



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case References** : **LC – 2024 – 000044**  
**LC – 2023 - 000523**

**Property** : **Vista Centre, 50 Salisbury Road,  
Hounslow TW4 6JQ**

**Claimant  
(Operator)** : **EE Limited**

**Representative** : **Winckworth Sherwood LLP**

**Respondent  
(Site Provider)** : **Acre 1176 Limited**

**Representative** : **Waldrons solicitors**

**Application** : **Schedule 3A of the Communications Act 2003,  
the 2017 Electronic Communications Code  
("the Code")**

**Date of Decision** : **10 April 2024**

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**DECISION on a Preliminary Issue**

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1. This decision concerns the operation of Part 5 of the Code, which contains provisions for the termination, modification and renewal of Code agreements.
2. A case management hearing took place on 9 April 2024, to determine as a preliminary issue, the validity of the Notice served by the Respondent on or around 15 September 2023 under paragraph 31(1) of the Code, seeking to terminate an existing Code agreement with effect from 23 March 2025.
3. Both parties were represented by counsel at the CMH, which took place using VHS remote conferencing. Ms Chorfi representing the Claimant, filed a skeleton argument before the hearing. Mr Salter represented the Respondent who had already filed a full statement (settled by counsel) setting out its legal arguments on the preliminary issue. A helpful agreed bundle of authorities was also filed.
4. There was no dispute concerning the form of the Notice or its content. The issue was whether it was implicit within the overall context of Part 5 of the Code, that a Site Owner could not serve a p31 notice seeking termination of a code agreement if current proceedings on a prior reference for renewal under an Operators p33 notice had not been disposed of.
5. By way of background this case concerns electronic communications apparatus (ECA) situated on the roof of the Respondent's offices in Hounslow. The ECA was installed pursuant to a lease granted in February 2002, which was excluded from the protections afforded by Part II of the Landlord & Tenant Act 1954. The lease expired in February 2022, but the Operator remained in occupation. There is no dispute that the lease is a 'subsisting agreement' for the purposes of the Code or that Part 5 of the Code (as modified by the transitional provisions contained in the Digital Economy Act Act 2017) applies to the agreement. The Respondent acquired the Property in June 2016 and does not dispute that it is bound by the Code rights in the existing agreement. Since expiry of the contractual term in February 2022 the Code rights in the existing agreement have continued by virtue of p30 of the Code.
6. On or about 15 December 2022, the Claimant commenced the process for termination and renewal of the existing agreement by service of an Operators Notice under p33 of Part 5 of the Code. The Claimant subsequently filed a reference in the Upper Tribunal

under case reference 2023.000523. The reference was transferred to the FTT on 11 August 2023 (“the prior reference”).

7. The Respondent objects to renewal of the agreement on redevelopment grounds. On 15 September 2023, the Respondent filed a formal response and statement of case in the prior reference and at the same time served a p31 notice (the Notice) on the Claimant seeking termination of the existing agreement on 25 March 2025 (18 months after the date of the Notice), relying on the same redevelopment grounds.
8. Faced with a p31 notice the Claimant was obliged by the strict procedural requirements of Part 5, p32 to serve a counter notice within 3 months and issue a second reference in the tribunal within a further 3 month period. It is that second reference, issued on 25 January 2024 under LC-2024-000044, that now occupies the tribunals time on this application.
9. The parties’ respective positions at the CMH were that the Claimant sought a declaration that the Respondent’s Notice was invalid or impermissible when a prior reference for renewal under p33 of the Code remained undetermined.
10. The Respondent disagreed with the Claimant’s argument on this but was content for an order to be made consolidating the two references. The Claimant did not oppose consolidation if the tribunal was not minded to make the declaration it sought.
11. There was no dispute that the possibility of overlapping notices (or references) is not expressly addressed in Part 5 of the Code either to permit or prohibit them. The drafting does not contemplate that possibility and consequently does not address it.
12. To summarise the Claimant argues that this is an important omission which raises a point of general importance to Code litigation and provides an opportunity for the tribunal to issue needed guidance on the interrelationship between overlapping renewal and termination references.
13. The Claimant argues that one effect of the p33 reference is to extend the p30 continuance of Code rights until a fixed point in time, that being the date of disposal of the reference. If correct this would matter when assessing the preconditions to service of the Notice (p31(3)(b)). It was argued that the disposal date cannot be ascertained until a final determination is made. Consequently, it is not possible to

calculate the date on which the existing agreement would have ended had it not been continued under p30. Therefore it is not possible to meet the precondition in s31(3)(b) - that the date specified in the Notice falls “*after the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider*”.

14. The problem with this argument is that s31(3)(b) is clearly intended to refer to the contractual termination date of the Code agreement. The purpose is to ensure that the agreement cannot be brought to an end within the contractual term because that would interfere with a bargain freely entered into. Nothing in the drafting, or intent behind Part 5 of the Code supports an argument that the precondition in p31(3)(b) also refers to the date of disposal of any prior reference seeking termination and renewal of the agreement.
15. Another argument is that the site owners challenge to an operator’s reference under p33 is limited to orders under p34 which do not include termination. It cannot therefore be right that a site owner can subsequently seek a fixed termination date by serving a later Notice under p31, effectively using this procedure as a counternotice to the p33 reference. However, this ignores two points. First that the site owner can challenge the length of any renewal application on redevelopment grounds. If made out this could lead to an order under p34(2) specifying an early termination date (which in theory could be earlier than that specified in the p31 Notice). Secondly the Claimant has served a counternotice to the p31 Notice and issued a reference under p32(1)(b) seeking an order under p34 for termination and renewal of the agreement. Once this reference was made, the date for termination will (should the Respondent succeed on redevelopment grounds), be fixed by the tribunal (p32 (4)), not by the date specified in the Notice. If the grounds are not made out, the tribunal must make one of the orders specified in paragraph 34 – which is consistent with the orders the tribunal can make on the prior reference.
16. On either reference, if the tribunal finds the redevelopment grounds are made out the termination date is likely to be the same, whether determined under p32(4) on the p31

reference, or p34(2) on the p33 reference. If the grounds are not made out the order under either reference will fall to be made under p34(6) termination and renewal .

17. A third argument is that overlapping references could lead to duplication and delay, ad-hoc case management, and an opportunity for parties to game the system particularly where the termination dates differed. This is a good argument for effective case management but less so for asking the tribunal to interpret legislation in a way that obviates the need for it.
18. Much caselaw was cited concerning occasions when courts and tribunals have found it necessary to interpret legislation by implying terms not expressly provided for within the legislation. It is sometimes necessary for the courts to interpret statutes and/or imply terms to ensure that the intention of parliament can be given fair and practical effect. If the concerns raised by the Claimant could not easily be resolved by case management it might have been necessary to determine how Part 5 was intended to operate in the case of overlapping references.
19. However, the issue under both references is the Respondent's redevelopment plans. That is the Respondents defence to the p33 renewal reference and its grounds under the later p31 termination reference. Substantive directions were issued under the prior reference on 1 November 2023 and have been largely complied with. The original trial window of 3 months from 15 April 2024 is going to slip slightly to accommodate supplemental statements and expert planning evidence. This is likely to have been the case whether or not the second reference was commenced.
20. The tribunal could either stay the second reference or consolidate it. The Respondent does not seek a stay. If the redevelopment grounds are not made out, both references will fall to be determined under p34. If the redevelopment grounds are made out the tribunal will fix a date for the existing agreement to come to an end. That date will be fixed by reference to the balancing exercise the tribunal is obliged to undertake when assessing the strength of the parties' competing interests. As in theory this could leave an unresolved issue on a stayed reference it is preferable for the cases to be consolidated, and to run and be heard together. That way all issues can be considered and disposed of together avoiding delay and duplication.

21. I explained at the CMH that as the practical and procedural fairness issues raised by the Claimant can be dealt with by consolidation of the cases, it was not necessary or desirable for the tribunal to instead consider declaring the Notice in this reference to be invalid. Particularly when there was no express or implied provision in Part 5 of the Code that restricts the right of a Site Provider (or Operator) to issue a competing or overlapping notice. The issues on each reference are identical and the terms of any termination or renewal ordered by the tribunal, whether made under p31 or p33, will almost certainly be the same, because the facts and evidence on which the order will be determined are identical.
22. I therefore ordered that the cases be consolidated to run and be heard together on the timetable set out in the prior reference. Further directions for filing of evidence and listing were discussed and agreed by the parties. I will issue these once a clean copy is received from the Claimant's solicitor.
23. On behalf of the Claimant Ms Chorfi sought leave to appeal this decision. I expressed doubt as to whether there was a route of appeal from what is essentially a case management decision and on that basis refused leave. I did however give permission for the Claimant to make a further request in writing setting out the part or parts of the decision the Claimant wishes to appeal and its grounds of appeal. I will issue a decision on that application if permission is sought.

D Barlow  
Deputy Regional Judge