FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023 – 000322, 323, 332, 348 and 365**
Properties (Abbreviated Site Name)	**:**	**Lubbards Lodge (322)** **Sandbach (348)** **Blackwell Grange (365)** **Hexton (323)** **Ampthill (332)**
Claimant	**:**	**On Tower UK Limited**
Representative	**:**	**Oliver Radley-Gardner KC and Kester Lees instructed by Gowling WLG (UK) LLP**
Respondent	**:**	**AP Wireless II (UK) Limited** **Robert and Jacalyn Parrish (332 – Ampthill only)**
Representatives	**:**	**Toby Watkin KC and Wayne Clark instructed by Eversheds Sutherland (International) LLP and Freeths LLP (322 and 348 only)**
Application	**:**	**Electronic Communications Code**
Date of Hearing	**:**	**13th and 14th December 2023** **Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**9th January 2024**

DECISION – Preliminary Issues 2 and 3

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1. On 30th October 2023 I issued my Decision on the First Preliminary Issue between the parties. That Decision concerned lease/licence distinction in respect of agreements relating to two sites known by the abbreviated site names of "Lubbards Lodge" and "Sandbach".

2. This Decision concerns the Second and Third Preliminary Issues raised by the Respondent, AP Wireless. The other Respondents in "Ampthill" Mr and Mrs Parrish having granted a concurrent lease to AP Wireless have taken no part in proceedings.

3. The Second Preliminary Issue concerns LC-2023-000332 ("Lubbards Lodge"), LC-2023-000348 ("Sandbach") and LC-2023-000365 ("Blackwell Grange"). The Second Preliminary Issue can be stated thus:

   Is the Claimant, On Tower, a "party to a Code agreement" for the purposes of Paragraph 33 of the Electronic Communications Code?

4. The Third Preliminary Issue concerns LC-2023-000323 ("Hexton") and LC-2023-000332 ("Ampthill") and can be succinctly put:

   Does the Claimant, On Tower, have sufficient title to bring these references?

5. In the Respondent's submission the Claimant has failed to establish that it is a party a Code agreement in respect of Lubbard's Lodge, Sandbach and Blackwell Grange. The Tribunal therefore has no jurisdiction to hear those references and they must be struck out. In respect of Hexton and Ampthill it is the Respondent's submission that the Claimant has failed to establish its standing to bring those references and they too must be struck out.

The Second Preliminary Issue – The Respondent's Position

6. The Claimant occupies the three sites under the terms of the following agreements:

   Lubbard's Lodge – Agreement dated 21st January 2022 and made between David Cousin Pinkerton and Andrew James Pinkerton (1) and Orange Personal Communications Services Ltd (2)

   Sandbach – Agreement dated 11th March 1997 and made between N Thornhill (1) and Orange Personal Communications Services Ltd (2) subject to a Supplemental Agreement dated 2nd November 2000

   Blackwell Grange – Agreement dated 5th July 2007 and made between Blackwell Grange Golf Club Limited (1) and T-Mobile (UK) Limited (2)

7. Following my Decision on the First Preliminary Issue the Lubbard's Lodge and Sandbach Agreements are licences and not leases. The parties agree that the agreement in respect of Blackwell Grange is also a licence. The Claimant is not the original licensee in respect of any of the three sites.

8. Paragraph 33 of the Code provides:

   (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—

9. The Respondent relies on the dicta of Nugee LJ in **Gencomp** (**Vodafone Ltd v Potting Shed Bar and Gardens Ltd, formerly known as Gencomp (No.7) Ltd**) at [75]:

   "…, 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" with the result that it can invoke paragraph 31 by serving notice on Vodafone, and both it and Vodafone can invoke paragraph 33 by serving notice on each other as "the other party to the agreement."

10. Accordingly, it is the Respondent's case that an operator is only "a party to a Code agreement" where it is a "person currently entitled to the benefit and burden of the agreement as operator".

11. The "General Rule" is that that whilst the benefit of a contractual licence can be assigned the burden cannot be assigned. In **Bexhill UK Limited v Razzaq** [2012] EWCA Civ 1376 at [44] Aikens LJ made it clear that an assignee is the beneficial owner of a chose in action and not a party to the agreement.

12. The statutory exception to the General Rule set out in Paragraph 16(4) of the Code which provides for an assignee to be bound by the terms of a code agreement is not available to the Claimant because the three agreements falling for consideration were created prior to 28th December 2017 and are therefore treated as "subsisting agreements" for the purposes of the Transitional Provisions set out in Schedule 2 to the Digital Economy Act 2017. Paragraph 5(1) of those Provisions disapplies Paragraph 16(4) to subsisting agreements.

13. I am grateful to Mr Watkin for his learned submissions elucidating the Conditional Benefit Principle which is also sometimes referred to as an exception to the General Rule. However, the true nature of that principle was explained by Gloster LJ in **Budana v Leeds Teaching Hospitals NHS Trust** [2018] 1 WLR 1965 at [63] where it was held that it was wrong to assume:

   "… that the conditional benefit principle involves an "assignment of obligations", whereas in fact it involves no such thing. Rather, it involves the imposition by law on a contractual assignee or successor in title of a positive obligation under the relevant contract or conveyance, notwithstanding the absence of any contractual or estate obligation to the third party beneficiary of the obligation."

14. As Mr Watkin submits the Condition Benefit Principle does not apply "wholesale". It operates in relation to particular burdens within an agreement which are intrinsic to the exercise of rights granted. In Mr Watkin's submission the Claimant can only be said to be "*entitled to the benefit and burden of the agreement as operator"* where, using Mr Watkin's emphasis, it has become entitled to **all** the benefits and **all** the burdens of the agreements. It is simply not enough for an assignee operator to become contractually entitled to some or all of the rights under the agreement.

15. There are limitations on the application of the Conditional Benefit Principal as identified by Lord Templeman in **Rhone v Stephens** [1994] 2 AC 310:

    (1) The condition must be relevant to the exercise of the right and
    (2) the assignee must be able to choose between enjoying the right and performing the burden or alternatively giving up the right

    The first condition was considered in **Energy Works Projects (Hull) Limited v MW High Tech Projects UK Ltd** [2020] EWHC 2357 QBD (TCC) where it was held that the obligation must be "inextricably linked" to the benefit assigned.

16. Mr Watkin's analysis demonstrates that the Claimant cannot show the necessary "inextricable link" between the enjoyment of rights to install telecommunications equipment at each of the three sites and the burdens imposed. Two examples suffice. First payment by the Claimant of fees or tariff payments under the agreements is insufficient (see payment of solicitors' fees under a CFA in **Budana**). Second the obligation to restore/reinstate each of the three sites at the end of the term was held to be insufficient in **Tito v Wardell (No. 2)** [1977] 1 WLR 106 in respect of mining rights.

17. In response Mr Radley Garner also referred me to **Tito v Wardell** at [1977] Ch. 106, 290 A-C:

    "An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit."

    Despite Mr Radley-Gardner's learned arguments I am not persuaded that the rights under the three agreements are qualified or conditional nor that the principle set out in **Tito v Wardell** can be stretched so as to regard the burdens and benefits as being wrapped into a package which can then be assigned. Nor in my judgement can the Claimant rely upon pure principle of benefit and burden (in the sense of rights being reciprocal) even assuming that any vestige of such principle remains.

The Conditional Benefit Principle is of "limited scope" (**Budana**). As was said in **Rhone v Stephens** "the mere fact that the same instrument creates both the benefit and burden, or that they both relate to the same subject matter, is not enough".

18. Mr Watkin's analysis of the General Rule and the Conditional Benefit Principle seems to me to be impeccable. However, for that analysis to be determinative of the application to strike out these references I must next consider the context in which Nugee LJ's dicta in **Gencomp** were made and the proper construction of Paragraph 33(1) of the Code.

Gencomp

19. The decision in **Gencomp** needs to be approached with some caution. **Gencomp** was concerned primarily with question of a concurrent lease entered into by a site provider. The present application, of course concerns licensees not lessees and very different considerations come into play. **Gencomp** was an appeal by a site provider (in fact APW who are the Respondent to the references before me) and focused on whether APW was "a party to a code agreement" under Paragraph 10 of the Code. Paragraph 10 has no application to operators. Finally, the transitional provisions did not apply in **Gencomp** and therefore Paragraph 16(4) was available. For all those reasons the specific passage at [75] of **Gencomp** on which the Respondent hangs its submissions in respect of benefit and burden is not binding on me.

20. However, **Gencomp** does contain useful guidance. I can do no better than to start with Nugee LJ at [74]:

"…interpretation of a legal text is never simply a matter of language. It is always relevant to seek to understand how the instrument is intended to work and why. And in the particular context of the Code, we have the benefit of guidance on this from the Supreme Court in Compton Beauchamp. There the question was who was "the occupier" in circumstances where the operator would normally be regarded as in occupation of the site (see paragraph 16 above). The guidance given by Lady Rose (at [106]) is as follows:

"The correct approach is 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".

21. At paragraphs [58] – [63] Nugee LJ considers how the Code is intended to work where there is a change of operator:

"…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." [58]

"Take first the case where there is a change of operator." [59]

I pause at this stage to remind myself that Nugee LJ was not talking about transitional cases. Indeed, in the following extract from [60] he specifically refers to the availability of Paragraph 16(4) which provides that an assignee (other than one excluded by the transitional provisions) takes both the benefit and burden of a code agreement.

"…It is to be noted that code agreements may take the form of the grant of property rights (either in the form of a lease or an easement) but may take the form of merely contractual arrangements …. Under the general law the assignment of a contract is effective to confer the benefit of the contract on an assignee but not normally the burden of the contract."

This it seems to me is the highwater mark of the Respondent's submissions on strike out. Nugee LJ continues at [61]:

"What however is conspicuously missing from the Code (either in paragraph 16 or anywhere else) is any provision equivalent to that in paragraph 10(3) that such an assignee is to be treated as a party to the agreement. But it cannot seriously be supposed that, after an assignment by B to C, C is not a "party to the agreement" for the purposes of the Code."

The crux of the matter can be found at [63]. Here Nugee LJ is considering the availability of Paragraph 33 to "A" the site provider and "C" the assignee:

"Now it was in fact common ground before us that in such a case C is to be regarded as a party to the agreement, and that A does have the right to invoke both paragraph 31 and paragraph 33 against C. I agree that this is the only sensible interpretation. But it should be noted what this means. It means that the Code requires C to be regarded as a "party to the agreement" despite the fact that there is no provision stating that an assignee of the agreement is to be treated as a party to it. Two things to my mind follow. First the drafter of the Code cannot have intended "party to the agreement" to mean (only) an original party to the agreement. And second, the drafter cannot have intended "party to the agreement" to be confined to (i) an original party to the agreement and (ii) a person expressly stated by the Code to be a person treated as a party to the agreement."

Thus, we see that the stumbling block of Paragraph 10 which was at the heart of **Gencomp** when considering the site provider and its concurrent lease provides no obstacle to the operator. There is no provision within the Code stating that an assignee is "a party to a Code agreement" but it "cannot seriously be supposed" nor is it "a sensible interpretation" that an assignee is not such a party.

Paragraph 33

22. I now turn to look at the wording of Paragraph 33 of the Code:

How may a party to a code agreement require a change to the terms of an agreement which has expired?

(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—

23. 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 of the burdens of the original contracting party.

24. 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 result 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.

The Claimant's Answer - Paragraph 12(1)

25. An alternative solution is advanced by Mr Radley-Gardner by way of Paragraph 12(1) of the Code. Part 2 of the Code is not disapplied to subsisting agreements by the Transitional Provisions. Paragraph 12(1) provides:

    "A Code right is exercisable only in accordance with the terms subject to which it is conferred".

    In Mr Radley-Gardner's submission 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).

26. I keep firmly in mind the warning of Nugee LJ in **Gencomp** at [78]:

    "The Code has to be applied both to contractual arrangements such as licences or wayleaves and to the grants of property rights such as leases. But I do not accept that

this means that one jettisons the ordinary law of landlord and tenant, or, as Lewison LJ put it in argument, that the Code exists in a legal vacuum."

However, the answer to the question whether or not the Claimant assignee is a "party to a code agreement" must be found within the statutory provisions of the Code and not the General Rule elucidated with such clarity by Mr Watkin.

27. In oral argument both parties were invited to consider the wording of Paragraph 30 of the Code:

Continuation of code rights

(1) Sub-paragraph (2) applies if—
(a) a code right is conferred by, or is otherwise binding on, a person (the "site provider") as the result of a code agreement, and
(b) under the terms of the agreement—
(i) the right ceases to be exercisable or the site provider ceases to be bound by it, or
(ii) the site provider may bring the code agreement to an end so far as it relates to that right.

(2) Where this sub-paragraph applies the code agreement continues so that—
(a) the operator may continue to exercise that right, and
(b) the site provider continues to be bound by the right.

Mr Watkin submits that Paragraph 30 is concerned solely with code rights and not code agreements. An operator should not under the present circumstances be entitled to access Part 5 to change the terms of an existing agreement. It is accepted by the Respondent that the Claimant can terminate the existing agreements and apply for new rights under Paragraph 20. No "fix" is required.

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 30(2) 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".

28. 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.

The Third Preliminary Issue – Hexton

29. The Claimant derives title from a lease granted to Orange for 20 years from 3rd September 2002. Orange assigned to EE who subsequently assigned to Arqiva. Arqiva assigned to the Claimant (previously known as Arqiva Services). The Respondent's

case rests on the failure of the Claimant to produce a copy of the Assignment from Orange to EE.

30. However, a Licence to Assign from EE to Arqiva dated 30th June 2017 contains a recital at C of an Assignment dated 14th October 2013 vesting the unexpired term in EE.

31. The Claimant bears the burden of proof to the civil standard (**Loveluck-Edwards v Ideal Developments Limited** [2012] EWHC 716).

32. On the balance of probabilities I find, on the basis of the recital, that the Assignment of 14th October 2013 existed but is now lost. The Claimant has sufficient title to bring the reference in respect of Hexton.

The Third Preliminary Issue – Ampthill

33. The Claimant's title derives from a lease granted to Orange for 20 years from 29th April 2002. There are then two inconsistent Assignments:

    - 13th May 2013 Orange to EE
    - 17th October 2016 Orange to Arqiva

34. The Claimant claims title from Arqiva. The Respondent's case is that the 2016 Assignment to Arqiva was ineffective as the unexpired residue of the term was by that time vested in EE pursuant to the 2013 Assignment.

35. The Claimant's answer is to be found in the recital to a Licence to Vary and Sublet also dated 17th October 2016 and made between the Parrish family as lessors, Orange and Arqiva. The Licence recites that Orange was the tenant at that time. EE, although not a party to the Licence, is referred to in the Schedule in respect of sharing arrangements.

36. I am not satisfied that is a sufficient answer. Unlike Hexton the recital does not provide an answer on which I can be satisfied on the balance of probabilities that the unexpired term was still vested in Orange at the time it purported to assign to Arqiva.

37. However, there are other relevant matters. Firstly, I find as 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.

38. 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.

39. 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.

40. 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.

Decision

41. In respect of the Second Preliminary Issue the Claimant is a "party to a Code agreement" for the purposes of references LC-2023-000332 ("Lubbards Lodge"), LC-2023-000348 ("Sandbach") and LC-2023-000365 ("Blackwell Grange") made pursuant to Paragraph 33 of the Electronic Communications Code

42. In respect of the Third Preliminary Issue the Claimant has sufficient title to bring references LC-2023-000323 ("Hexton") and LC-2023-000332 ("Ampthill")

43. The Respondent's applications to strike out references LC-2023-000332 ("Lubbards Lodge"), LC-2023-000348 ("Sandbach"), LC-2023-000365 ("Blackwell Grange"), LC-2023-000323 ("Hexton") and LC-2023-000332 ("Ampthill") are refused.

44. The Respondent shall pay the Claimant's costs of the Second and Third Preliminary Issues summarily assessed in the sum of £26,000 within 28 days of the date of this Decision.

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.

APPENDIX
The Properties

Lubbards Lodge (322) – Land lying to the west of Burlington Gardens, Hullbridge, Hockley SS5 6BD

Sandbach (348) – Meadowley and Fields Farm, 150A, 150B, Congleton Road, Sandbach CW11 4TE

Blackwell Grange (365) – Telecommunications Site, Blackwell Grange Golf Course, Darlington DL3 8QL

Hexton (323) – Land lying to the south of Mill Lane, Hexton, Hitchin SG5 3JH

Ampthill (332) – Manor Farm, Millbrook Road, Houghton Conquest, Bedford MK45 3JL