UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0272 (LC)
UTLC Case Number: TCR/90/2020

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – preliminary issue about the validity of paragraph 31 notices – service – effectiveness of break notice in a lease – assignment of Code agreement in breach of covenant – whether the Code agreement was a lease or a licence – effect of agreement to be bound by Code rights

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

(1) EE LIMITED
(2) HUTCHISON 3G UK LIMITED

Applicants/
Operators
and

(1) EDELWIND LIMITED **Respondents/**
(2) SECRETARY OF STATE FOR HOUSING COMMUNITIES **Site providers**

Re: 11 Belgrave Road,
London,
SW1V 1RB

Upper Tribunal Judge Elizabeth Cooke
11 August 2020
Skype Hearing

Stephanie Tozer QC for the applicants, instructed by Winckworth Sherwood
Wayne Clark for the first respondent, instructed by Baker & McKenzie

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The following cases are referred to in this decision:

Arqiva Services Limited v AP Wireless II (UK) Limited [2020] UKUT 195 (LC)
Cornerstone Telecommunication Infrastructure Limited v Compton Beauchamp Estates Limited [2019] EWCA Civ 1755
Old Grovebury Manor Farm v W Seymour Plant Sales & Hire (no 2) [1979] 1 WLR 1397
Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2015] UKSC 72
Street v Mountford [1985] UKHL 4
TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd [2019] EWHC 1363 (Ch)

Introduction

1. This is the Tribunal's decision on a preliminary issue in a reference made under Schedule 3A to the Communications Act 2003 (known as the Electronic Communications Code, and referred to here as "the Code"). The reference is brought by the claimants, who operate telecommunications equipment on a rooftop site of which the first respondent is the freeholder and the second respondent holds a long lease. The reference was made after the respondents served notices under paragraph 31 of the Code, seeking to bring to an end the agreements that create Code rights in respect of the roof; the claimants say that the notices were invalid.

2. Success for the claimants on the preliminary issue would bring the reference to an end; success for the respondents will require the determination of a further preliminary issue namely whether the first respondent intends to redevelop the building on the roof of which the claimants operate telecommunications apparatus.

3. This first preliminary issue was heard using a remote video conferencing platform on 11 August 2020. Ms Tozer QC represented the claimants and Mr Clark represented the first respondent. The second respondent did not appear and was not represented.

4. It is for the claimants to show that the paragraph 31 notices were invalid; in the paragraphs that follow I explain the factual and legal background and then set out the various points made by Ms Tozer QC about the notices, and the argument and my conclusions on each, explaining the relevant law where necessary.

The factual and legal background

The agreements

5. The first respondent is the freeholder of 11 Belgrave Road, London SW1V 1RB ("the building"), and the second respondent holds a 25-year lease of the building granted on 2 November 2002. The claimants are both "Code operators", which means that they have been designated by Ofcom, pursuant to the section 106 of the Communications Act 2003, as operators who can have Code rights conferred upon them.

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.

8. Paragraph 11.1 of Schedule 3 to the primary Code agreement obliges the first claimant:

> "Not to assign this Agreement or the Rights nor to grant any rights in respect of the Telecommunications Equipment or the Equipment Cabin to any third party and the Company [the First Claimant] acknowledges that this Agreement is personal to it provided that the Company shall have the right to assign the benefit of the use of the Rights to a member of the same group of companies as the Company (within the meaning of the Landlord and Tenant Act 1954 Section 42(as amended) without the need for the Owner's Approval or any other party with the Owner's Approval."

9. On 31 March 2010 the first claimant made a deed purporting to assign the primary Code agreement to itself and the second claimant. It is not in dispute that such an assignment would have been contrary to the terms of paragraph 1.1 of Schedule 3, set out above, since they claimants were not at that date members of the same group of companies. It is agreed that the law is clear: if the primary Code agreement is a lease then that assignment was effective, but not otherwise.

10. The primary Code agreement contains a break clause at paragraph 1.2(a)(i) of Schedule 4, enabling the second respondent to bring it to an end on 12 months' written notice if it has planning permission for a development that it cannot carry out with the claimant's equipment in place.

11. Those, then, are the agreements that form the background to this preliminary issue.

Bringing Code rights to an end

12. The primary Code agreement is expressed to expire on 29 November 2024. However, paragraph 30 of the Code provides that Code agreements do not come to an end when they expire, but continue until terminated in accordance with paragraph 31 and following. Paragraph 31 provides for Code rights to be brought to an end by notice given by a site provider who is a party to the relevant agreement. The notice must specify the grounds on which the agreement is to end, including the site provider's intention to redevelop the site in a way that is incompatible with the continuation of the agreement. The notice must specify a date at which the agreement is to come to an end, which must be:

> "31(3)(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."

13. If the Code operator does not want the agreement to come to an end it must serve counternotice within three months of service of the paragraph 31 notice and then, if that does not resolve matters, within a further three months must apply to the Tribunal for a decision as to whether the grounds for ending the agreement are made out.

The notices

14. On 19 December 2019 the solicitors for the first respondent served on the first claimant a notice in the standard form of a notice under paragraph 31(1) of the Code. It stated that the first respondent was party to an agreement with the first claimant whereby it agreed to confer or be bound by code rights, that it proposed to bring the agreement to an end on 24 June 2021, and that it intended once the Code agreement came to an end to redevelop the property and could not do so unless the Code agreement came to an end.

15. On 23 December 2019 the same solicitors, acting for the first respondent but writing on behalf of the second respondent, served another notice in the form of a paragraph 31 notice, in identical terms save that it proposed the agreement should end on 30 June 2021.

16. The claimants served counter-notices without prejudice to their contention that those notices were not valid, and on the same basis made the present reference.

The pleadings

17. The claimants' Statement of Case recited the respondents' interests in the building and referred to the primary Code agreement as "the Code agreement". As to the first respondent's notice, it said that the first respondent was not a party to the Code agreement and so could not serve a paragraph 31 notice, that the notice was served far too early in view of the contractual expiry date, and that the first respondent could not be relying on the contractual break clause because it was not a party to the agreement, had not referred to the break clause, and did not appear to have planning permission.

18. As to the second respondent's notice, again the claimant said that the notice was served far too early in view of the contractual expiry date, and that although the second respondent was a party to the agreement it could not rely on the contractual break clause because, again, there was no indication that the break clause was relied upon, there was no sign of a planning permission, and in any event it appeared from the first respondent's

solicitor's letter that it was the first respondent that intended to demolish the building, not the second.

19. As to both notices, the first claimant said that it was invalid for the additional reason that the second claimant had not been served.

20. The respondents' Statement of Case , served in accordance with the Tribunal's directions on 22 July 2020, explains the position as follows. Neither respondent is relying upon the break clause in the primary Code agreement. But there is a break clause in the second respondent's lease; and that, it is said, was exercised by the second respondent on 14 December 2018 so as to bring the lease to an end on 2 April 2021. And the notices served by the two respondents relate to the secondary and primary Code agreements respectively. On ordinary legal principles the primary Code agreement will come to an end, say the respondents, when the lease ends and the end date specified in the two notices falls after that date.

21. As to the second claimant, so far as the respondents are concerned the second claimant is not a party to either the primary or the secondary Code agreement and so there was no need to serve the notice upon it.

22. It may be, and this is guesswork on my part, that the claimants' representatives overlooked the secondary Code agreement when considering the notices. At any rate they drafted their Statement of Case on the assumption that both notices referred to the primary Code agreement. It is now accepted that the first respondent's notice was intended to bring the secondary Code agreement to an end and the second respondent's notices to bring the primary Code agreement to an end. But even had the first claimant tumbled to that on receipt of the notices, how it was supposed to make sense of them without being told about the exercise of the break clause in the second respondent's lease is a mystery. No attempt has been made by the respondents to enlighten the claimants, or the Tribunal, as to why that information was not given to the first claimant when the notices were served, rather than seven months later.

The points made by the Claimants

23. The claimants have two arguments for the invalidity of the notices: the date point and the recipient point.

24. The date point is that the notices were invalid because they were served too early, expiring before the time at which the code rights would, but for paragraph 30, have come to an end which they maintain remains the contractual expiry date of 29 November 2024.

25. The respondents say that because of the breaking of the lease the Code agreements will come to an end with that lease on 2 April 2021 and that therefore the service of notices specifying an end date of 24 June 2021 is appropriate. In response to this the claimants make three points:

a. First, that the respondents have not shown that the break notice was served

b. Second, that the service of the break notice does not enable the Tribunal to find that the Code agreements "would" come to an end on 2 April 2021.

c. Third the claimants say that even if the Tribunal is able to find that the primary Code agreement comes to an end on that date, the secondary Code agreement does not do so; it is not a derivative interest under the second respondent's lease. Therefore the first respondent's notice is invalid.

26. Further, in case they fail on the date point, the claimants make the recipient point, which is that the notices were served on the first claimant but should have been served on both. The claimants say, first, that the primary Code agreement was a lease not a licence and that therefore even if the assignment was in breach of covenant it was effective, and second, that the secondary Code agreement was also a lease and therefore, for the same reason, has been effectively assigned.

The date point

27. Turning now to the detail, the claimants accept that if the second respondent's lease is in fact brought to a premature end then the primary Code agreement, being an interest derived from it, would fall with it but for the operation of paragraph 30 of the Code. But they do not agree that that is going to happen on 2 April 2021. If they are right then the notices were served prematurely, because they would not have complied with paragraphs 31(3). The claimants have three arguments about this.

Was the break notice served?

28. When Ms Tozer QC's skeleton argument was drafted the respondents had not provided any witness evidence to the effect that the break notice was served, and their Statement of Case was not verified by a statement of truth.

29. Since then, the respondents have provided two witness statements sworn by Mr Ben Farnell, a solicitor and partner in Baker & McKenzie LLP, the first respondent's solicitors, attesting to the service of the break notice and exhibiting correspondence between Clarke Willmott LLP, the second respondent's solicitors and Farrer and Co LLP, the first respondent's former solicitor. Mr Clark at the hearing professed indignation at the demand for evidence, when the Tribunal had given no directions for the service of witness statements. That of course was because of the puzzle posed by the notices and the fact that the Tribunal was as much in the dark about the basis on which they had been served as were the claimants. The respondents having kept the factual basis of the notices, namely the breaking of the lease, up their sleeves for so long can hardly be surprised at the claimants' wish for some evidence on the point.

30. For the claimants it is argued that the evidence now provided is not good enough. Mr Farnell's evidence is hearsay. There is no evidence produced from the individual who actually posted the notice. It is not known whether the first respondent's then solicitors were authorised to accept service.

31. Mr Clark referred me to *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2019] EWHC 1363 (Ch), where HHJ Davis-White QC sitting as a judge of the High Court held, at paragraph 108, that if a person authorises a solicitor to hold itself out as acting for it, that solicitor has apparent authority to accept service of documents,

    and "to hold otherwise would mean that solicitors who made representations that they had authority to accept service (whether or notices of proceedings) would not be capable of being relied on without some further evidence of authority from the client, which would be a great change in the manner in which matters customarily proceed at present."

32. Even without that authority I take the view that sufficient evidence of service has been provided. There is no allegation of bad faith, no suggestion that the witnesses be crossexamined, and really no basis on which the Tribunal can do other than find that the break notice was served, and I do so.

    Will the break notice bring the lease to an end?

33. Ms Tozer QC then argues that even if the notice was validly served, it will not necessarily bring the lease to an end. The lease provides that the break notice will only take effect if the second respondent has paid rent up to date and gives vacant possession (other than as regards telecommunications equipment). To do that it will have to get itself and its chattels out, and also ensure that its sub-tenants have left, and there is no evidence that that will happen. The Tribunal must find, on the balance of probabilities, that the lease will (not might) come to an end on 2 April 2021 and it cannot just assume that the break notice will make that happen.

34. Mr Clark in response says that paragraph 31(3) uses the word "would", not "will", and that that expresses conditionality or probability. He says that the Tribunal has to find on the balance of probabilities that the lease will probably come to an end on 2 April 2021 and that it has enough evidence to do so.

35. Paragraph 31(3) says that the date specified in the notice must fall:

> "after the time at which, apart from paragraph 30, the code right … would have ceased to be exercisable…"

36. The drafter could not have used "will" instead of "would" because the phrase "apart from paragraph 30" and the implied counterfactual require the conditional mood. If an agreement is going to expire by effluxion of time on 1 January 2021 we say "this agreement would come to an end on 1 January but for paragraph 30 (as a result of which it will not)". The "would" is dictated by form of the sentence; it does not mean "will probably", or "might".

I agree with Ms Tozer QC that for the respondents to succeed on the date point I have to find on the balance of probabilities that the lease will come to an end.

37. Again, on the balance of probabilities it is difficult to see how I could do otherwise. A break notice has been served. There is no allegation or evidence of bad faith. It is likely, as a matter of fact, that where a lessee serves a break notice (which is irrevocable) it wishes to bring the lease to an end and thinks it will be able to get out and get it sub-tenants out by the date of the break. To say that that was unlikely, or no more likely than not, is to speculate. It is true that a break notice could be served collusively in these circumstances, but that would be a very risky course of action for the two respondents to take because of the risk of detection.

38. I find on the balance of probabilities that 2 April 2021 is the date on which, as a result of the service of the second respondent's break notice, the primary Code agreement would come to an end but for the effect of paragraph 30 of the Code. The termination date specified in the second respondent's notice falls after that date, and the date point therefore fails so far as that notice is concerned.

Does the second Code agreement continue despite the ending of the primary Code agreement?

39. The Claimants say that even if the primary Code agreement comes to an end on 2 April 2021 the secondary Code agreement will not.

40. Ms Tozer QC argues that the purpose of a secondary Code agreement is to confer rights for a longer term that the occupier itself can grant, and that therefore the agreement to be bound by

Code rights is not vulnerable to the break clause in the second respondent's lease. That in her view is the whole point of an agreement by a superior landowner to be bound by the Code rights granted by its tenant or licensee.

41. In considering this argument it is worth bearing in mind that these agreements were drafted under the old Code and without reference to the structure of the present Code where agreements to be bound by Code rights have an important role to play. I agree with Ms Tozer QC's analysis of such agreements under the present Code. I explain that effect further below, and then explain why I do not think the secondary Code agreement has the effect for which she argues.

42. Paragraph 9 of the Code provides that a Code right can only be conferred on an operator by an agreement between the occupier of the land and the operator. That means that the operator who wants Code rights to a site must deal with the person at the bottom of the chain of estates and interests, who has an immediate right to possession; where land is let or subject to a licence it will be the lessee, or the sub-lessee, or a licensee, depending upon the facts. The occupier's grant of Code rights cannot bind persons with greater interests. The lessee cannot bind the freeholder, although it can bind successors in title to its own estate

(paragraph 10(2) of the Code); Code rights behave like property rights in this respect, and the position is exactly the same as if a sub-tenant, for example, were to grant an easement.

43. In those circumstances an operator may seek the agreement of the freeholder to be bound by the Code rights granted by the person in occupation. There are two reasons why it might do so. The first is to prevent, if necessary, a breach of covenant by the person in occupation. If that person is a lessee and the lease prevents any sharing or parting with possession, the grant of Code rights will be a breach of that covenant and therefore the permission of the freeholder will be necessary to protect the occupier. There might in some circumstances be a second reason, namely to create Code rights that bind the freeholder and go beyond what the occupier itself is able to grant.

44. The idea is that if the occupier of a prospective telecommunications site has, say, a one year licence to occupy, so that the rights it can offer to the operator are too short-term to be of much use, one way to deal with the situation is for that occupier to grant Code rights for a longer period, say ten or twenty years, and then seek the agreement of the freeholder to be bound by those rights (or an order of the Tribunal in default of agreement). Such a situation was imagined in discussion in the Court of Appeal in *Cornerstone Telecommunication Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755, and was contemplated by the Tribunal at paragraph 158 of *Arqiva Services Limited v AP Wireless II (UK)* Limited [2020] UKUT 195 (LC).

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.

47. The secondary Code agreement is an agreement by the freeholder to be bound by the Code rights actually granted by the second respondent. Those Code rights were vulnerable to the early termination of the lease, whether by break notice or, for example by forfeiture. The secondary Code agreement makes no provision for the freeholder to be bound by Code rights that the second respondent could not grant, for example by providing that it would continue to be bound by Code rights even if they came to an end vis-à-vis the second respondent because of the premature termination of the lease. It could have made such provision but it did not.

48. There is of course, on ordinary contractual principles, not the slightest possibility of the implication of a term to that effect. The secondary Code agreement is perfectly workable as

it stands and there is no reason of necessity or of business efficacy why any extension to its terms should be implied. Had the officious bystander asked the parties, when they were signing the secondary Code agreement, whether they intended the first respondent to be bound in circumstances where the second respondent was not bound, the answer to the question would have been by no means obvious, and it might well have been "no".

49. The first respondent is bound only by the Code rights granted by the second respondent. Those Code rights were vulnerable to the breaking of the second respondent's lease. Where they come to an end by virtue of the disappearance of the second respondent's estate, the first respondent too ceases to be bound by them.

50. Accordingly the claimants fail on the date point.

The recipient point

51. Had the claimants succeeded on the date point that would have been the end of the matter. I have found that the claimants fail on the date point, but they have a further argument. They say that because the Code agreement was assigned by the first claimant to them both on 31 March 2010, the notices should have been addressed to them both.

52. It is not in dispute that an assignment of a lease in breach of covenant is effective, whereas the assignment of purely contractual rights in breach of covenant is not (*Old Grovebury Manor Farm v W Seymour Plant Sales & Hire (no 2)* [1979] 1 WLR 1397). Accordingly the
"recipient point" turns first on whether the primary Code agreement was a lease or a licence and whether it was in fact assigned by the first claimant to the first and second claimants by the deed of 31 March 2010, and then on whether the secondary Code agreement was a lease and, if it was, whether it was validly assigned.

Was the primary Code agreement a lease or a licence?

53. Paragraph 3 of Schedule 4 to the primary Code agreement says:

> "This Agreement is not intended to create nor shall be treated or construed as creating the relationship of landlord and tenant between the parties in respect of the Building the Equipment Cabin or the Telecommunications Equipment."

54. However, it is trite law that if an agreement does grant exclusive possession for a term, it is a lease even if the parties say it is not. A fork is a fork even when called a spade (as Lord Templeman put it in *Street v Mountford* [1985] UKHL 4). A lease is the grant of exclusive possession for a term, and if that is what the primary Code agreement did then it is a lease, despite the words quoted above and despite the fact that it is not in the form of a lease.

55. Clearly the primary Code agreement was made for a period of 20 years, but the difficult issue is exclusive possession. Many rooftop Code agreements are accompanied by a plan with a red line around one or more areas reserved to the operator, but the primary Code

agreement does not use that structure. It takes the form of an agreement that the operator shall have the rights set out in Schedule 2, with the second respondent giving undertakings in Schedule 3 and on further terms in Schedule 4. It uses definitions set out in Schedule 1, among them "the Drawing", which is then referred to in the definitions of the Antennae and the Equipment Cabinet which are said to be in the position shown on the Drawing or in other positions to be agreed.

56. The Drawing shows the proposed location of the telecommunications equipment including antennae, cable trays and a cabinet, as well as the second respondent's plantroom and airconditioning equipment. There is no indication that the operator is to have the use of an area shown on a plan, and there is no designated area of the roof reserved for the first claimant's exclusive use. There is no provision in the primary Code agreement preventing the second respondent from having access to the roof or to its own equipment there.

57. Ms Tozer QC argues that the primary Code agreement is a grant of exclusive possession for the following reasons:

    a. The first claimant was required by clause 5.6 of Schedule 3 to the primary Code agreement to provide exclusion zones around the equipment on the roof, so it had exclusive possession of those zones.

    b. Paragraph 2 of part 2 of Schedule 3 obliges the second respondent "Not to enter (or permit any third party to enter) the Equipment Cabin", so there is exclusive possession of the cabin.

    c. Paragraph 9.1 of part 1 of Schedule 3 obliges the first claimant to allow the second respondent access on notice to inspect the telecommunications equipment. Ms Tozer QC says that this is the reservation of a right of entry and "reinforces the impression that exclusive possession was granted."

    d. By paragraph 9 of the Fourth Schedule the parties recorded that the agreement contracted out of Part II of the Landlord and Tenant Act 1954, which is relevant only to leases.

    e. The "Fee Review" provisions in Schedule 5 require the reviewed fee to be calculated on the assumption of a "term of years" to be granted for the same length as the term of the primary Code agreement.

    f. The covenant not to assign, and the warranty of title, are typical of a lease not a licence.

58. Mr Clark in response points to the absence of a clear demise of a defined area, to the fact that the agreement gives the operator the right of access to the rooftop only between the hours of 0800 and 1800 (paragraph 1 of Schedule 2), to the fact that the operator has the right to move equipment around on the roof only with the second respondent's consent

(Schedule 3, part 1, paragraph 3), to the operator's responsibility only to insure its equipment while the second respondent insures the building, and to the fact that the exclusion zones around the equipment are explicable by the requirements for protection from non-ionising radiation. The warranty of title only says that the second respondent has "sufficient legal title to the Building …to enter into and give full effect to this Agreement", which is consistent with the grant of a licence.

59. I take the view that there is no grant of exclusive possession of the roof. The second respondent has unrestricted access to it save for the exclusion zones which are in place for safety purposes and for the cabinet (which is the operator's property in any event). The operator can access the roof only within certain hours, and therefore, as Mr Clark says, the agreement cannot be said to be conferring a right to occupy the roof, let alone to grant exclusive possession of it. The second respondent's covenant not to enter the equipment cabinet is consistent with its not having granted exclusive possession (if it had, the covenant about the cabinet would not be needed). The right to inspect the equipment on notice is about inspection of the equipment, not about possession. The provisions for fee review, the warranty of title and the alienation covenant are perfectly consistent with a licence. The contracting out of the Landlord and Tenant Act 1954 is no more determinative of the matter than is the declaration that the agreement is not a lease; the parties have expressed themselves both ways, but the substantive provisions of the agreement make it clear that this is a licence not a lease.

60. Ms Tozer QC argued that the demise itself is restricted to the exclusion zones and to the area occupied by the cabinet. The difficulty with that is that when the parties entered into the primary Code agreement they did not know where the exclusion zones were; the first claimant was obliged to provide them. And the plan shows only the proposed location of the cabinet. So it is impossible to regard the agreement as conferring exclusive possession of any defined area. Moreover, the subject matter of the primary Code agreement is the whole rooftop. To regard it as a lease of the area occupied by the cabinet and of the exclusion zones, with the rest of the rooftop being subject to ancillary rights perhaps by way of licence or easement, is an unrealistic description and a mischaracterisation of the agreement. This was a licence agreement extending to the whole roof.

Did the deed of 31 March 2010 assign the primary Code agreement to the two claimants?

61. The respondents say that the deed of 31 March 2010 only assigned to the first and second claimant the rights under the primary Code agreement, rather than the whole agreement as the claimants say. If the primary Code agreement is a lease, but the 2010 deed only assigned the rights rather than the lease itself, then the second respondent would be correct to serve its notice only upon the first claimant.

62. The claimants point to the recital to the deed which says that the first claimant "has agreed to assign the Agreement", while the respondent points to the operative part which states that the first claimant assigns "the Rights" (defined as the rights granted by the primary Code agreement).

63. As I have found that the primary Code agreement was not a lease, the question whether it was in fact assigned does not arise. And the construction of the deed is necessarily influenced by the nature of the primary Code agreement; had the primary Code agreement been a lease I would have been inclined to find – on balance, given the contradictory wording of the recital and the operative part – that there had been an assignment of the lease since it would be hard to see why the parties would intend to do otherwise. Since the primary Code agreement is a licence, there is no real difference between an assignment of rights and an assignment of the agreement, because there is no estate to assign, and the question is meaningless. But as I say, it no longer arises.

Was the secondary Code Agreement a lease?

64. Ms Tozer QC argues that the secondary Code agreement was also a lease, and that it was assigned to the two claimants.

65. The secondary Code agreement is a licence to the second respondent to confer Code rights. How it could be construed as a lease is difficult to understand. If, as the claimants argue, they held a sub-lease from the second respondent, how could they also be granted a lease by the first respondent? The first respondent, holding only the reversion to the lease of the building, would have to grant some sort of reversionary lease, interpolated between the freehold and the lease.

66. In any event it is not possible to construe the secondary Code agreement as a lease. It is quite simply a licence to grant Code rights and an agreement to be bound by them, and nothing more.

If the secondary Code agreement was a lease, was it assigned to the first and second claimants by the deed of 31 March 2010?

67. Ms Tozer QC argued that the assignment of the secondary Code agreement, in addition to the first, must be an implied term of the deed of 31 March 2010. The officious bystander who asked "do you not intend to assign both Code agreements" would have been brushed aside with an "oh yes of course". Mr Clarke, in response, points out that a term can be implied in a contract only if it is necessary, or if it would give business efficacy to the contract: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey)* Limited [2015] UKSC 72).

68. The implication into the deed of 31 March 2010, which specifically referred only to the primary Code agreement, of an assignment of the secondary Code agreement is not in any sense necessary. The deed works perfectly well without it. The assignment of a further agreement would be a major addition to a deed whose scope is already clearly set out, and would go well beyond the scope of necessary implication. In the event, the point does not arise, but had it arisen I would have had no hesitation in saying that I could not imply any such term in the deed of 31 March 2010.

Conclusion

69. Accordingly the claimants fail on both the date point and the recipient point. The notices, addressed to the first claimant only, were valid. It remains to be decided whether the ground of termination stated in the notices, namely the site provider's intention to redevelop the property, can be made out by the respondents, and the parties have submitted draft directions for the determination of that issue.

Judge Elizabeth Cooke 21 September 2020