FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/OOCN/ECR/2024/0602 and others**
Properties (Abbreviated Site Name)	**:**	**Lupton Road, Burchett's Green, Vulcan Arms, Cromer Hyde Farm, Plunders Price Papers, Roman Garage, South Cave, Hopes Hill and Ardsley House.**
Claimant	**:**	**On Tower UK Limited**
Representative	**:**	**Justin Kitson KC and Taylor Briggs Pinsent Masons LLP**
Respondent	**:**	**AP Wireless II (UK) Limited**
Representative	**:**	**Wayne Clark KC and Tom Morris instructed by Freeths LLP**
Application	**:**	**Electronic Communications Code**
Hearing	**:**	**9th – 11th July 2025 Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Order	**:**	**8th August 2025**

DECISION

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1. This is my Decision on Preliminary Issues in respect of 9 telecommunications sites occupied by the Claimant under existing agreements. The Claimant seeks renewal under Part 5 of the Code in respect of all sites. The Respondent is the site provider. The sites are all "greenfield sites" [AF2]. References under Paragraph 33 of the Code were made on various dates between October and December 2024. On 11th December 2024 I directed that all references be heard together under FTT Rule 6(3)(b) [1181-1183].

2. On 18th March 2025 I issued the following Directions [1184-1187]:

   *In order to determine whether or not it has jurisdiction to impose a new agreement under part 5 of the Code, the Tribunal will determine the following preliminary issues (the "**Preliminary Issues**"):*

   a. *Is On Tower in respect of the Existing Agreements exercising Code rights for the "statutory purposes"?*

   b. *Has On Tower save for the Existing Code Agreements, **Bullimore Wood 24/0605** and **Washdyke Farm 24/0633**, established that it has title, by reference to a valid and effective chain of assignments, to the relevant Existing Agreement?*

   c. *Are the agreements in **Burchett's Green 24/0604** and **South Cave 24/0635**, assuming that the Existing Agreement in each case is a lease, effectively excluded from the security of tenure provisions of the 1954 Act?*

   d. *Do Para 33 Notices served in **Glebe Farm 24/0603, Bullimore Wood 24/0605, Maes Dulais Farm 24/0608** and **Washdyke Farm 24/063** comply with the OFCOM prescribed form? If not are they void and of no effect?*

   e. *In respect of **Burchett's Green 24/0604** (assuming it is contracted out of the 1954 Act and is caught by the Code), is On Tower entitled to rely on the Para 33 Notice served in that case or is reliance on it an abuse of process?*

   By Order dated 28th April 2025 [1188-1190] I consented to withdrawal of references in respect of Glebe Farm, Bullimore Wood, Washdyke Farm and Maes Dulais Farm. Accordingly Preliminary Issues (b) and (d) have fallen away.

3. The Preliminary Hearing took place in Birmingham over three days 9th – 11th July 2025. I have considered a Bundle of Documents [1-1836] and Supplemental Bundle [SB 1-77]. I am grateful to Justin Kitson KC and Taylor Briggs for their Skeleton Argument dated 4th July 2025. I am also grateful to Wayne Clarke KC and Tom Morris for their Skeleton Argument on behalf of the Respondent dated 3rd July 2025.

4. I received oral evidence from 4 Witness for the Claimant, Timothy Charles Holloway (Witness Statement dated 6th May 2025 [1197-1214]), Andrew Bryan Doyle-Jennings (Witness Statement dated 20th June 2025 [1818-1821]), Paddy Jackson (Witness Statement dated 20th June 2025 [1822-1836]) and Simon Robinson (Witness

Statement dated 20th June 2025 [1826-1836]). The Respondent did not rely on any witness evidence.

5. I have also considered Schedule of Agreed and Assumed Facts dated 10th July 2025 [AF 1-21] and Agreed Questions of Law [AQL 1-5].

6. To assist in understanding this decision it may be helpful to know that the Claimant, On Tower UK limited was previously known as Arqiva Services Limited (2008-2020) and Crown Castle UK Limited (1999-2005). In 2019 there was a transfer of telecoms sites between Arqiva Limited ("Arqiva") and Arqiva Services Limited. Arqiva Services Limited left the Arqiva group of companies in 2020 when it was acquired by Cellnex UK Limited ("Cellnex"). At the same time Arqiva Services Limited changed its name to On Tower UK Limited.

   This decision also concerns Mobile Broadband Network Limited ("MBNL"). MBNL was established by EE Limited ("EE") and Hutchison 3G UK Limited ("H3G") to manage its telecoms Networks and acts as their agent.

   I also refer to Mobile Network Operators ("NMO's") which includes the big four operators EE, H3G, O2 and Vodafone. I also use the term Wholesale Infrastructure Provider's ("WIP's") to refer to operators which provide passive infrastructure in the form of masts, towers and monopole's which are made available to NMO's and other sharers. Typically, an MNO will attach its antennae to a mast provided by a WIP.

Is On Tower in respect of the Existing Agreements exercising Code rights for the "statutory purposes"?

7. The Respondent's case is set out at paragraphs 8 and 9 of Respondent's Single Joint Statement of Case dated 26th February 2025 [862]:

   "APW's Position as to the Jurisdiction of the FTT to consider the References

   (1) The Statutory Purposes

   8. On Tower is put to proof that in respect of each and every Site forming the subject matter of the References it is exercising the Code rights conferred by the Existing Agreements for the "statutory purposes", namely, that it is providing a system of infrastructure as defined within Para 7 of the Code.

   9. In particular APW puts On Tower to proof that it has ownership of all passive ECA (that is to say all ECA other than the active infrastructure owned by any MNO) on any of the Sites."

8. A Case Management Hearing was held on 18th March 2025 [1184-1187]. At that hearing I gave Directions as to the Preliminary Issues and also ordered disclosure and filing of witness statements. Both parties were also required to file and serve written submissions. The Respondent's Written submissions are dated 3rd June 2025 [7-16] and the Claimant's Written Submissions are dated 23rd June 2025 [17-28]. On 29th May 2025 (amended 5th June 2025) [1191-1193] I directed the parties to exchange and

file with the Tribunal a Schedule of Agreed and Assumed Facts [AF 1-21] together with a list of Agreed Questions of Law to be determined.

9. The Claimant relies on a number of commercially sensitive agreements made between EE, H3G, MBNL (acting as agent for EE and H3G), Arqiva and others. The Claimant has made heavily redacted disclosure those agreements. Unsurprisingly the Respondent, by letter dated 27th May 2025 [29-32], made application for specific disclosure of unredacted versions of the agreements. On 29th May 2025 I directed the Claimant to respond to the application for specific disclosure and listed the application to be heard at a further Case Management Hearing [1191-1193]. The Claimant filed Response to Specific Disclosure Application on 12th June 2025 [33-39]. Thereafter the Respondent did not pursue its application for specific disclosure further and, by consent, the CMH which had been listed to consider the application, was vacated.

10. At paragraph 32 of their Skeleton Argument Mr Clark and Mr Morris set out the Respondent's position in respect of disclosure:

"OT has made a deliberate decision to refrain from disclosing the documentation which APW has called for and has provided only heavily redacted documents. OT has openly stated that it is prepared to live or die by the documents it has provided. That was its case in resisting the specific disclosure application. APW is prepared to fight this case on the basis of the material currently provided by OT."

11. The Respondent has chosen not to call evidence and instead puts the Claimant to proof. The burden of proof rests with the Claimant to satisfy me as to the statutory purposes on the balance of probabilities.

Applications during the course of the hearing

12. At the opening of the Preliminary Issues hearing, 9th July 2025, Mr Clark sought to adduce evidence of publicly available documents as to payment of rates for the sites which it was claimed showed that MBNL rather than the Claimant was the "site host" for the purposes of mast sharing regulations (The Non-Domestic Rating (Telecommunications Apparatus) (England) Regulations 2000 (SI 2000 No. 2421)). I refused that application because the Respondent had failed to comply with disclosure as directed on 18th March 2025, the application was made woefully late and to admit such evidence would be unfair to the Claimant as none of its witnesses have rating expertise and would not be able to deal with the issue. In addition, the payment of rates is simply irrelevant to the consideration of statutory purposes.

13. Evidence of the witnesses was taken on 9th July 2025. On 10th July Mr Kitson and Ms Briggs made their oral submissions. On 11th July 2025, prior to Mr Clark and Mr Morris commencing their submissions, Mr Kitson applied to adduce evidence of further parts of the EE/H3G/MBNL/Arqiva agreements together with a side letter written in 2013. The basis of the application was that the way the Respondent had put its case came as "*some surprise to On Tower*". I refused the application. The Respondent's case could not have been clearer. It has been meticulously set out by Mr Clark in the Respondent's Single Joint Statement of Case, Written Submissions and Skeleton Argument. In addition, the Respondent's case appears in the detailed list of Agreed Questions of Law. The application was extraordinary late and prejudicial to the Respondent. Mr Kitson sought to adduce further parts of the agreement after his witness Mr Holloway,

who exhibited the agreements to his Witness Statement had given his evidence. Neither the existence nor the content of the 2013 Side Letter had been previously disclosed.

14. The Upper Tribunal considered confidentiality in **Vodafone Limited v Icon Tower Infrastructure Limited (1) and AP Wireless II Limited** [2025] UKUT 00058 ("**Steppes Hill Farm**") at paragraphs 81-90:

"Vodafone's case was that the various contribution agreements and master services agreements entered into between Vodafone and CTIL were confidential documents, containing information of competitive, business and/or commercial sensitivity."

By consent the parties agreed to a Confidentiality Order setting up a confidentiality ring complicated further by an inner confidentiality ring and an outer confidentiality ring.

15. The Chamber President, Mr Justice Edwin Johnson and Mrs Diane Martin TD MRICS said at paragraph 89:

"As the Trial progressed, and the issues (both legal and evidential) became clearer, we began to entertain some doubt as to whether the confidentiality arrangements, which constituted a substantial inroad into the principle of open justice, were strictly justified or necessary. We concluded however, so far as the Trial was concerned, that it would not have been appropriate or sensible to raise, on our own initiative, the question of whether the confidentiality arrangements should be disrupted. We reached this conclusion principally for the following reasons. First, the confidentiality arrangements were the product of agreement between the parties. Second, we were not asked by either party to amend or terminate the confidentiality arrangements, so far as the Trial itself was concerned. Third, although there was complaint made by the Respondents' counsel that the confidentiality arrangements were to the material prejudice of the Respondents, this was not our view. The confidentiality arrangements did not, in our view, generate a material unfairness in the Trial or material prejudice to the Respondents, particularly given that the cross examination and submissions in the relevant parts of the Trial were left in the capable hands of Mr Watkin and Mr Clark. Fourth, raising the question of amendment or termination of the confidentiality arrangements, on our own initiative, would have disrupted the progress of the Trial, not least because it would have required us to give the parties an opportunity to make submissions on the question of whether confidentiality should be maintained."

16. In the context of Mr Kitson's application, I shared my own doubts with counsel. The manner in which the Claimant has gone about disclosure is wholly unsatisfactory. The redaction has rendered the agreements virtually meaningless. I considered whether I should act on my own initiative. However, following **Steppes Hill Farm** I decided not to disrupt the progress of the hearing. First the parties had not agreed a confidentiality ring. Second, the Respondent has made clear that it was content to fight the case on the basis of the material provided. Third, the Respondent has not pursued its specific disclosure application. Fourth, cross examination and submissions were

once again in the very capable hands of Mr Clark ably assisted on this occasion by Mr Morris.

Agreed Questions of Law

17. I have helpfully been provided with the following Agreed Questions of Law:

1. As a matter of law, is there a jurisdictional requirement that an operator must be exercising a Code right(s) for the "statutory purposes" (as defined in paragraph 4 of the Code) in order to apply for an order under paragraph 34?

2. If the answer to (2) is no, are the "statutory purposes" nevertheless relevant to a reference under paragraph 33?

3. If the answer to either (1) or (2) is yes, then:

(a) What is OT required to prove in order to satisfy the Tribunal that it is and/or was exercising a Code right(s) for such purposes? In particular:

i. Is OT required to prove ownership of some or all of the passive infrastructure at each of the Sites or is it sufficient that OT can prove that it is and/or has been "maintaining" an infrastructure system?
ii. What is meant by "maintaining such a system [i.e. an infrastructure system]" within paragraph 7(2) of the Code?
iii. What is the relevance (if any) of the status of occupation of a third party at any of the relevant sites to the "statutory purposes" issue?
iv. Does the occupation of any such third party affect the question as to whether or not OT can be said to have a Code agreement within the protection of the Code? If so, how?

(b) At what point(s) in time must the operator prove that it is and/or has been exercising a Code right(s) for such purposes?

(c) In particular, is OT required to show that it has been exercising a Code right(s) for such purposes on any or all of the following dates:

i. the date of entry into the relevant agreement;
ii. the date of the term of the agreement vesting in OTUK pursuant to any assignment of the relevant agreement to OTUK;
iii. the date of expiry of the contractual term of the relevant agreement;
iv. the date of service of the paragraph 33 notice;
v. the date of the issuing of the reference; and
vi. the date of trial.

18. In considering Agreed Questions of Law, I have adopted the following analysis:

Paras 19-24: Statutory purposes and code agreements [AQL 1 and 2]
Paras 25-36: What is the relevant time? [AQL 3(b) and (c)]
Paras 37-65: Ownership of passive infrastructure and the evidence of Timothy Holloway (On Tower), Paddy Jackson (MBNL) and Andrew Doyle Jennings (Arqiva) [AQL 3(a)(i)]

Para. 66-67: What is meant by maintaining an infrastructure system? [AQL 3(a)(ii)]
Paras 68-72: Active maintenance and the evidence of Simon Robinson (On Tower)
Paras 73-76: Maintaining an established system
Paras 77-79: Lupton Road, Burchett's Green and South Cave
Paras 80-83: Vulcan Arms, Plunders Price Papers, Roman Garage and Ardsley House
Paras 84-85: Cromer Hyde Farm and Hopes Hill
Paras 86-88: NMO's and third party occupiers [AQL 3(a)(iii) and (iv)]
Paras 89-96: OFCOM Direction - Vulcan Arms
Paras 97-108: Conclusions

A party to a code agreement

19. The Claimant seeks renewal of its agreements at all 9 sites under Part 5 of the Code: "*Modification and Termination of Agreements*". Paragraph 33 of Part 5 explains "*How may a party to a code agreement require a change to the terms of an agreement which has expired?*". The process begins with a Notice under paragraph 33(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…"*

    The Respondent's case is that the Claimant is not "*a party to a code agreement*".

20. The meaning of "*a code agreement*" is explained in Paragraph 29 of Part 5 which provides:

    (1) This Part of this code applies to an agreement under Part 2 of this code ….

    (5) An agreement to which this Part of this code applies is referred to in this code as a "code agreement".

21. A code agreement is therefore an agreement under Part 2 of the Code. Paragraph 9(1) of Part 2 provides that:

    "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

    Agreements under Part 2 are therefore agreements which confer code rights. The definition of a code right is contained in Paragraph 3:

    *For the purposes of this code a "code right", in relation to an operator and any land, is a right for **the statutory purposes**—*

22. The renewal process under Part 5 of the Code can only be commenced by a Paragraph 33 notice given by an operator who is a "*a party to a code agreement*". A code agreement is an agreement under Part 2 of the Code conferring a "*code right*" i.e. a right for the "*statutory purposes*".

23. If, following expiry of the period of 6 months after giving the Paragraph 33 Notice, the parties have not reached agreement the Claimant may make application to the Tribunal under Paragraph 33(5). In the present references the Claimant seeks orders under paragraph 34(6) which provides:

The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—

(a) confers a code right on the operator, or
(b) provides for a code right to bind the site provider.

Accordingly, the Tribunal may terminate "*the code agreement*" and order the parties to enter into a new agreement which confers "*a code right*" i.e. a right for the "*statutory purposes*".

24. The answer to the first Agreed Question of law is that as a matter of law, there is a jurisdictional requirement that an operator must be exercising a Code right(s) for the "statutory purposes" (as defined in paragraph 4 of the Code) in order to apply for an order under paragraph 34. Under those circumstances the second Agreed Question of Law does not arise.

The Relevant Time

25. Mr Clark's submits that an agreement can drop in and out of Code protection. He cites a number of examples: a completely bare site where no ECA has ever been installed because planning permission cannot be obtained, the case of an operator "land banking" without any intention to use the site and finally the situation of an operator who has a change of mind without ECA ever having been installed. This, Mr Clark, submits would lead to the absurd outcome that an agreement continues to have protection under the Code despite ECA never having been installed on site.

26. Further, Mr Clark argues that, if in any of the situations postulated above, should ECA subsequently be installed the code agreement would be resuscitated. However, Mr Clark adds a caveat: in all cases if an agreement is not a code agreement at inception it can never become one. An agreement must be a code agreement at the outset but thereafter it may drop in and out of protection.

27. Mr Kitson characterised Mr Clark's approach as an "ambulatory" one. Mr Kitson's case can be expressed simply as "once a code agreement always a code agreement".

28. Paragraph 9(1) of the Code deals with conferral:

"A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

Paragraph 12(1) deals with the exercise of code rights:

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

29. Paragraph 30 deals with 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.

30. The proper approach to interpretation of the Code as a whole requires identification of the underlying legislative purpose. The starting point is set out by Lady Rose at paragraph 106 of **Compton Beauchamp**: "*The correct approach is to work out how the regime is intended to work.*"

31. I prefer the construction advanced by Mr Kitson. Paragraph 9 is, on my reading, clear. There is a single "one time" conferral of code rights at the date a code agreement is entered into. Paragraph 12 confirms that interpretation, in that the exercise of code rights is contingent upon conferral. Finally, Paragraph 30 provides for the continuation of code rights beyond expiry of the contractual term of a code agreement.

32. In **On Tower UK Limited v British Telecommunications PLC** [2025] EWCA Civ 844 Holgate LJ considered principles of statutory interpretation at paragraph 54:

If legislation is open to competing interpretations, it is relevant for the court to assess the likely consequences of adopting each for the law generally and to weigh up whether those consequences are more likely to be beneficial or adverse. It is presumed that Parliament did not intend to bring about an absurd or unreasonable result (Bennion, Bailey and Norbury on Statutory Interpretation 8th ed. sections 11.6 and 13.1).

33. The code came into force in 2017. The issue now raised by the Respondent has never caused the slightest difficulty. NMO's have chosen to outsource the provision of passive infrastructure to WIP's. Separation of network provision and system of infrastructure has worked as the Code intended. The "ambulatory" interpretation proposed by Mr Clark would bring about an absurd or unreasonable result in the case of NMO's operating from a site where an agreement suddenly dropped out of Code protection. If code protection were lost by the WIP site host, NMO's would be at risk of loss of network coverage. Their only course of action would be to apply for interim or temporary rights under Paragraphs 26 and 27 pending determination of a Paragraph 20 application. This would be both costly and time consuming.

34. I entirely understand the Respondent's concerns in respect of what is an expropriatory regime. In **Cornerstone Telecommunications Infrastructure Limited v Keast** [2019] UKUT 0116 (LC) Judge Cooke said at paragraph 13:

"The courts take a particularly strict approach to the construction of statutes that expropriate private property: R (Sainsbury's) v Wolverhampton City Council [2011] 1 AC 437. Where there is any ambiguity, the construction chosen will be the one that interferes least with private property rights. It seems to me that that principle is relevant both to the construction of the Code and to the exercise of the Tribunal's discretion under the Code, for example in its judgment as to what are the "appropriate" terms to be imposed alongside Code rights. I bear this closely in mind in assessing the preliminary issues, all of which challenge the Claimant's application on the basis that it is out of line with the requirements of the Code – whether as to the form of the notice, the nature of the rights sought, or the OFCOM direction that authorises the Claimant to seek them."

35. In my judgement the Respondent's concerns are a matter for OFCOM. Section 117 of the Communications 2003 Act ("the 2003 Act") provides for "Transitional schemes on cessation of application of code":

(1) Where it appears to OFCOM—

(a) that the electronic communications code has ceased or is to cease to apply, to any extent, in the case of any person ("the former operator"),
(b) that it has ceased or will cease so to apply for either of the reasons specified in subsection (2), and
(c) that it is appropriate for transitional provision to be made in connection with it ceasing to apply in the case of the former operator,

they may by order make a scheme containing any such transitional provision as they think fit in that case.

(2) Those reasons are—

(a) the suspension under section 113 of the application of the code in the former operator's case;
(b) the revocation or modification under section 115 of the direction applying the code in his case.

(3) A scheme contained in an order under this section may, in particular—

(a) impose any one or more obligations falling within subsection (4) on the former operator;
(b) ….

(4) The obligations referred to in subsection (3)(a) are—

(a) an obligation to remove anything installed in pursuance of any right conferred by or in accordance with the code
(b) an obligation to restore land to its condition before anything was done in pursuance of any such right; or

(c) an obligation to pay the expenses of any such removal or restoration.

I am therefore satisfied that a single "one time" conferral of code rights as at the date of entering into the agreement, in the context of OFCOM's powers to make a scheme on cessation of application of the Code, interferes least with private property rights.

36. Accordingly in answer to Agreed Questions of Law 3b and 3c an operator need only show that it is exercising a code right for the statutory purposes at the date of entry into the relevant agreement.

Ownership of passive infrastructure

37. Paragraph 4 of the Code provides:

The statutory purposes

(1) In this code "the statutory purposes", in relation to an operator, means—

(a) in relation to sharing rights, the purposes of enabling the provision by other operators of their networks, and

(a) in relation to rights other than sharing rights—

(i) the purposes of providing the operator's network, or
(ii) the purposes of providing an infrastructure system.

(2) In sub-paragraph (1), "sharing right" means a right within paragraph 3(1)(ca), (ea)or (fa).

38. Paragraph 7 of the Code provides:

Infrastructure system

(1) In this code "infrastructure system" means a system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

(2) References in this code to provision of an infrastructure system include references to establishing or maintaining such a system.

39. The Claimant is not a network provider. The Claimants case is that it is providing an infrastructure system. The parties have reached agreement as to the passive infrastructure at each of the sites:

"It is agreed, for the purposes of these proceedings, the principal passive infrastructure at each of the Sites is as follows:

a. Lupton Road: 17.5m 30H Lattice Tower;
b. Burchett's Green: 27.5m Lattice Tower;

c. *Vulcan Arms: 22.5m Monopole;*
d. *Cromer Hyde Farm: 30m Monopole;*
e. *Plunder Price Papers: 15m Monopole;*
f. *Roman Garage: 15m Monopole;*
g. *South Cave: 15m Monopole;*
h. *Hopes Hill: 18m imitation Scots Pine Tree-Mast; and*
i. *Ardsley House: 22.5m Monopole."* [AF20]

"It is agreed, for the purposes of these proceedings, that the full details of the passive infrastructure at each site is as detailed at page 1 to Exhibit "TCH1" to the Witness Statement of Timothy Charles Holloway dated 6 May 2025 which can be found at page 1813 of the Preliminary Issues Hearing Bundle." [AF21]

40. In order to prove ownership of the passive infrastructure the Claimant relies on the evidence of Timothy Holloway, Senior Estates Surveyor for On Tower [1197- 1214], Paddy Jackson of MBNL (for and on behalf of EE and H3G) [1822-1836] and Andrew Doyle-Jennings Head of Site Access at Arqiva [1818-1821]. I remind myself when reviewing the evidence of all witnesses that the burden of proof rests on the Claimant to satisfy me on the balance of probabilities.

Evidence of Timothy Holloway (On Tower)

41. I start my consideration of Mr Holloway's evidence by recording the remarks made by Mr Clark that Mr Holloway was a "completely honest witness in an invidious position". I entirely agree. Mr Holloway exhibited to his Witness Statement heavily redacted copies of agreements made between EE, H3G, MBNL, Arqiva and others. For convenience those agreements are referred to as:

- 2008 MBNL Agreement [1374-1381]
- 2011 EE Agreement [1382-1387]
- 2019 MBNL Termination Agreement [1398-1408]
- 2019 MBNL Agreement [1409 -1428]
- 2020 EE Termination Agreement [1429-1436]
- 2020 EE Agreement [1437-1445]

In addition, Mr Holloway also produced a redacted version of an agreement made in 2019 between Arqiva and Arqiva Services Limited ("the 2019 Arqiva Agreement") [1388-1397].

42. Mr Holloway accepted under cross examination that he had not seen unredacted copies of any of the agreements. The extracts of the agreements set out in his witness statement contain interpolations, no doubt intended to make sense of the extracts which due to redaction were not readily understandable. Mr Holloway was completely candid in his evidence that those interpolations had been made by "a lawyer at On Tower" and that he had no personal knowledge or understanding of how or why this had been done. Mr Holloway also conceded that he had "no idea" about the agreements or their legal effect.

43. It is clear from **JD Wetherspoon plc v Harris and another** [2013] EWHC 1088 (Ch) that it is not the function of a witness statement to provide a commentary on

documents. At para. 33 Sir Terence Etherton C made it clear that witness statements should not contain "*a recitation of facts based on documents, commentary on those documents, argument, submissions and expressions of opinion…".* In the case of Mr Holloway's evidence, the position is compounded by the fact that the commentary is not his own but that of "a lawyer at On Tower" about which the witness candidly accepted he had "no idea". I therefore attach very limited weight to Mr Holloway's evidence.

Evidence of Paddy Jackson (MBNL)

44. Paddy Jackson of MBNL gave evidence for and on behalf of EE and H3G. Again, the hand of the nameless lawyer is present in his Witness Statement. For example, paragraphs 6- 13 of his Witness Statement [1824-1825] appear virtually identical to paragraphs 6-12 of the Witness Statement of Andrew Doyle-Jennings [1820-1821], save for the difference in sites and that Mr Jackson speaks for MBNL and Mr Doyle-Jennings speaks for Arqiva. Mr Jackson confirmed that his witness statement was drafted by Winckworth Sherwood (solicitors for MBNL) and signed by him following discussions by email and Teams. Quite properly the involvement of Winckworth Sherwood is set out in paragraph 4 of Mr Jackson's witness statement.

45. Mr Jackson's oral evidence was much more helpful. Mr Jackson is the Contracts Manager/Commercial Relationship Manager for MBNL. He manages MBNL's contractual relationship with Cellnex (Claimant's parent company) and others. He has worked for MBNL for 17 years.

46. Mr Jackson explained the practical effect of the agreements exhibited by Mr Holloway:

- 2008 MBNL Agreement. Following the decision by T Mobile (subsequently EE) and H3G to merge networks this agreement brought together all existing service agreements into on document regulating arrangements between T Mobile, H3G, MBNL and Arqiva.
- 2011 EE Agreement. Mr Jackson described this as a "unilateral contract" covering all EE sites previously owned by Orange Personal Communications Services Limited ("Orange")
- 2019 MBNL Termination Agreement. This was a subsidiary agreement terminating the 2008 MBNL agreement which completed in 2019 with an effective date of 1st January 2020.
- 2019 MBNL Agreement. This is the Master Site Services Agreement also known as the Brunel Agreement. It sets out arrangements for the shared EE and H3G site portfolio.
- 2020 EE Termination Agreement. This terminates the 2011 EE Agreement in respect of former Orange sites.
- 2020 EE Agreement. This is the EE equivalent of Brunel. It covers the Orange portfolio i.e. sites not shared with H3G.

Mr Jackson also described a Novation Agreement. Following transfer of some sites from Arqiva to Arqiva Services Limited (the former name of the Claimant), the Master Site Service Agreement was novated from Arqiva to Cellnex in 2020.

47. When asked about the 2008 MBNL Agreement Mr Jackson told me "I have worked with that since 2008. I am fully aware of what it says". In respect of the 2019 MBNL Agreement Mr Jackson explained that he was part of the negotiating team that pulled that contract together. He was "locked in a lawyer's office for 3 months in London" during negotiations. When asked if he had seen unredacted copies of the agreements Mr Jackson told me that "I work with unredacted documents every day".

48. I asked Mr Jackson about the role of WIP's. The relationship between NMO's and WIP's varies and is subject to the terms of the agreement between them. Some agreements are service agreements where the third party provides more than just infrastructure. In those cases, the WIP provides estate management and maintenance services and in some cases electricity sub supplies and the management of access via landlords.

49. Mr Jackson explained that at a "greenfield site" MBNL would typically expect a WIP to provide a delineated fenced compound and concrete bases on which MBNL would place its own cabinets. The WIP would provide a tower constructed of galvanised steel with a headframe on which MBNL could mount antennae and connect to its cabinets. The electricity meter would usually be in the compound fence. At a rooftop site MBNL would expect steel grillage to mount cabling and either pole masts or a "stub" tower. In all cases feeder cable would be supplied by MBNL.

50. Installation, in respect of new equipment, was undertaken by Cellnex. The usual arrangement is for MBNL to provide "free issue equipment" for example antennae, dishes and additional cabinets, which Cellnex would install. Cellnex also provide designs for approval and prepare ICNIRP drawings.

51. In terms of maintenance Mr Jackson told me that masts decay. Sites can become overgrown, there may be issues with fences, livestock may cause damage, extreme weather (high wind, flooding and heat) can also cause problems.

52. Mr Jackson was asked about maintenance. He told me that all 9 sites were held "under the main contract which is a services contract". He told me that one of the most important services provided by the Claimant under the agreements was the installation of equipment. Until 2020 routine maintenance was carried out by MBNL with the exception of maintenance of the tower. Cellnex maintained the masts and ensured they were safe to climb. Mr Jackson was asked, by Mr Morris, what would happen if the Claimant did not perform its obligations under the service agreements. Mr Jackson was somewhat chary in his response, citing confidentiality, but confirmed that the agreements contained "step in" provisions in such circumstances.

53. I asked Mr Jackson whether the 2008 and 2019 MBNL agreements were a sale and leaseback arrangement. Mr Jackson told me that was only an element of a substantial agreement. The agreements were complex but put simply after 2020 the Claimant owned the infrastructure and MBNL used it for a fee.

54. Mr Jackson, at paragraph 9 of his Witness Statement refers to a letter from MBNL's solicitors Winckworth Sherwood LLP to the Tribunal dated 5th June 2025 [1867]. That letter reads:

"In order to assist the Tribunal in this matter, we can confirm, for the avoidance of doubt, that we are instructed that neither EE nor H3G nor MBNL own any primary passive infrastructure at the Sites and clarify as follows:

(a) In respect of (1) Ardsley House Hotel, (2) Brough Off Newfield Lane, (3) Maidenhead Burchett's Green, (4) Plunder Price Papers, (5) Roman Garage, (6) Vulcan Arms, and (7) Cromer Hyde Lane, H3G and EE transferred the primary passive infrastructure at the Sites (including the masts) to On Tower with effect from 1 January 2020 and no longer have any interest in them; and

(b) In respect of Doddington Hopes Hill, EE transferred the primary passive infrastructure at the Sites (including the mast) to On Tower with effect from 1 April 2020 and no longer have has any interest in it; and

(c) In respect of Thame Lupton Road, H3G and/or EE transferred the primary passive infrastructure at the Sites (including the mast) to Arqiva Limited with effect from 1 January 2020 and no longer have any interest in it; and

(d) H3G and/or EE use the infrastructure system provided by On Tower at each of the Sites for the purposes of their electronic communications networks, with MBNL acting as their managing agent. On Tower is responsible for maintaining its passive infrastructure (including the masts) that H3G and EE use at the Sites to provide network services to their customers. This is a commercial arrangement between EE/H3G and On Tower to the Sites (and other sites) provided by On Tower."

55. Mr Clark objected to Mr Jackson's evidence of negotiations on the basis of the principles most recently set out in in **Schofield v Smith** [2022] EWCA Civ 824. It is not permissible to rely on what was said in pre-contract negotiations to draw inferences as to what the contract should be understood to mean. Mr Clark therefore urges caution in my assessment of Mr Jackson's evidence. The letter from Winckworth Sherwood is also, in Mr Clark's submission, impermissible.

56. I found Mr Jackson's evidence to be detailed and persuasive. It is based on a wealth of personal knowledge and practical experience as to how the agreements work day to day. He came to the Tribunal armed with a letter from MBNL's solicitors setting out their opinion, on instruction from EE and H3G, that passive infrastructure was transferred at 7 of the sites to the Claimant on 1st January 2020. At Hopes Hill the transfer took place on 1st April 2020. At Lupton Road passive infrastructure was transferred to Arqiva on 1st January 2020. Of course that is the opinion of the solicitors. As Mr Clarke rightly submits their opinion is irrelevant. Whether or not ownership passed as a matter of law can only be determined upon consideration of the agreements.

57. I look at the matter in this way. The evidence of Mr Jackson was clear and reliable. He works with the agreements on a daily basis and understands their practical effect. Both MBNL and Cellnex operate on the basis that there has been an effective transfer of ownership of passive infrastructure at the sites. I take Winckworth Sherwood's letter to be the clearest evidence that EE and H3G no longer assert ownership of the passive infrastructure. I find on the balance of probabilities that ownership of the passive infrastructure passed to the Claimant on 1st January 2020 in respect of 7 of the sites, on 1st April 2020 in respect of Hopes Hill and in respect of Lupton Road to Arqiva on 1st January 2020.

Evidence of Andrew Doyle-Jennings (Arqiva)

58. Andrew Doyle-Jennings is Head of Site Access and responsible for managing contracts between Arqiva and Cellnex. Mr Doyle-Jennings has only been in post since 19th June 2023. His evidence was based on information he has obtained from reading what he described as legacy contracts and systems. His Witness Statement was prepared following a Teams meeting with the Claimant's legal team and Nicola Philips who is Arqiva's Chief Legal Officer. Mr Doyle-Jennings told me that he had drafted his Witness Statement himself. However, he conceded that paragraphs 6-12 were strikingly similar to paragraphs 6-13 of Mr Jackson's Witness Statement.

59. Mr Doyle-Jennings evidence was that passive infrastructure at Lupton Road was transferred by EE to Arqiva on 1st January 2020. There was then a subsequent "novation split" on 8th July 2020 when the site at Lupton Road was transferred from Arqiva to Arqiva Services Limited*. Clearly Mr Doyle-Jennings was not in post at that time however he told me that he has been through the sites in the Arqiva portfolio and was satisfied that Lupton Road sat "in the right pocket" i.e. it had been assigned to the correct entity.

**The site at Lupton Road was originally in the ownership of Orange under the terms of an agreement dated 29th May 2008. No assignment from EE can be found. However, "the parties agree that OT is the registered proprietor of Lupton Road as of the 14 December 2020 as registered at HM Land Registry under tile number: ON279456"* [AF3a]

60. Mr Doyle-Jennings produced a letter dated 3rd June 2025 from Arqiva to the Tribunal [1814-1815]. That letter headed "Telecommunications site at Unit 4. Lupton Road, Thame, Oxfordshire OX9 3SE" states:

"We confirm that the transfer of the primary passive infrastructure (including the mast) from Arqiva Limited to On Tower took effect on 8th July 2020 and we no longer have any interest in it"

Mr Doyle-Jennings said that he had checked the site and saw movement within the Arqiva system and the legacy system. Lupton Road is not a broadcasting site (which were retained by Arqiva following the transfer of telecoms sites to Arqiva at the time of novation). Mr Doyle-Jennings told me that the site at Lupton Road "was no longer with us".

61. Mr Doyle-Jennings told me that Arqiva is an operator. Arqiva sites were managed by Cellnex. The Novation Agreement between Arqiva and Arqiva Services was effective from 8th July 2020. The Novation Agreement provided for transfer of sites (other than broadcasting sites) and for management of sites in the interim. In addition, Arqiva and the Claimant entered into a Master Site Services Agreement, also made on 8th July 2020, to regulate their ongoing commercial relationship. It was the Master Site Services Agreement which transferred the passive infrastructure at Lupton Road to the Claimant.

62. I treat the evidence of Mr Doyle-Jennings in much the same way as the evidence of Mr Jackson. Mr Doyle-Jennings has substantial practical knowledge of the way

contractual relations between Arqiva and Cellnex. I accept entirely his evidence that the site at Lupton Road "sits in the right pocket". I am also satisfied that Mr Doyle-Jennings interrogation of Arqiva legacy systems enables him to speak with confidence about matters that occurred before he took up post. The letter from Arqiva is subject to the same criticisms as the letter from Winckworth Sherwood. However, it is absolutely clear that Arqiva no longer assert ownership of the passive infrastructure at Lupton Road. I find on the balance of probabilities that ownership of passive infrastructure passed to the Claimant on 8th July 2020 in respect of Lupton Road.

63. My finding of fact is that ownership of passive infrastructure passed to the Claimant on 1st January 2020 in respect of 7 of the sites and on 1st April 2020 in respect of the site at Hopes Hill. Passive Infrastructure at Lupton Road passed to Arqiva on 1st January 2020 and from Arqiva to the Claimant on 8th July 2020. I have determined that an operator must show that it is exercising a code right for the statutory purposes at the date of entry into the relevant agreement. The Claimant acquired its interest in each of the sites prior to 2020. Accordingly, I find that the Claimant did not own passive infrastructure as at the date it acquired its interest in each of the sites.

64. However, that is not the end of the matter. Provision does not necessarily mean ownership, although it may do so. To suggest that provision can only be understood in the context of ownership seems to me to be commercially naïve. As Mr Jackson explained to me when I asked whether the agreements were a sale and leaseback arrangement: "*that was only an element of a substantial agreement*". Provision of infrastructure is a complex matter governed by highly structured multiparty agreements. To talk simply in terms of ownership is fails to grasp the complexity of the commercial arrangements entered into by NMO's with WIP's for the use of passive infrastructure to provide network services to the public.

65. Agreed Question of Law 3a(i) asks whether the Claimant is required to prove ownership of some or all of the passive infrastructure at each of the Sites. Paragraph 7(2) of the Code provides:

"References in this code to provision of an infrastructure system include references to establishing or maintaining such a system"

Nowhere in Paragraph 7 of the Code "Infrastructure System" is there any reference to ownership. The statutory wording requires **provision** of an infrastructure system which includes **establishing** or **maintaining** such a system (my emphasis). Accordingly, the answer to Agreed Question of Law 3(a)(i) is that the Claimant is not required to prove ownership of passive infrastructure. Maintaining an infrastructure system is sufficient.

What is meant by maintaining an infrastructure system?

66. Mr Clark and Mr Morris's set out their analysis of the meaning of "maintaining" at paragraph 57 of their Skeleton Argument:

"It is submitted that "maintaining" in this context requires the operator to continue that which has been established. In other words it is not identifying the performance of an activity, such as effecting a repair, but the maintenance of a "state of affairs".

It avoids the use of the verb "to maintain". It is to secure the continuation of the system that has been established; in other words if the system once established is then dismantled, one cannot be said to be "maintaining" an infrastructure system."

67. There are therefore two different ways in which an operator can be said to be maintaining an infrastructure system. The first is active maintenance and the second is the maintenance of an established system.

Active maintenance

Evidence of Simon Robinson (On Tower)

68. I deal firstly with maintenance in the sense of "performance of an activity". The Claimant relies on the evidence of Simon Robinson who has been Head of Infrastructure at On Tower since 2021. Mr Robinson has not been to any of the sites. He explained that the building of new towers was outside his remit. His role is to ensure that the design of infrastructure is appropriate. Mr Robinson is not a site maintenance engineer and does not instruct maintenance providers himself. The information in respect of maintenance in his Witness Statement was provided by a colleague. Asked why he had not produced maintenance records prior to 2002 Mr Robinson said that he had only been asked for the latest inspection report.

69. Mr Robinson explained that the arrangements identified in his Witness Statement have only applied since April 2025. The current arrangement is that DCS (Cellnex's Facilities Management Partner) and MITIE (Cellnex's third party Structural Engineering support partner) work together. Prior to April 2025 those roles were undertaken by MML who instructed RJC to carry out works.

70. The maintenance identified by Mr Robinson is set out at paragraph2 21-49 of his Witness Statement:

- Ardsley House – October 2023 - clearing and removing detritus from the base of the mast and replacing signage.
- South Cave – June 2023 - clearing and removing detritus from the base of the mast, repairing barbed wire, and replacing signage.
- Burchett's Green – May 2023 - clearing and removing detritus from the base of the mast and replacing signage.
- Plunders Price Papers - June 2023 - inspection found that the clamps on the Antennae, Feeders and Gantry Trays required tightening and that the climb door hinges required cleaning; these issues were resolved.
- Roman Garage – July 2023 - clearing and removing detritus from the base of the mast, replacing signage, cutting back foliage, and undertaking rust treatment.
- Vulcan Arms – December 2023 clearing and removing detritus from the base of the mast and replacing signage.
- Cromer Hyde Farm – May 2023 –replacing signage and repairing barbed wire.
- Hopes Hill – June 2024 - replacing signage and undertaking works to the gates.
- Lupton Road – October 2023 - clearing and removing detritus from the base of the mast, replacing signage and removing a bird's nest.

71. I find that the works described by Mr Robinson amount to biennial inspections. Mr Clark reinforced the point: May 2023 inspection at Burchett's Green "job started" 14:29; "job finished" 14:35 [1489]. Total time 6 minutes. In any event maintenance in 2023 and 2024, after the date of acquisition of its interest in the sites, does not assist the Claimant.

72. The evidence of Mr Jackson is that the nine sites were subject to various Master Site Services Agreements which were service agreements. Up until the transfer of ownership of passive infrastructure in 2020 MBNL maintained the sites. However, the Claimant also provided services which included installation of equipment and responsibility for ensuring that the tower was maintained and was safe to climb. In the event that the Claimant defaulted in its obligations the agreements contained provision for MBNL to step in. Similarly, at the Arqiva sites Mr Doyle-Jennings explained the management role undertaken by Cellnex again under a Master Site Services Agreement. I therefore find as fact that prior to the transfer of ownership of passive infrastructure at each of the sites that the Claimant was undertaking maintenance at the sites under the terms of the Master Site Services Agreements.

Maintaining an established system

73. I now turn to the second part of Mr Clark's analysis of the meaning of maintaining i.e. maintenance of a "state of affairs". Support for that proposition is to be found in the code rights at Paragraph 3 (1) (b) and (c) of the Code:

> *(b) to keep installed electronic communications apparatus, which is on, under or over the land,*
>
> *(c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus, which is on, under or over the land,*

74. I find that simply to keep ECA installed on land amounts to maintaining an infrastructure system under Paragraph 7 of the Code. To use Mr Clark's words "it is to secure the continuation of a system that has been established".

75. To ascertain whether there has been a continuation of an infrastructure system that has been established I now turn the agreements at each of the sites. The Existing Agreements are set out at [AF3] and the Earlier Agreements are at [AF16]. The Schedule of Agreed and Assumed Facts sets out some important clauses dealing ownership of ECA in respect of the Existing Agreements [AF8-15] and in respect of the Earlier Agreements [AF17-18].

76. In considering the agreements for all 9 sites I am, again indebted to Mr Clark who helpfully divides the sites into two groups which Mr Clark refers to as "Assignment Cases" and "Direct Grant Cases".

Lupton Road, Burchett's Green and South Cave

77. The Assignment Cases are:

> **Lupton Road**: agreement dated 29 May 2008 between (1) Central Midlands Estates Ltd and (2) Orange Personal Communications Limited [AF3a]

Burchett's Green: agreement dated 4 June 2009 between (1) Berkshire College of Agriculture Further Education Corporation and (2) T-Mobile (UK) Limited and Hutchison 3G UK Limited [AF3b]

South Cave: agreement dated 22 February 2005 between (1) Kenneth Noble, Mary Janet Noble, and Simon Richard Thomas Gittings and (2) T-Mobile (UK) Limited [AF3g]

The Claimant became a party to those agreements on or around the following dates [AF5e]:

Lupton Road: 14th December 2020
Burchett's Green: 24th October 2019
South Cave: 26th September 2019

78. In respect of those three sites, it is agreed that for the purposes of the Preliminary Issues Trial, that the agreements above have been validly and lawfully assigned to the Claimant [AF7]. It was also conceded by Mr Clark at the hearing that, as the agreements were made with NMO's, the Respondent accepted that code rights were being exercised for the statutory purposes at the date of entry into those agreements.

79. Having determined that an operator need only show that it is exercising a code right for the statutory purposes at the date of entry into the relevant agreement I find that the Claimant is, in respect of the Existing Agreements at Lupton Road, Burchett's Green and South Cave, exercising Code rights for the "statutory purposes".

Vulcan Arms, Plunders Price Papers, Roman Garage and Ardsley House

80. The Direct Grant Cases can be divided into two groups. The first is where the grant was made directly to the Claimant (under its former name of Arqiva Services Limited) and the second where the grant was to Arqiva Limited (subsequently assigned to the Claimant).

Grant to Arqiva Services Limited

Vulcan Arms: agreement dated 27 September 2016 between (1) Raymond John Denis Lawrence, Rita Ann Lawrence and Julia Elaine Zamroz and (2) Arqiva Services Limited [AF3c]

Plunders Price Papers: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Servies Limited [AF3e]

Roman Garage: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Services Limited [AF3f]

Ardsley House: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Services Limited [AF3i]

Grant to Arqiva Limited

Cromer Hyde Farm: agreement dated 5 February 2019 between (1) APW and (2) Arqiva Limited [AF3d]

Hopes Hill: agreement dated 19 March 2003 between (1) Mr Melvyn Roy Worrell and Mrs Teresa Jeane Worrell and (2) Orange Personal Communications Services Limited; the parties agree that this agreement was subject to an implied surrender and re-grant by virtue of a licence to assign and vary dated 30 May 2018 between (1) APW (2) EE Limited and (3) Arqiva Limited [AF3h]

81. The agreements where there was a direct grant to Arqiva Services Limited were preceded by earlier agreements. It is agreed that the parties to the Earlier Agreements were operators [AF19].

Vulcan Arms: agreement dated 19 October 2012 and made between (1) Raymond John Denis Lawrence, Rita Ann Lawrence and Julia Elaine Zamroz and (2) Everything Everywhere Limited and Hutchison 3G UK Limited (the "Vulcan Arms Earlier Agreement"). [AF16b]

Vulcan Arms: agreement dated 27 September 2016 between (1) Raymond John Denis Lawrence, Rita Ann Lawrence and Julia Elaine Zamroz and (2) Arqiva Services Limited (the "Vulcan Arms Agreement"). [AF3c]

The Vulcan Arms Agreement included a definition of "*Installation"* (which includes passive infrastructure) which stipulated that "*for the avoidance of doubt the Installation shall remain the property of the Tenant EE H3G and/or any other third party authorised under the terms of this lease at all times…"* (supplemental bundle, page 33). [AF13]

Plunder Price Papers: agreement dated 16 November 2000 and made between (1) David Grierson (t/a Plunder Price Papers) and (2) One 2 One Personal Communications Limited (the "Plunder Price Papers Earlier Agreement") [AF16d]

Plunders Price Papers: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Servies Limited (the "Plunders Price Papers Agreement"). [AF3e]

The Plunders Price Papers Agreement included at clause 4.1 an acknowledgement that "*the Apparatus on the Property now or at any time during the Contractual Term may belong to third parties (including EE H3G and any Operator) and/or to the Tenant"* (supplemental bundle, page 46). [AF15]

The Plunders Price Papers Earlier Agreement was surrendered by a deed of surrender dated 21st November 2019 which, at clause 5, included the following acknowledgement (supplemental bundle, page 41): "*…for the avoidance of doubt the ownership of the "Apparatus" or "Telecommunications Apparatus" and associated equipment and apparatus at the Premises shall not transfer to the Landlord by virtue of this Deed and shall remain in the ownership of the Tenant"*. [AF17]

Roman Garage: agreement dated 20 March 2001 and made between (1) Roy Howard Foster Gibson and (2) One 2 One Personal Communications Limited (the "Roman Garage Earlier Agreement") [AF16e]

Roman Garage: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Services Limited" [AF3f]

Ardsley House: agreement dated 19 September 2000 and made between (2) Ardsley House Hotel Limited and (2) One 2 One Personal Communications Limited; (the "Ardsley House Earlier Agreement") [AF16f]

Ardsley House: agreement dated 21 November 2019 between (1) APW and (2) Arqiva Services Limited (the "Ardsley House Agreement") [AF3i]

The Ardsley House Agreement included at clause 4.1 an acknowledgement that "*the Apparatus on the Property now or at any time during the Contractual Term may belong to third parties (including EE H3G and any Operator) and/or to the Tenant"* (supplemental bundle, page 65). [AF12]

The Ardsley House Earlier Agreement was surrendered by a deed of surrender dated 21 November 2019 which, at clause 5, included the following acknowledgement (supplemental bundle, page 59): "*…for the avoidance of doubt the ownership of the "Apparatus" or "Telecommunications Apparatus" and associated equipment and apparatus at the Premises shall not transfer to the Landlord by virtue of this Deed and shall remain in the ownership of the Tenant".* [AF18]

82. In summary:

- The grant at Vulcan Arms in 2012 was to EE and H3G. The same grantors entered into a new agreement with the Claimant in 2016. The 2016 Agreement records that passive infrastructure was already on site and belonged to EE and H3G.
- The grant at Plunders Price Papers was made to One 2 One (former name of EE 1999-2002) in 2000. The surrender and regrant to the Claimant in 2019 confirmed that ECA was on site and belonged to the tenant.
- The grant at Roman Garage was made to One 2 One (EE) in 2001 and a new agreement entered into by the Claimant in 2019
- The grant at Ardsley House was made to One 2 One (EE) in 2000. The surrender and regrant to the Claimant in 2019 confirmed that ECA was on site and belonged to the tenant.

83. I apply Mr Clark's test for maintaining in respect of all 4 sites. I find that the agreements made in 2016 (Vulcan Arms) and 2019 (Plunders Price Papers, Roman Garage and Ardsley House) were entered into "*to secure the continuation of the system that has been established"* in 2012 (Vulcan Arms) and 2000/2001 (Plunders Price Papers, Roman Garage and Ardsley House) in respect of ECA that was already on site.

Cromer Hyde Farm and Hopes Hill

84. The agreements where there was a direct grant to Arqiva were preceded by earlier agreements:

Cromer Hyde Farm: agreement dated 26 September 2003 and made between (2) Stephen Marius Gray and Michael John Nicol and (2) T-Mobile (UK) Limited (the "Cromer Hyde Farm Earlier Agreement"). [AF16c]

Cromer Hyde Farm: agreement dated 5 February 2019 between (1) APW and (2) Arqiva Limited (the "Cromer Hyde Farm Agreement"). [AF3d]

The Cromer Hyde Farm Agreement included at paragraph 3 of the Schedule an acknowledgement that "*the Apparatus on the Property now or at any time during the Term may belong to third parties (including EE and/or H3G and/or any other Operator) and/or to the Tenant. The Landlord agrees that all the provisions of this Lease will apply in relation to the Apparatus, including the exercise of the Rights, regardless of whether the Apparatus is owned by the tenant or a third party"* (supplemental bundle, page 37). [AF14]

The Comer Hyde Farm Agreement was varied by a licence to assign and vary dated 30th May 2018 so that it included the following provision (paragraph 1.3 of the Schedule to the lice to assign and vary): "*The Owner acknowledges and agrees that the Apparatus on the Premises now or at any time during the term may belong to third parties (including EE and/or H3G) and/or to Arquiva and the Owner agrees that all the provisions of the Agreement will apply in relation to the Apparatus including the exercise of the Rights regardless of whether the Apparatus is owned by Arquiva or a third party"* (supplemental bundle, page 53). [AF9]

The Cromer Hyde Farm Agreement was assigned by Arqiva to the Claimant on 30th September 2019 [AF5e(iii)]

Hopes Hill Agreement "*agreement dated 19 March 2003 between (1) Mr Melvyn Roy Worrell and Mrs Teresa Jeane Worrell and (2) Orange Personal Communications Services Limited; the parties agree that this agreement was subject to an implied surrender and re-grant by virtue of a licence to assign and vary dated 30 May 2018 between (1) APW (2) EE Limited and (3) Arqiva Limited*" [AF3h]

The Hopes Hill Agreement was assigned by Arqiva to the Claimant on 15th November 2019 [AF5e (iv)]

85. I apply Mr Clark's test for maintaining in respect of both sites. I find that the agreements made in 2018/2019 at both sites were entered into "to secure the continuation of the system that has been established" in 2003 in respect of ECA that was already on site.

Mobile Network Operators and third-party occupiers

86. The Respondent's case is that the clauses in both the Existing Agreements and the Earlier Agreement [AF8-15 and 17-18] in respect of retention of ownership of ECA are consistent with the MNO's having exclusive possession of the sites. Absent transfer of ownership of the passive infrastructure NMO's are transmitting from their own ECA. The presence of an MNO or other third party on each site would indicate that it is those

parties rather than the Claimant which is exercising a code right for the statutory purposes.

87. I have had the benefit of hearing from representatives of MBNL and Arqiva. Neither EE nor H3G seek to assert that they are exercising code rights to the exclusion of the Claimant. It is for the NMO's and the Claimant to reach their own commercial arrangements. No method of provision of a system of infrastructure is prescribed by the Code. How NMO's and WIP's choose to secure the continuation of the system that has been established is a matter for their commercial judgement. EE and H3G have chosen Cellnex as their WIP and have transferred a large number of sites on the basis that Cellnex would own the infrastructure which MBNL could continue to use for a fee. Other MNOs operate in the same way, for example O2 and Telefonica are content for their sites to be in the hands of their own WIP, Cornerstone Telecommunications Infrastructure Limited. That is how things work in practice and that is how the Code was intended to work. Paragraph 4 of the Code makes very clear the distinction between operators who are providing a network and operators who are providing infrastructure. Although the Code does not use the terms MNO or WIP it clearly recognises that dichotomy.

88. I find that the presence of NMO's and other third parties at any of the sites is simply irrelevant.

Vulcan Arms

89. Paragraph 2 of the Code contains the definition of an operator:

In this code "operator" means—

(a) where this code is applied in any person's case by a direction undersection 106, that person, and ….

90. The parties agree that a direction has been made under section 106 of the Communications Act 2003 applying the electronic communications code to the Claimant [AF1]

91. Section 106(4) of the 2003 Act provides that:

(4) The only purposes for which the electronic communications code may be applied in a person's case by a direction under this section are—

(a) the purposes of the provision by him of an electronic communications network; or
(b) the purposes of the provision by him of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

(5) A direction applying the electronic communications code in any person's case may provide for that code to have effect in his case—

(a) in relation only to such places or localities as may be specified or described in the direction;

(b) for the purposes only of the provision of such electronic communications network, or part of an electronic communications network, as may be so specified or described; or

(c) for the purposes only of the provision of such system of infrastructure, or part of a system of infrastructure, as may be so specified or described

92. On 21st July 2005 OFCOM gave a Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of the Claimant (at that time known as Crown Castle UK Ltd) [1736-1740]. The terms of the Direction were:

"The electronic communications code shall apply to Crown Castle UK Ltd for the purposes of the provision by Crown Castle UK Ltd of an electronic communications network to have effect in the United Kingdom."

93. The 2003 Act was amended with effect from 28th December 2017 by the Digital Economy Act 2017. Prior to 2017 a Direction could be given for a network or a system of conduits or both. In 2017 the wording "system of conduits" was amended to "system of infrastructure". It is important to note that the 2005 Direction only applied for the purposes of a network and not to the provision of a system of conduits. The agreement at Vulcan Arms was entered into on 27th September 2016 between Raymond John Denis Lawrence and others (1) and Arqiva Services Limited (2) [AF 3c]. At the time that agreement was entered into the Claimant (known at that time as Arqiva Services Limited) had a Direction as a network provider but not for the purposes of the provision of a system of conduits. The Claimant was the subject of a limitation under section 106(5)(b).

The Limitation was not removed until 25th September 2018 when following modification, the Claimant received a "Modification to Direction" from OFCOM adding a further direction in respect of an infrastructure system [1766-1767].

94. This issue was considered in **Cornerstone Telecommunications Infrastructure Limited v Keast** [2019] UKUT 116 (LC) at paragraphs 77-90. However, the point that arises before me was not decided for the reasons given by Upper Tribunal Judge Cooke at paragraph 100:

"The Claimant argues that because there is no reference in paragraph 7 of the Code to any limitation under paragraph 106(5) – in contrast to the reference in paragraph 6(1), and in contrast to the way a conduit system was defined under the old Code - then any Code operator who has had the Code applied to it for the purpose of the provision of infrastructure, subject to a limitation under section 106(5), is able nevertheless to seek Code rights that fall outside that limitation. I make no decision on that point, although I note that it seems far-fetched; but I do not need to address it because there is clearly no section 106(5) limitation in the direction made in respect of the Claimant."

95. Paragraph 6(a) of the Code deals with "The Operator's Network" and provides:

In this code "network" in relation to an operator means—

(a) if the operator falls within paragraph 2(a), so much of any electronic communications network or infrastructure system provided by the operator as is not excluded from the application of the code under section 106(5),

Paragraph 2(a) of the Code provides that an operator means any person to whom the Code is applied by a direction undersection 106.

96. I reject Mr Kitson's submission that an OFCOM Direction is a gateway. In the case of Vulcan Arms, the 2005 Direction was limited to the provision of a network. Taking the Claimant's case at its highest it is a provider of a system of infrastructure. The Claimant did not have a Direction for a system of conduits in 2016 when the agreement at Vulcan Arms was entered into. Its Direction was limited under section 106(5) to the provision of an electronic communications network. The provision of a system of conduits provided by the operator was, to use the language of Paragraph 6(a), excluded from the application of the Code under section 106(5). Accordingly, I find that the code rights granted by the 2016 Agreement were not for statutory purposes.

Conclusions

97. As a matter of law, there is a jurisdictional requirement that an operator must be exercising a Code right(s) for the "statutory purposes" (as defined in paragraph 4 of the Code) in order to apply for an order under paragraph 34.

98. There is a single "one time" conferral of code rights as at the date of entering into the agreement. Accordingly, an operator need only show that it is exercising a code right for the statutory purposes at the date of entry into the relevant agreement.

99. I find as fact that ownership of passive infrastructure passed to the Claimant on 1st January 2020 in respect of 7 of the sites and on 1st April 2020 in respect of the site at Hopes Hill. Passive Infrastructure at Lupton Road passed to Arqiva on 1st January 2020 and from Arqiva to the Claimant on 8th July 2020.

100. The Claimant is not required to prove ownership of passive infrastructure at the sites. "The statutory purposes" means providing an infrastructure system. Provision of an infrastructure system includes establishing or maintaining such a system.

101. "Maintaining" means "*the performance of an activity, such as effecting a repair*" and also "*to secure the continuation of the system that has been established*".

102. In respect of active maintenance, I find as fact that all sites were held under the various Master Site Services Agreements which were service agreements. Under those agreements the Claimant provided services which included installation of equipment and responsibility for ensuring that the tower was maintained and was safe to climb.

103. Lupton Road, Burchett's Green and South Cave are sites where agreements have been assigned to the Claimant. As the agreements were made with NMO's code rights were being exercised for the statutory purposes at the date of entry into those agreements.

104. In respect of the direct grant cases where the grant was made directly to the Claimant (Vulcan Arms, Plunders Price Papers, Roman Garage and Ardsley House) or to Arqiva Limited and subsequently assigned to the Claimant (Cromer Hyde Farm and Hopes Hill) there was in all cases an Earlier Agreement made with an MNO operator. I find that the Existing Agreements made on dates between 2016 and 2019 were entered into "*to secure the continuation of the system that has been established*" by the Earlier Agreements with MNO operators in respect of ECA that had been installed many years previously and continued to remain on site.

105. The occupation of a site by an MNO or other third party is irrelevant.

106. In respect of Vulcan Arms, because the Claimant had a section 106(5) limitation at the time of entering into the agreement dated 27th September 2016, I find that it was not exercising Code rights for the statutory purposes.

107. Maintaining an infrastructure system is for the statutory purposes of providing an infrastructure system. I therefore find that for all sites, with the exception of Vulcan Arms, that the Claimant is, in respect of the Existing Agreements exercising code rights for statutory purposes. The Claimant is therefore a party to a code agreement and able to renew its existing agreements, with the exception of Vulcan Arms, under Part 5 of the Code.

108. The Claimant therefore succeeds in respect of the first Preliminary Issue at all sites except for Vulcan Arms.

Are the agreements in Burchett's Green and South Cave, assuming that the Existing Agreement in each case is a lease, effectively excluded from the security of tenure provisions of the 1954 Act?

109. Section 38 (1) of the Landlord and Tenant Act 1954 ("the 1954 Act") provides that an agreement to exclude the provisions of Part II of the 1954 Act is void except as provided for by section 38A:

> *"(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.*
>
> *(3) An agreement under subsection (1) above shall be void unless—*
>
> *(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the 2003 Order"); and*
>
> *(b) the requirements specified in Schedule 2 to that Order are met."*

110. The requirements specified in Schedule 2 are a Notice (paragraph 2) and either a declaration (paragraph 3) or a statutory declaration (paragraph 4). Paragraph 6 provides:

The agreement under section 38A(1) of the Act, or a reference to the agreement, must be contained in or endorsed upon the instrument creating the tenancy.

111. The agreement must be "*an agreement in writing between them"* (see section 69(2) of the 1954 Act). The authors of "Foskett on Compromise" [AB 484] suggest:

"In the normal course of events, a provision will be included in the lease when executed to the effect that the parties have agreed that the provisions of ss.24–28 of the Act are excluded from the tenancy…"

112. At both Burchett's Green and South Cave, the agreement to exclude is an express term of the tenancy rather than an endorsement. By incorporating the agreement to exclude as an express term of the tenancy the requirement for an agreement to be in writing is satisfied.

113. The statutory purpose behind the requirement for the agreement to exclude to be endorsed on or contained in the instrument creating the tenancy is explained by Lawson J in Tottenham **Hotspur v Princegrove Publishers Limited** [1974] 1 WLR 113 at 119 C:

"The reason for the formula which is adopted in the latter part of subsection (4) can, in my judgment, only be that these procedural devices were introduced in order that third parties, prospective assignees, or prospective mortgagees of the tenant's interest under a lease should know, on the assumption that they are dealing with a lease of business premises, that this is a lease which, by agreement of the parties and by the authority of the court, has a special restriction; that is, it is a lease to which, basically, Part II of the Act of 1954 does not apply, because the court has so authorised. Unless the agreement was either contained in, or endorsed on the document creating the tenancy, or some other instrument, of course it would be extremely difficult for a third party to know of the existence of this special feature of a lease which, by the authority of the court, contracts out the tenant from his statutory rights under Part II of the Act of 1954."

114. The Agreement at Burchett's Green is dated 4th June 2009 and made between Berkshire College of Agriculture (1) and T-Mobile (UK) Limited and Hutchison 3G UK Limited (2) [1326] [AF3b]. The first page of the Agreement reads:

***THIS AGREEMENT** is made the 4th day of June 2009 pursuant to the Code ….*

NOW IT IS HEREBY AGREED as follows

Clause 15 is at [1338]

15 Exclusion of the security of tenure provisions of the Landlord and Tenant Act 1954

"Notwithstanding that the arrangements being entered into are not intended by either party to constitute a relationship of landlord and tenant, the Owner has served a notice dated 8th May 2009 and the Operator has made a declaration dated 4th June 2009 pursuant to Section 38A(3) of the Landlord and Tenant Act 1954 in accordance with the procedure set out in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 confirming that the Operator will not have security of tenure under the provisions of Sections 24 to 28 inclusive of the Landlord and Tenant Act 1954" [AF6]

115. The Agreement at South Cave is dated 22nd February 2005 and made between Kenneth Noble and others (1) and T-Mobile (UK) Limited (2) [1215] [AF3G]. The first page of the Agreement reads [1216]:

THIS AGREEMENT *is made the 22nd day of February 2005 pursuant to the Code ….*

NOW IT IS HEREBY AGREED as follows

Clause 15 is at [1226]

15. Exclusion

"Notwithstanding that the arrangements being entered into are not intended by either party to constitute the relationship of landlord and tenant the Owner has served a notice dated 11th January 2005 and T-Mobile has made a declaration dated 25th January 2005 pursuant to Section 38A(3) of the Landlord and Tenant Act 1954 in accordance with the procedure set out in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 confirming that T-Mobile will not have security of tenure under the provisions of Sections 24 to 28 inclusive of the Landlord and Tenant Act 1954"

116. The Respondent's case is that Paragraph 6 of Schedule 2 to the 2003 Order (reference to the agreement to be contained in or endorsed upon the instrument) is not satisfied.

117. The exclusion clause in both agreements must be read in the context of the words at the outset "*NOW IT IS HEREBY AGREED*". What follows, at clause 15 in both cases, cannot be anything other than the agreement the parties have reached which, as Foskett advises, has been included as a provision in the agreement.

118. Both clauses 15 refer to "arrangements being entered into", what was "intended" by the parties and "confirming" that the tenant will not have security of tenure. The usual everyday meaning of "confirm" is to make an arrangement definite. I read both clauses as confirming that the arrangements in respect of security of tenure are being made definite. I am quite satisfied that arrangements, what was intended, and the confirmation taken together amount to "the agreement under section 38A(1) of the Act" that T- Mobile would not have security of tenure. A third-party reading clause 15 in both agreements would know that the 1954 Act does not apply to those tenancies. The statutory purpose is satisfied and the agreements that the parties reached are faithfully recorded. I find that Paragraph 6 of Schedule 2 to the 2003 Order is satisfied and that the agreements at Burchett's Green and South Cave to exclude the provisions of Part II of the 1954 Act under section 38A(1) are not void.

119. Agreed Question of Law 4 asks:

*Are the Existing Agreements in the **Burchett's Green** and **South Cave** references (assuming that the existing agreement in each case is a lease) effectively excluded from the security of tenure provisions of the 1954 Act? In particular:*

(a)What is the meaning and effect of the requirement that "an agreement made under s.38A(1) of the Act or a reference to the agreement must be contained in or endorsed upon the instrument created the tenancy" in paragraph 6 of Schedule 2 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003?

*(b) Should the Tribunal conclude that the agreement under s.38A(1) of the 1954 Act ("**the s.38A Agreement**"), or a reference to the same, was neither contained in nor endorsed on the Burchett's Green Agreement and/or South Cave Agreement, then is the s.38A Agreement void and of no effect?*

I am not persuaded that the third Preliminary Issue raises any question of law. What is required is a fact specific enquiry as to whether the Existing Agreements contain a reference to the agreement under section 38A(1) that the provisions of sections 24-28 of the 1954 Act are excluded in relation to that tenancy. On the facts the Existing Agreements at Burchett's Green and South Cave have been effectively excluded from security of tenure provisions of the 1954 Act.

In respect of Burchett's Green (assuming it is contracted out of the 1954 Act and is caught by the Code), is On Tower entitled to rely on the Para 33 Notice served in that case or is reliance on it an abuse of process?

120. The doctrine of abuse of process exists "*to protect the process of the court from abuse and the defendant from oppression*" **Johnson v Gore Wood & Co. (a firm)** [2002] 2 AC 1.

121. The Paragraph 33 Notice at Burchett's Green was served on 30th December 2021. The earliest a reference could be brought under Paragraph's 33(4) and (5) is 6 months thereafter i.e. 30th May 2002. The reference was issued on 1st October 2024. The delay is a little under 2 ½ years.

122. There are two lines of authority. The first relates to the striking out of an action for want of prosecution. The leading authority is **Icebird Ltd v Winegardner** [2009] UKPC 24

"8. Birkett v James [1978] AC 297 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied –

"... either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not

possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party" (per Lord Diplock at 318)."

123. To succeed the Respondent would have to show both inordinate and inexcusable delay giving rise to a substantial risk that it is not possible to have a fair trial, or that delay is likely to cause or has caused serious prejudice to the Respondent. Mere delay is insufficient. **Icebird** is concerned with delay once proceedings have been commenced as are the "warehousing" of claims cases (see **Asturion Foundation v Alibrahim** [2020] 1 WLR 1627).

124. The second line of cases relates to delay in pursuing claims under statutory notices. Ms Briggs helpfully referred me to **Collin v Duke of Westminster** [1985] QB 581. That case concerned a notice under the Leasehold Reform Act 1967. There is a special feature of such notices, absent from Code notices, in that service of a 1967 Act notice gives rise to a statutory contract. Nevertheless, the authorities are clear; there must be either abandonment or estoppel.

125. In the case of the notice at Burchett's Green the delay is 2 ½ years. Even if the Limitation Act 1980 applied delay of less than 2 ½ years would not prevent an action being brought. Under **Icebird** principles a delay of less than 2 ½ years is neither inordinate nor inexcusable. A fair trail is still possible and there is no prejudice to the Respondent.

126. The better view is that **Icebird** and the "warehousing" cases apply only once proceedings have been commenced. The authorities deal with strike out where a Claimant unilaterally decides not to peruse a claim for a substantial period of time (see **Asturion Foundation** at [55])

127. What the Respondent characterises as "stale notices" fall within the **Collin v Duke of Westminster** line of cases. To succeed the Respondent would need to persuade me that the notice has been abandoned or that the Claimant is estopped from relying on the notice.

128. There is no material before me on which I can find that the notice issued on 30th December 2021 has been abandoned. The Respondent cannot demonstrate any prejudice to found an estoppel. The Respondent did not acquire its interest at Burchett's Green until 2023, some time after the notice was served. However, I have no doubt that the Respondent's due diligence on acquisition will have discovered the notice. In any event with ECA on site and the Existing Agreement having expired the Respondent will have been well aware of the possibility that a notice may have been served. There is no threat of expropriation. The Claimant is on site and the renewal is not contested. The Respondent has not served a notice to bring the code agreement to an end on one of the grounds in Paragraph 31(4). The starting rent under the Existing Agreement at Burchett's Green was £5,300 p.a. subject to review. I was told at the hearing the passing rent is now £7,202. The starting point for a code rent of a greenfield site is £1750 p.a. Accordingly there is no prejudice to the Respondent, as between 30th December 2021 and 1st October 2024 it has been in receipt of a market rent substantially in excess of the likely code rent (absent any alternative use value). The only party that has been prejudiced by delay is the Claimant.

129. Agreed Question of Law 5 asks:

Should the Tribunal conclude that the Burchett's Green Agreement is contracted out of the 1954 Act, then:

(a) Is the Tribunal entitled to strike out a reference under paragraph 33 of the Code as an abuse of process?

(b) If so:

(i) What is the correct test to be applied by the Tribunal in deciding whether to do so?
(ii) In particular, should the Tribunal adopt the approach taken in On Tower UK Limited and On Tower UK 2 Limited v AP Wireless II (UK) Limited ("Patricroft"), Ref LC-2023-000852 & Ors?

(c) Is OT entitled to rely on the paragraph 33 notice served in the Burchett's Green Reference or is it an abuse of process?

130. The Tribunal has jurisdiction to strike out proceedings as an abuse of process under FTT Rule 9(3)(d). The test to be applied where proceedings have been commenced is set out in **Icebird**. Where a Claimant seeks to rely on a "stale notice" the principles in **Collin v Duke of Westminster** apply. Abuse of Process is always highly fact sensitive. My decision in **Patricroft** should be confined to its own facts.

Decision

131. In respect of the Existing Agreements the Claimant is exercising Code rights for the "statutory purposes" at all sites except Vulcan Arms

132. The Claimant is not exercising Code rights for the "statutory purposes" in respect of the Existing Agreement at Vulcan Arms

133. The agreements in Burchett's Green and South Cave have been effectively excluded from the security of tenure provisions of the 1954 Act.

134. Reliance on the Para 33 Notice served in respect of Burchett's Green is not an abuse of process.

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.

Schedule of Sites

Lupton Road – BIR/00CN/ECR/2024/0602
An electronic communications site at land adjoining Unit 2A Lupton Road, Thame, OX9 3SE.
Burchett's Green – BIR/00CN/ECR/2024/0604
An electronic communications site at Berkshire College of Agriculture, Hall Place, Burchett's Green, Maidenhead, SL6 6QR
Vulcan Arms – BIR/00CN/ECR/2024/0609
Electronic Communications Site at Vulcan Arms, Doldowlod Llandrindod Wells, LD1 6NN
Cromer Hyde Farm – BIR/00CN/ECR/2024/0630
Cromer Hyde Farm, Lemsford, Welwyn. Garden City, AL8 7XB.
Plunders Price Papers –BIR/00CN/ECR/2024/0631
Plunders Price Papers Transmitting Station, Cotton Hall Industrial Estate, Cotton Hall Street, Darwen BB3 ODWI
Roman Garage – BIR/00CN/ECR/2024/0632
Roman Garage, Bridge End Road near Grantham Lincolnshire NG32 3AD
South Cave –BIR/00CN/ECR/2024/0635
Electronic communications site lying to the north of A63, South Cave, Brough
Hopes Hill –BIR/00CN/ECR/2024/0636
Land to the South of The Street and to the East of Hopes Hill, Doddington Sittingbourne Kent
Ardsley House – BIR/00CN/ECR/2024/0637
Ardsley House Hotel, Doncaster Road, Ardsley, Barnsley, South Yorkshire, S71 5EH