

Insights

DEVELOPERS CAN BREATHE A SIGH OF RELIEF (FOR NOW) AS THE COURT OF APPEAL PLUGS A GAP IN THE TELECOMS CODE

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SUMMARY

Last year the Upper Tribunal held that holders of concurrent leases that are subject to pre-existing Telecoms Code agreements cannot be treated as a 'party to the agreement', effectively sterilising their ability to terminate or modify/renew those Code agreements. Concurrent leaseholders requiring the removal or relocation of telecommunications equipment to facilitate a development were particularly badly affected, as they were left at the mercy of the operators, or faced with costly revisions to adapt their scheme around the apparatus and associated rights. The Court of Appeal has unanimously overturned the Upper Tribunal's decision, bringing welcome relief and clarity for both site providers and telecoms operators.

FACTS

The case of *Vodafone Ltd v Potting Shed Bar & Gardens Ltd (formerly Gencomp (No. 7) Ltd) & AP Wireless II (UK) Ltd* concerned a tower at the old Fire Station in Bingley, west Yorkshire, used by Vodafone as a site for its electronic communications apparatus. Before the expiry of Vodafone's lease, Gencomp (the then freeholder of the site) had granted a long concurrent leasehold interest of the site to AP Wireless II (UK) Ltd ("**APW**"), effectively causing APW to become Vodafone's landlord, entitled to the rent due under Vodafone's telecoms lease. On expiry of its lease of the site in 2018, Vodafone applied to the Upper Tribunal, seeking a renewal of its lease under the Electronic Communications Code ("**the Code**").

The Code provides that notices kicking off the lease renewal procedure must be served on (1) the site provider (2) who is a party to the Code agreement or a 'successor in title'. Vodafone served notices seeking a new Code agreement on both Gencomp and APW, however it claimed that although APW was the "site provider" for the purpose of the Code (being entitled to occupation of the site by virtue of its concurrent lease), it was not a party to Vodafone's original Code agreement, nor was it Gencomp's 'successor in title'. It could not therefore grant the new agreement sought by

Vodafone. APW argued that it was both the site provider and a successor in title to Gencomp, and was the correct party to grant a renewal or modification of Vodafone's Code agreement. The Upper Tribunal found that *neither* Gencomp nor APW satisfied the requirements under the Code to renew Vodafone's lease; Gencomp was clearly not a 'site provider' (having granted the concurrent lease to APW), and APW was neither a party to the original Code agreement nor a successor in title to the grantor of the Code agreement. There was therefore no mechanism in the Code by which Vodafone could seek a renewal or modification of its Code agreement, nor any mechanism for a site provider such as APW to take steps to terminate Vodafone's Code rights, thereby creating a legislative impasse.

This left a worrying loophole in the Code in circumstances where a concurrent leaseholder "inherits" a Code operator (and is not an original party to the Code agreement or a successor in title) and wishes to terminate the operator's Code rights in order to redevelop its land. On the basis of the Upper Tribunal's interpretation of the relevant provisions of the Code, there would be no available mechanism in the Code for them to secure vacant possession to facilitate development.

COURT OF APPEAL DECISION

APW appealed and the Court of Appeal adopted a wider and more purposive interpretation of the Code. With the benefit of guidance from the Supreme Court in *Compton Beauchamp*, the Court of Appeal considered how the regime was intended to work in order to determine the meaning of the relevant provisions concerning the renewal and termination of Code rights. It held that although APW could not be regarded as a "successor in title" to the freeholder who originally granted Vodafone's Code agreement, it should be treated as a "party to the agreement". It reached this decision by having regard to both the intention behind the Code (which is to entitle the persons with the benefit and burden of the Code agreement - Vodafone and APW - to be able to exercise Code rights) and also to other provisions in the Code that support a wider interpretation of the phrase "party to the agreement".

Accordingly, both Vodafone and APW could serve notices on each other to renew/modify or terminate (respectively) their current Code agreement.

BCLP COMMENT

Concurrent lessees who wish to develop land subject to telecoms Code agreements will welcome this decision, as it confirms their ability to terminate historic "inherited" Code agreements and secure vacant possession of their site (provided that they are able to prove one of the statutory grounds to oppose the renewal of a Code agreement in the usual way). From an operator's perspective, this decision provides welcome clarity that they can seek the renewal or modification of an existing Code agreement from their "immediate" (concurrent lessee) landlord, even though they were not a party to the original Code agreement.

It should be noted, however, that the case centred around the ability of an operator to renew or modify their old/existing Code agreement, as distinct from seeking a brand new Code agreement from the site provider (APW in this case). It was never in dispute that APW, as site provider in this case, could grant a fresh new Code agreement to Vodafone – there was no gap in the Code in this respect. Notwithstanding this new Code agreement option, Vodafone had maintained in the Court of Appeal that Gencomp was the correct party to effectively renew its Code agreement (on its existing terms) rather than APW (as concurrent lessee). Given the importance of certainty in this area for both sides, a referral to the Supreme Court may well follow.

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