignment would not necessarily be disclosed to the site provider, the obvious inference to draw from notification of the interest of the new operator and/or payment of the licence fee by the operator, as happened in all three cases on this appeal, is that there has been a formal assignment. The site provider is safe to assume that the assignee is the relevant operator in those circumstances, but in case of any doubt it can inquire.

82. The next question to answer is therefore whether it is sufficient, as Mr Lees contends and the FTT decided, that the whole benefit of the licence agreement has been lawfully assigned to the current operator. Unlawful assignments are obviously different: if no assignment is permitted, or is permitted only with consent of the licensor which has not been sought, Parliament cannot have intended the site provider to have to deal with an unlawful assignee in place of the assignor or the original grantee. When the Court of Appeal explained in *Gencomp* why an assignee of a tenancy stands in the shoes of the assignor, they were not suggesting, contrary to the law of landlord and tenant, that an unlawful assignee would stand in that position.

83. Mr Lees contends that liability to perform the licensee's obligations is irrelevant, and that it is sufficient that the benefit of the agreement has been lawfully assigned and that the assignee's performance (in relation to payment of the licence fee) has been accepted by the site provider.

84. The notion that responsibility for performance of the licensee's obligations is irrelevant is difficult, both as a matter of the general law (see *Bexhill v Razzaq*, above) and in light of the reasoning in *Gencomp*. The assignee in such a case is not subject to the burden of the agreement and so does not stand in the shoes of the assignor for all purposes, which the Court of Appeal held to be fundamental to its decision that a concurrent lessee and an assignee of a tenancy were to be treated as a party to a code agreement.

85. Further, the burden of the licence agreement is not irrelevant to the operation of Part 5. The four grounds for seeking possession of the site in para 31 of the Code include two where default on the part of the operator has to be established (see para 34 above). The operator who is referred to in these grounds, in para 31(4), is clearly the same operator who is referred to as a party to a code agreement in para 31(1). Unless the operator is responsible for making payment of the licence fee by a stipulated date, it cannot be late in so doing, within the meaning of the ground; and it cannot be said to be in substantial breach of its obligations under the agreement either. If Mr Lees is right, the operator referred to in these grounds would be the assignee but the site provider would be unable to establish these grounds of possession – or, alternatively, some violence has to be done to the clear meaning of the wording of the grounds, taking the reference to "the operator" as if it said "any" or "an" operator.

86. I accept that a degree of purposive interpretation of the language is nevertheless involved, if the obligations that are broken are obligations that are not owed directly by the assignee to the site provider, but that seems to me to be a more acceptable interpretation because the assignee is in default of an obligation that it has assumed, and the site provider has not had performance of the obligations.

87. Moreover, On Tower's case gives rise to a greater risk of uncertainty on the facts of individual cases, if an informal (but lawful) assignment at any time is sufficient to change the identity of the operator, or if the identity of the relevant operator under Part 5 depends on payment or acceptance of rent in the absence of any obligation to make payment. The application of Part 5 would then depend on facts that could change from time to time, at the will of one or other party. I therefore reject the argument that a mere assignment of the benefit of the licence agreement, or assignment coupled with payment of licence fee, suffices to make the assignee a party to the code agreement.

88. I acknowledge that, if assumption of responsibility for the obligations of the licence agreement is required, there can still be cases at the fringes where complete clarity will be lacking. However, it will generally be sufficiently clear, and a safe assumption, that a new operator that is a commercial entity and has lawfully taken up occupation of the site and started to perform the obligations of the agreement has assumed the responsibility for the obligations in place of the assignor. At all events, the site provider can easily inquire.

89. The interpretation favoured by APW, which arguably provides a greater degree of clarity to site providers, seems to me to be too prescriptive and restrictive. It would require lawful assignees of the benefit of many licence agreements, in order to become the relevant operator for Part 5 purposes, to take a step that neither the terms of the licence agreement nor the Code required. (In a case where the licence agreement requires a deed of covenant to be made with the licensor, any lawful assignee will already have made one.) Where no deed of covenant was made at the time of the assignment, APW's interpretation would give the assignee control over who was to be treated as a party to the code agreement, and when.

90. APW's case does not, however, require the assignee to make a deed of covenant with the current site provider, if it has previously made a deed of covenant with a predecessor in title of the site provider. Mr Watkin and Mr Clark agree that, on their case, it cannot be necessary for the assignee to make successive deeds of covenant in order to remain the operator that is a party to the code agreement. As a consequence of this, there will still be cases where clarity is not provided by the existence of a covenant between the current operator and the site provider. Indeed, APW's case, which is based on a unilateral deed being made by the assignee, does not require the site provider to be a party to the deed, or even to be aware of it.

91. A further difficulty with APW's solution, if it is assumed that an assignee has to stand in the shoes of the assignor as regards the benefit and burden of the agreement, is that it is difficult then to see why reliance could not be placed on other dealings between the site provider and the assignee, such as an informal agreement or conduct or assurances subsequently relied upon, which might estop them from denying that the assignee was subject to the burden of the agreement. Mr Watkin acknowledged that that really amounted to the same thing, namely that the assignee is bound by the terms of the agreement. So it seems to be accepted by APW that a deed of covenant is not required in every case; yet the possibility that an assignee's standing might depend on informal agreement or understanding and reliance would further reduce the degree of certainty in practice that is sought.

92. A better interpretation of who falls to be treated as a party to a code agreement is in my judgement that a lawful assignee who has assumed the primary responsibility for performing the obligations in the licence agreement will be the operator who is a party to the code agreement. That could be pursuant to a multi-partite deed by which the licensor permitted the assignment, or a unilateral deed of covenant with the site provider made by the assignee, or it could be a covenant or agreement made by the assignee with the assignor to perform the obligations in the licence agreement. Any of these have the effect of placing the burden of the obligations in the licence agreement on the assignee, so that, as between them, the assignee is standing in the shoes of the assignor.

93. I notified the parties of my view that this was a possible interpretation because it was not one that they had addressed at the hearing, and I had the benefit of further written argument on the point. Having considered carefully those submissions, I remain of the view that this is the correct interpretation, in light of the decision in *Gencomp*. I would make clear, however, that I do not reach this conclusion on the basis that the licensor could then seek to enforce the obligations of the assignee indirectly, by a chain of covenants made by successive assignees. I reach it on the basis that, by assuming the principal responsibility for the burden of the agreement, the assignee is sufficiently standing in the shoes of the licensee, at least for the purposes of Part 5 of the Code. Whether it can be sued by the licensor under the general law, directly or indirectly, is a different issue, which is not material to the operation of Part 5.

94. My conclusion that the primary responsibility for performing the obligations of the licensee must have passed to the assignee before it can be a party to a code agreement does mean that, in a case where there has been a "bare assignment" (by which I mean a case where there is no covenant given by the assignee to anyone), the operator who is a party to the agreement for Code purposes will remain the assignor, until such time as the assignee does assume responsibility for the burden. For reasons that I have given, a lawful bare assignment is likely to be an unusual case, given the commercial context. However, in such a case, until the assignee assumes a primary liability to perform the obligations of the licence agreement, notices under the Code would have to be served by or on the assignor.

95. Since the site provider may assume that the burden has passed to the assignee, this could result in a notice being invalidly served; or alternatively, a notice correctly served on the assignor not coming to the assignee's attention. These possible consequences do naturally give one pause to consider whether the conclusion is right. However, as I have said, there is no perfect answer to the problem: the possibility of invalid notices on the facts of unusual cases is not avoided by any different interpretation. Second, the risk that I have identified will be the consequence of the terms of the bargain that the licensor struck (no requirement for consent or a deed of covenant), the terms that the assignee agreed with the assignor (no assumption of the burden of the licence agreement and no obligation on the assignor to pass Code notices to the assignee), and of the policy of the Code that code agreements should be assignable. Third, if by some mishap an operator loses its rights under Part 5, it will then have the right to apply for new rights under Part 4. Fourth, a site provider can inquire of the assignee whether it has covenanted to perform the obligations.

96. It would also be a consequence of a bare assignment that – if an application is made to the court following a valid notice served by or on the assignor – the business and technical needs that the court would have to consider under para 34(13)(a) of the Code would be those of the assignor, not the assignee. That is because it is clear that the operator referred to throughout para 34 is the operator who is a party to the agreement on whom (or by whom) a notice was served under paras 31 or 33 of the Code. However, a notice to terminate has to be given by the site provider at least 18 months before it takes effect (para 31(3)(a)), and a notice to vary the terms of the agreement or for a new agreement could not result in an application to the court within 6 months of the date of service (para 33(4), (5)). It is therefore likely that, in all but an unusual case, the notice will come to the attention of the assignee in time for matters to be regularised, making the assignee the relevant party before the court is seised of the matter. I would not allow a relatively small risk in that regard in unusual cases to compel a different conclusion, particularly one that would not make sense of the termination provisions of Part 5 (para 31), as explained in para 85 above.

97. On the basis (as I have explained) that a covenant by the assignee with the assignor to perform the obligations in the licence agreement (whether a full covenant or a covenant by way of indemnity only) makes the assignee primarily responsible for discharge of the burden of the agreement, as between it and the assignor, and so makes it a party to the code agreement for the purposes of Part V, the final question is whether on the facts of these cases On Tower has made such a covenant. It appears to have done so in each case, as a result of the covenant given in the 2019 block transfer. However, that factual question has not been addressed by the parties and accordingly, if they cannot agree the answer to that question, they may return to this Tribunal to argue that factual question only. In the first instance, the parties should notify the Tribunal of the basis for any disagreement on this question, and the Tribunal will then consider whether to direct a further hearing or invite written submissions.

98. If the parties agree or I subsequently determine that On Tower did covenant in each case with Arqiva to pay the rent or licence fee and perform the obligations in the agreements, by way of indemnity to Arqiva, then I will dismiss APW's appeal on the First Issue, on the basis that the FTT reached the right result in all three cases albeit for the wrong reasons.

99. Before turning to On Tower's Additional Arguments and the Second Issue, it is appropriate to say something, briefly, about the consequences of my decision for the way that an applicant and the FTT should deal with other applications under Part 5, whether made by a site provider or by an operator.

100. As a matter of good practice, the applicant's formal case should state the basis on which it and the respondent are said to be a party to the relevant code agreement, whether the code agreement is a subsisting agreement or a new agreement within the meaning of the Code, and if a subsisting agreement whether it is claimed to be a lease to which Part 5 applies or a licence or wayleave. While in many cases there may be no dispute, issues will on occasions arise, as they have in these cases, as to whether the applicant or indeed the respondent is the proper party to the reference, or whether the FTT or the County Court is the appropriate jurisdiction. This may involve a case that the respondent remains the operator that is the party to the code agreement, notwithstanding an assignment that is known to have taken place, and, if so, this requires to be stated in the applicant's formal case.

101. The current practice of the FTT appears to be to direct that questions of standing or jurisdiction are to be heard as preliminary issues and, as in this case, proceed directly to written submissions on such issues, once they are identified. While it is understood that the FTT is an informal tribunal and not a court, it would nevertheless be safer, and ultimately more convenient, for the respondent to be directed to plead and serve points of response to the application, even if limited to the intended preliminary issues, before any evidence (if necessary) and submissions are prepared.

102. In some cases, where it is thought that the respondent may raise further facts in response, it may also be necessary for the applicant to plead its responsive case. This will ensure that the parties' factual cases on such issues are clearly defined at the outset. Questions of lease or licence, and whether an applicant has standing or the correct respondent has been identified may continue to arise in applications to the FTT for some years.

On Tower's Alternative Arguments

103. The FTT also acceded to On Tower's alternative case that, by virtue of para 12 of the Code, it was in law subject to the burden of each of the three licence agreements in these cases, and so was a party to the code agreement in each case. It did so in relatively short order in its decision, first identifying the argument of On Tower that:

> ".. the statutory right is imprinted with the terms on which it was conferred. Further Paragraph 12(1) maintains the symmetry with the burden imposed on the site provider under Paragraph 10(3)"

and then stating that:

> "I find the submissions of Mr Radley-Gardner in relation to Paragraph 12(1) to be persuasive and, in the event that I am wrong in my own analysis of **Gencomp** and Paragraph 33, I adopt his analysis."

104. As the FTT gave its conclusion on the meaning of para 12 as an alternative basis for its decision, and it raises another point of interpretation of the Code, which is meant to operate as a coherent whole, and as I have heard full argument on the point, I will deal with it too.

105. In my judgment, the FTT reached the wrong conclusion on this point.

106. While para 12(1) states that a code right is exercisable only in accordance with the terms subject to which it is conferred, it does not seem to me that this is capable of being construed as making the enjoyment of each code right subject to the obligations in the code agreement generally.

107. The starting point is that that is not what para 12(1) says. As explained above, the enjoyment of code rights is a different matter from being a party to a code agreement, and different from enjoyment of the benefit of the code agreement as a whole.

108. I agree with APW that what this provision is directed at is the terms and conditions subject to which a *code right* is conferred, not the burden of the code agreement as a whole. The language is not apt to extend to obligations that are independent promises, such as the obligation to pay the licence fee quarterly.

109. Its purpose is explained by the terms of para 12(2) that follow. This confers a statutory immunity for the operator for anything done in exercise of a code right in relation to any land. But where the code right is limited or subject to conditions in the terms in which it is granted, the operator does not have the right to exercise it in an unlimited way, or shorn of the conditions for its exercise. The code right may only be exercised in accordance with its terms.

110. Anything done by the operator which is in excess of those terms does not attract the immunity conferred by para 12(2). Although it is true that para 12 is not headed "Statutory immunity for exercise of code rights", in my view para 12(1) is nevertheless concerned with the way in which code rights may be exercised, not with duplicating the effect of para 16(4) of the Code, which is otherwise limited to new agreements and does not apply to subsisting agreements.

111. It is difficult to see the point of para 16(4) if On Tower is correct about the true meaning of para 12(1). In my view, para 16(4) is not there to emphasise what would be obvious anyway, namely that if a Part 2 agreement is assigned, the assignee is not liable for obligations that accrued before the assignment.

112. Further, if the burden of subsisting and new agreements passes with the benefit under para 12(1), para 16(4) would not have been drafted in that way, or alternatively it would not have been excluded (with the remainder of para 16) in relation to subsisting agreements by the transitional provisions in Schedule 2 to the 2017 Act.

113. The FTT rejected On Tower's further alternative argument that the burden of the licence agreements passed to it under the principle of benefit and burden. On Tower raised the point again in a respondent's notice on this appeal. It is unnecessary to say anything much about it, in view of my conclusion on the First Issue, save that it seems to me that the FTT was clearly right to accept the argument of APW that the limited principle of benefit and burden has no application to the generality of independent obligations on the part of the licensee in the licence agreement. As stated by Beatson LJ in *Budana v Leeds Teaching Hospital* [2018] 1 WLR 1965 at [117], citing Professor Tolhurst's book, *The Assignment of Contractual Rights*, "there must be a contractual duty or burden that does not merely define a contractual right but is inherent or intrinsic in the right itself", or, per Davis LJ at [96] in the same case, "the burden in question must be relevant to and linked to the exercise of the right in question". The fact that code rights are exercisable by persons not parties to the code agreement demonstrates that this is not so in the current context.

The Second Issue

114. This issue concerns the property referred to by the FTT simply as "Ampthill", at Manor Farm, Millbrook Road, Houghton Conquest, Bedford, which was demised to Orange for a term of 20 years from 29 April 2002 ("the Ampthill lease").

115. On Tower claimed to be entitled to apply for a new code agreement under para 33 of the Code, on the basis that it was the assignee of the term of the Ampthill lease from Arqiva, to which company the lease had previously been assigned in 2016 by Orange. The deed granting licence to assign the Ampthill lease in 2016 recited that the residue of the term was vested in Orange.

116. The difficulty for On Tower was that a certified copy of another executed deed dated 13 May 2013 was produced in evidence. It is a deed of assignment of the Ampthill property by Orange to EE for the residue of the term of the same lease. There is also a copy of a signed notice of assignment of the lease to EE on 13 May 2013, dated 22 May 2013. This is clear evidence that the lease had been assigned to EE 3 years before Orange purported to assign it to Arqiva.

117. The point was therefore taken by APW that, since Orange could not convey that which it did not have, On Tower had failed to prove its entitlement as the operator that was a party to the code agreement. (On Tower was presumably not registered as proprietor of the leasehold estate, though the FTT's decision says nothing about this question.)

118. The FTT held that the recital in the 2016 deed was insufficient to prove that Orange was still the lessee at the date of the 2016 deed, but that "other relevant matters" sufficed to establish On Tower's right to apply in respect of the code agreement. It concluded as follows:

> "Firstly, I find as a fact that the Claimant is in occupation of the site. Secondly the Respondent has been demanding and accepting rent for the site from the Claimant. In my judgement it simply does not lie in the mouth of the Respondent to deny that the Claimant has sufficient title to bring this reference in circumstances where the Respondent has been demanding and accepting rent from the Claimant in occupation.
>
> The Claimant is an operator by virtue of a direction under section 106 (see paragraph 2 of the Code). It seems to me that when considering whether or not a party has standing to bring a reference that I should attach considerable weight to the fact that the claimant has been approved by Ofcom and has the code applied to it.
>
> I repeat my findings in relation to paragraph 30 of the Code (see above). The 2002 agreement having expired after 20 years the code agreement continues and the Claimant continues to exercise code rights. Under those circumstances the Claimant must have sufficient standing to bring a reference in respect of Ampthill.
>
> In circumstances where the Respondent site provider demands and accepts rent from the Claimant operator to whom the Code is applied by virtue of a section 106 direction and where the Claimant operator is in occupation and exercising code rights I find that the Claimant has sufficient possessory title to bring this reference."

119. It was common ground that the burden lay on On Tower to prove its standing as applicant. APW contends that the FTT was wrong to reach the conclusion that it had discharged this burden, having rightly concluded that the 2016 deed was insufficient evidence of Orange's continuing entitlement to the term of the lease. The existence of the 2013 deed was inconsistent with Orange having title in 2016 to assign it to Arqiva, and On Tower had

been unable to explain whether the 2013 assignment either did not have effect, or was revoked or reversed at some later time.

120. The FTT nevertheless felt able to rely on the fact that On Tower was in undisputed occupation of the site, as an approved operator, and that APW was demanding and accepting rent from it, as a basis for concluding that it was a party to the code agreement contained in the lease.

121. I am uncertain what the FTT meant by On Tower having sufficient possessory title to bring the claim. Nor do I understand why it thought that the status of On Tower as an operator carried any weight on the question of whether the lease had been duly vested in it.

122. I think it is unlikely that the FTT was referring to a possessory title under the Land Registration Act 2002, as any issue about the quality of On Tower's title could not have been relevant under the Code, nor could On Tower have acquired a possessory title by virtue of its or Arqiva's possession of the site since 2016. I think the FTT probably had in mind just the fact of On Tower's undisturbed possession of the site. The fact that On Tower was undisturbed in possession was, perhaps, some evidence that the lease is not vested in EE, though the FTT did not reach that evidential conclusion.

123. On Tower seeks to uphold the decision of the FTT on essentially two different bases. First, that everyone seemed to have accepted that it was in occupation pursuant to the lease, and that payment of the rent meant that the FTT was entitled to conclude that On Tower was a party to the code agreement even in the absence of proof of valid assignment. Second, that the FTT was entitled to conclude that APW was estopped from contending that On Tower was not a party to the code agreement, having demanded and accepted rent from it.

124. There are difficulties with each of these arguments. First, the relevant question is whether On Tower had become a party to the code agreement, namely the lease. A person does not become a party to a code agreement simply by exercising code rights and paying for them. The benefit of the code agreement as a whole must have been lawfully assigned to them, and they must have assumed the burden of the agreement as a whole. If Orange had no title to assign the lease to Arqiva, as the 2013 deed suggests, the benefit of the code agreement cannot have been assigned to Arqiva then, and so it cannot have been further assigned to On Tower by the 2019 block transfer.

125. Second, no estoppel argument was raised before the FTT. On Tower's case was based on the 2016 deed, the 2019 block transfer and its payment of rent. It is unnecessary to speculate about whether an estoppel could have arisen based on the demand and acceptance of rent by APW: the argument was not identified and pursued before the FTT, and a complex issue of that kind cannot be raised for determination on appeal. Indeed, it could not properly have been entertained by the FTT without a pleading of the essentials relied upon. Absent a case of estoppel raised by On Tower, the FTT could not decide the case against APW on the basis that it did not lie in its mouth to dispute that On Tower was a party to the lease.

126. What the FTT did not do was explain - if (as it held) the 2016 deed of assignment was not sufficient evidence to prove Orange's interest as tenant under the lease - how On Tower had probably become a party to the lease by other means. The fact of occupation and payment of rent from 2019 onwards does not prove a valid assignment of the lease, and in the absence of a signed written agreement with APW, On Tower could not (and did not) assert a new code agreement with APW.

127. Accordingly, I would allow APW's appeal in relation to Ampthill, on the basis that On Tower failed to prove that it was the tenant under the lease and had thereby become the operator who was a party to the code agreement, even though there was no dispute that it was an operator in occupation of the site and paying the rent.

128. I reiterate the point made above, in relation to the First Issue, that it is important where there are preliminary issues of this kind to obtain clarity about the cases that are being advanced before the FTT, and about the facts that are alleged to establish that case.

Mr Justice Fancourt

18 December 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.