



Neutral Citation Number: [2025] UKUT 43 (LC)

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

APPEAL AGAINST A DECISION OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL

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

Mr Justice Fancourt
Written submissions received: 17 January 2025
Decision date: 6 February 2025

Mr Toby Watkin KC and Mr Wayne Clark for the appellant

Mr Kester Lees KC for the respondent

© CROWN COPYRIGHT 2024

Mr Justice Fancourt :

1. On 18 December 2024, the Tribunal published my decision on the substantive issues heard on the appeal against the decision of the First-tier Tribunal (neutral citation: [2024] UKUT 429 (LC)) (“the Decision”).
2. On the First Issue, I decided 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 of the Code.
3. It appeared to me that, in the case of each of the three agreements that I had considered, there was such a covenant (by way of indemnity only) made by On Tower as assignee with Arqiva as assignor, and that accordingly On Tower thereupon became “a party to the Code agreement” for those purposes. However, the factual question of whether such a covenant had been made by On Tower had not been addressed by the parties and accordingly I gave them liberty – if they could not agree the answer to that question in any such case – to return to argue that question. Although I indicated that, in the first instance, the parties should notify the Tribunal of the basis for any disagreement on this question, so that I could consider whether to direct a further hearing or invite written submissions, APW instead has sent written submissions explaining their reasons for contending that it was not in fact the case that a covenant complying with the description in my decision had been made by On Tower. I therefore infer that there is no agreement.
4. APW indicated in its letter dated 17 January 2025, enclosing its submissions, that it had sent them to On Tower too. On Tower has not responded to the submissions but, for the reasons given below, it is unnecessary for it to do so now.
5. In relation to the **Sandbach** licence agreement, APW contended that a different version of a licence agreement, which it contended was the correct version in place of that contained in the appeal bundle and referred to at the hearing, contained a clause stating that it was the parties’ intention that the agreement they made “shall continue to bind their respective successors in title”. On that basis, it submitted that, even if on the basis of my decision an indemnity covenant would normally render the assignee primarily liable and so a party to a

Code agreement, that should not be so in a case where the parties intended that successors in title should be bound by the agreement and where On Tower is not bound.

6. I disagree. Putting to one side the issue of whether I should now be considering a different licence agreement that was not before me at the hearing, the fact that an agreement contains a (commonplace though – for a licence - inapposite) expression of intention that successors in title should be bound does not amount to an agreement that a lawful assignee of the benefit of the agreement cannot be (for statutory purposes) a party to a Code agreement unless they have covenanted with the successor in title of the licensor to comply with its obligations. Nor does it mean that there is no valid covenant (by way of indemnity) with the assignor. If anything, such a term indicates an intention that successors in title (so far as legally possible) should automatically be bound, though that is not legally possible in the case of a licence agreement. The expression of intention has no impact at all on the question that I have decided or on the reasons for my decision.
7. In relation to the **Blackwell Grange** licence agreement, APW relies on an obligation of the original licensee that every assignee should covenant directly with the licensor to observe the terms of the licence. Arqiva did give such a covenant for so long as the agreement was vested in it. On the further assignment from Arqiva to On Tower, no such covenant with the licensor was made. On Tower was not bound to the licensor or any successor of the licensor by that covenant, though it did covenanted with Arqiva (by way of indemnity only) to perform the obligations of the licensee.
8. APW argues that there is no covenant by On Tower which puts it in the same position as Arqiva. That may be true, in the sense that On Tower is not obligated to APW, whereas Arqiva was obligated to APW's predecessor in title. However, immediately prior to the assignment to On Tower, Arqiva was principally liable to perform the licensee's obligations, and immediately after the assignment, as between Arqiva and On Tower, On Tower was principally liable to perform them, by reason of the indemnity covenant it gave. That therefore satisfies the test in my decision.
9. APW also argues that On Tower cannot be treated as a party to a Code agreement because there is no indirect means by which APW can require On Tower to comply with the obligations in the licence agreement. APW cannot sue either of On Tower's predecessors in title in the hope that they will enforce On Tower's covenant. That merely repeats a written submission made by APW prior to my Decision and is irrelevant. For the reasons given in my decision, the question is not whether APW standing in the shoes of the licensor can enforce against On Tower, directly or indirectly, but whether On Tower stands in the shoes of its assignor as the person principally liable, as between them, to perform the obligations, and so becomes the party to the Code agreement in place of the assignor. By reason of the covenant given by On Tower to Arqiva, it does.
10. As regards **Lubbards Lodge**, APW has informed me that this Tribunal's decision that the agreement in that case created a tenancy and not a licence is now final, so that the contingent decision I made in relation to it – in case a further appeal succeeded – does not need to be taken any further. I will therefore express no view in relation to that matter, as it would be otiose to do so.
11. Accordingly, I conclude that in relation to **Sandbach** and **Blackwell Grange**, 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, and formally dismiss APW's appeal on the First Issue, as described in the Decision, for the reasons given there.

Mr Justice Fancourt

6 February 2025

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.