



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

Case Reference : **LC – 2023 – 000548**

Property : **Rooftop Site at Battle Bridge House,
300-306 Gray's Inn Road WC1X 8DU**

**Claimant
(Operator)** : **Vodafone Limited**

Representative : **Camilla Chorfi of counsel
instructed by Osborne Clarke LLP**

**Respondent
(Site Provider)** : **Platignum Properties Ltd**

Representative : **Wayne Clark of counsel
instructed by Knights PLC**

Application : **Electronic Communications Code**

Date of Hearing : **18th January by way of remote video platform**

Tribunal : **Judge D Jackson**

Date of Decision : **19 February 2024**

DECISION – Preliminary Issue

Background

1. The Applicant (“Vodafone”) occupies a rooftop telecommunications site at the Property (Battle Bridge House). The Respondent (Platignum Properties Limited – “PPL”) has been the freeholder of Battle Bridge House since 1995.
2. By a lease dated 25th November 2003 PPL demised the Property to BUPA Occupational Health Ltd for a term of 15 years commencing 25th November 2003 and expiring on 24th November 2018 (“the BUPA lease”).
3. By a lease dated 23rd January 2009 BUPA granted a lease of the rooftop site to Vodafone for a term of 15 years and 321 days commencing on 24th December 2002 and expiring 21st November 2018 (“the Vodafone Lease”).
4. As the BUPA lease contains a qualified prohibition on subletting it was necessary for the parties to enter into a Licence to Sublet also dated 23rd January 2009 and made between PPL (1) BUPA Occupational Health Limited (2) Vodafone (3) and BUPA Investments Limited (4) (“the Licence”).
5. The BUPA lease expired on 24th November 2018. However, on 15th May 2017 PPL relet the Property to BUPA by way of a reversionary lease for a term commencing on 25th November 2018 and expiring on 24th November 2023 (“the BUPA Reversionary Lease”).
6. On 15th March 2023 PPL served a Paragraph 31 Notice terminating Vodafone’s Code rights on 14th February 2024 on redevelopment grounds (“the Notice”). Vodafone served a counter notice on 5th June 2023.
7. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 28 August 2023 including an application for an order under paragraph 34 of the Electronic Communications Code requiring the parties to enter into a new agreement for the occupation by the claimants of land belonging to the Respondent of which the Claimants are already in occupation under a subsisting agreement.
8. By Order made on 30th August 2023 the reference was transferred to the First-tier Tribunal (Property Chamber) under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

Preliminary Issue

9. Determination of validity of the Paragraph 31 Notice served on 15th March 2023 was listed as a Preliminary Issue and heard by way of remote video hearing on 18th January 2024. Camilla Chorfi appeared for Vodafone and Wayne Clark appeared for PPL.
10. For completeness PPL has served a further Paragraph Notice 31 Notice on 14th December 2023 expiring on 12th November 2024 (“the Second Notice”). Vodafone does not dispute the validity of the Second Notice. However, the parties have not

been able to agree a basis on which to proceed on the basis of the Second Notice. Accordingly, this Decision is concerned solely with validity of the 15th March 2023 Notice.

The Old Code and the New Code

11. The Vodafone Lease is a subsisting agreement for the purposes of paragraph 2(4) of the Old Code and paragraph 2 of the Transitional Provisions.
12. In granting the Licence PPL became bound by the rights granted by the Vodafone Lease. Similarly in granting the BUPA Reversionary Lease, which was expressed to be subject to the Vodafone Lease, PPL further bound itself for the purposes of the Old Code and the Transitional Provisions.
13. The Vodafone Lease expired on 21st November 2018. However, under paragraph 30 of the (new) Code the existing code agreement continues so that the operator may continue to exercise the rights, and the site provider continues to be bound by the rights.
14. The BUPA Reversionary Lease came to an end on 23rd November 2023. I am told that the Property was handed back the day before its contractual term ended. This operates as a surrender and renders PPL's freehold interest the reversion expectant on the Vodafone Lease. It is accepted that PPL was then entitled to serve the Second Notice of the validity of which is not disputed.

Primary and Secondary Code Agreements

15. In **EE Limited and Hutchison 3G UK Limited v Edelwind Limited and Secretary of State for Housing and Communities** [2020] UKUT 0272 (LC) Upper Tribunal Judge Elizabeth Cooke considered the question of Primary and Secondary Code Agreements. In that case Edelwind was the freeholder and the Secretary of State the leaseholder. The Secretary of State granted rights to EE. The grant of those rights was the subject of a "Licence" granted by the freeholder, Edelwind. Upper Tribunal Judge Cooke explains in more detail at [6-7]:

"6. By an agreement dated 30 November 2002 ("the primary Code agreement") the second respondent conferred upon the first claimant the right to install and operate telecommunications equipment on the roof of the building. That agreement conferred rights under the statutory predecessor of the Code, Schedule 2 to the Telecommunications Act 1984. When the Code came into force in December 2017 the primary Code agreement was therefore a "subsisting agreement" within the terms of the transitional provisions enacted by the Digital Economy Act 2017 and is therefore an agreement to which the Code applies (with modifications that do not concern us).

7. *On the same date an agreement entitled “Licence” was made between the then freeholder, Diamondridge Limited, the second respondent, and the first claimant. It is agreed that by that agreement the freeholder gave consent to the second respondent to enter into the primary Code agreement and agreed to be bound by its terms. I refer to that licence as “the secondary Code agreement” because it is agreed that it operates as an agreement to be bound by Code rights. It too was a subsisting agreement at the point when the Code came into force.”*
16. The factual situation in **Edelwind** is similar in many respects to the facts of the present reference. Accordingly, it is appropriate to refer to the Vodafone Lease as “the primary code agreement” (“PCA”) and the Licence as “the secondary code agreement” (“SCA”).
17. Ms Chorfi for Vodafone takes no issue, for the purposes of the Preliminary Issue, with the reference to the Licence as a secondary code agreement in accordance with **Edelwind**. However, in the event of any appeal the Respondent’s position is reserved.
18. For the avoidance of any doubt Mr Clark for PPL has confirmed that the Notice served on 15th March was intended solely to determine the Licence (“SCA”). It is not suggested by PPL that the Notice has any effect in respect of the Vodafone Lease (“PCA”). Accordingly, nothing said in this Decision in any way affects the PCA. It may be, as Mr Clark suggests, that successful termination of the SCA will be sufficient to enable PPL to commence Part 6 proceedings for removal. Alternatively, it may be that a further reference may be necessary to determine termination of the PCA following service of the Second Notice. However, for present purposes I am not in any way concerned with the PCA or the Second Notice.
19. It is convenient to determine validity of the first Notice by answering four questions.

Question 1: What is the duration of the SCA?

20. The Licence entered into on 23rd January 2009 contains, at clause 2, consent to the “*Approved Draft Sublease*” to be entered into between BUPA and Vodafone [145]. Clause 1.1 provides [145]:

“Sublease Term: The term commencing on 24th December 2002 and ending on 21st November 2018”.

At clause 5.1 the provisions of the Landlord and Tenant Act 1954 are excluded [147].

21. Duration of an SCA was considered in **Edelwind** at [45-46]:

“45. I accept therefore that the purpose of obtaining a freeholder’s agreement to be bound by Code rights granted by a lessee may be to create Code rights of a longer duration than the occupier can confer.

46. But an agreement with the freeholder does not have to do that. It depends upon its terms. In the present reference the secondary Code agreement was a licence

which enabled the second respondent to grant Code rights where that would otherwise have been in breach of the covenant at clause 4.16 of its lease. There was no difficulty about the term of the Code rights; the second respondent's lease expires in 2027 and the Code rights were granted until 2024, so there was no need for an agreement with the freeholder to validate a conferral of Code rights for a term longer than the second respondent could grant and no indication in the secondary Code agreement of any intention to do that."

22. I find no difficulty in determining the term and duration of the code rights granted by the SCA. The "Sublease Term" expired on 21st November 2018 and is clearly expressed to do so both in the Licence (SCA) and the Vodafone Lease itself. It must therefore follow that the term and duration of the SCA is 24th December 2002 to 21st November 2018.
23. Of course, expiry of the contractual term does not mean that Code rights cease. Paragraph 30 applies, and rights continue. Ms Chorfi submits that the term of the SCA must include statutory continuation under Paragraph 30 and any rights under the 1954 Act (albeit contracted out). Ms Chorfi further submits that the duration of the SCA must be coterminous with the BUPA's interest. I am not persuaded that **Edelwind** provides any support for either proposition. Nor am I persuaded that the SCA should be construed as tethered to Vodafone's rights under the PCA. The term of the sublease, the subject matter of the SCA is clearly expressed to expire on 21st November 2018. In the face of such clarity, I am unable to construe the SCA nor treat its term and duration as including Vodafone's post term statutory rights to remain under either Paragraph 30 or the 1954 Act.

Question 2: Is the BUPA Reversionary Lease a further Secondary Code Agreement?

24. On 15th May 2017 PPL relet the Property to BUPA by way of a reversionary lease for a term commencing on 25th November 2018 and expiring on 24th November 2023. What is the status of that reversionary lease?
25. There are two potential answers to this question. Either the BUPA Reversionary Lease is an independent further SCA or it operates to extend or renew the existing SCA created by the Licence.
26. The first point to note is that Vodafone was not a party to the BUPA Reversionary Lease which was made between PPL (1) BUPA Occupational Health Limited (2) and BUPA Investments Limited (3) [161]. Under Paragraph 2(4) of the Old Code all that is required is for the intention to be bound to be contained in an agreement in writing. There is no requirement for a tri-partite agreement or even for the operator to be a party to the agreement.
27. I find that the BUPA Reversionary Lease operates to extend the existing SCA. The alienation covenant at paragraph 20.1 of Schedule 3 [174] contains a proviso in relation to renewal of the Vodafone Lease. The BUPA Reversionary Lease and the

SCA concern the same site owner which agrees to be bound in both cases, both concern the same rooftop site and the BUPA Reversionary Lease is made for the benefit of Vodafone. I find that the BUPA Reversionary Lease is not an independent further SCA.

28. The contractual term of the BUPA Reversionary Lease is set out at clause 1.1.6 [165]:

“Contractual term: 5 years from and including 25 November 2018 to and including 24 November 2023” .

The BUPA Reversionary Lease was not contracted out of 1954 Act protection. For the reasons set out at paragraph 23 above the term and duration of the BUPA Reversionary Lease does not include any post term continuation under Paragraph 30 or the 1954 Act.

29. There is a gap of 4 days between the Licence (SCA) which was for a term from 24th December 2002 to 21st November 2018 and the BUPA Reversionary Lease which was for a term 25th November 2018 and expiring on 24th November 2023. However, I am not persuaded that means that the BUPA Reversionary Lease is an independent further SCA.

Question 3: Is the termination date in the Paragraph 31 Notice valid?

30. The Notice of 15th March 2023 served by PPL gives a termination date of 14th February 2024.

31. A Notice under Paragraph 31 must specify the date on which the site provider proposes the code agreement should come to an end. Paragraph 31(3)(b) provides:

“(3) The date specified under sub-paragraph (2)(b) must fall—

(a) after the end of the period of 18 months beginning with the day on which the notice is given, and

(b) 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.”

32. I have already found that the SCA term expired on 21st November 2018. That term was extended by the BUPA Reversionary Lease which expired on 24th November 2023. Paragraph 31(3)(b) specifically requires that I should not take into account continuation under Paragraph 30. It therefore follows that the termination date of 14th February 2024 is valid.

Question 4: Does the Notice satisfy the reasonable recipient test?

33. The Notice [210] is in standard Ofcom form. It might have been helpful if the Ofcom form required the agreement the subject of the Notice to be specified. It does not. However, paragraph 2 of the standard wording refers to “otherwise bound”. Vodafone cannot be criticised for using the Ofcom form. It has been correctly completed. Put simply “it does the job”.
34. Ms Chorfi submits that the Notice when read with the covering letter is such that no reasonable recipient would have understood that the Notice was intended to terminate the SCA.
35. The covering letter [208-209] written by Knights solicitors, acting on behalf of PPL, to Vodafone is also dated 15th March 2023. The heading to the letter (in bold type) is helpful. The heading clearly sets out:
- Premises (i.e. the Property)
 - The Licence
 - Rooftop Lease (i.e. the Vodafone Lease): and
 - Lease (i.e. the BUPA Reversionary Lease).
36. Paragraph 2 refers to the Licence. Paragraph 5 refers to redevelopment. However, there is then a reference to “terminating any right which you have pursuant to the Rooftop Lease and the Code”. That is incorrect. The reference should be to the Licence and not “the Rooftop Lease”.
37. I am not satisfied that single error would cause any difficulty for the reasonable recipient. Vodafone would have been aware that PPL agreed to be bound by its code rights under the Licence and the subsequent BUPA Reversionary Lease. The Ofcom notice refers to “otherwise bound”. It would have been obvious to the reasonable recipient that PPL could not terminate the Vodafone Lease as it was not a party to that lease.

Decision

38. Licence to Sublet dated 23rd January 2009 and made between the PPL (1) BUPA Occupational Health Limited (2) Vodafone (3) and BUPA Investments Limited (4) as extended by Lease dated 15th May 2017 and made between PPL(1) BUPA Occupational Health Limited (2) and BUPA Investments Limited (3) is a secondary code agreement as understood by the Upper Tribunal in **Edelwind**.
39. The Paragraph 31 Notice dated 15th March 2023 is valid in respect of proposed termination of the secondary code agreement effective 14th February 2024 on redevelopment grounds.
40. The Notice of 15th March 2023 does not relate to, nor does it seek to terminate the primary code agreement contained in a Lease dated 23rd January 2009 and made between BUPA Occupational Health Limited (1) and Vodafone (2).

41. Accordingly, nothing said in this Decision is of any effect in respect of the primary code agreement.

42. I make an Order that the Claimant shall pay the Respondent's costs of the Preliminary Issue summarily assessed in the sum of £12,000 together with any additional amount to reflect any VAT payable thereon.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.