FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LC-2024-000365
Claimants (Operators)	:	(1) EE Limited (2) Hutchison 3G UK Limited
Representative	:	Winckworth Sherwood LLP
Respondent (Site Provider)	:	Clocktower Investments Limited
Representative	:	Waldrons Solicitors Limited
Type of Application	:	Electronic Communications Code
Date of Hearing	:	7 March 2025
Date of Decision	:	3 June 2025

DECISION on preliminary issue and Order

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1. The Claimant owns apparatus and equipment mounted on parts of a Clocktower situated on the Respondent's land pursuant to a lease dated 11 June 2004, which predates the Code coming into force. The original parties are (1) the Respondent landlord and (2) Orange Personal Communications Services Limited ("Orange") the tenant.

2. As successor to Orange the Claimant (EE H3G) served notices pursuant to paragraph 33(1)(d) of the Code seeking a renewal lease under paragraph 34.

3. It is not in dispute that the lease is a 'subsisting agreement' for the purposes of Schedule 2 para 1(4) of Digital Economy Act 2017, or that Part 5 of the Code will apply, provided it is not a lease to which Part II of the Landlord and Tenant Act 1954 applies.

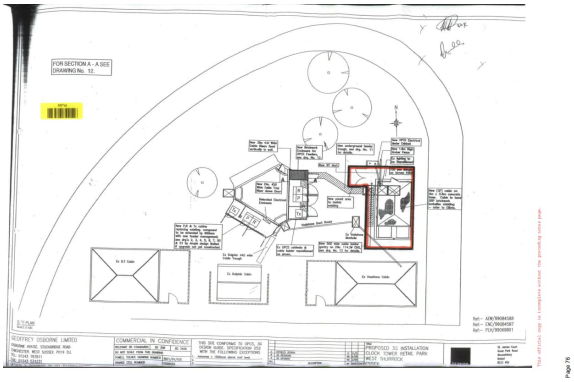
4. It is also not in dispute that the primary purpose of the lease was to grant Code rights or that that there is no agreement under section 38A of the 1954 Act to exclude security of tenure in relation the tenancy created by the lease. In principle therefore the lease creates a tenancy that is protected by Part II of the LTA 1954.

5. If correct, paragraph 6(2) of Schedule 2 to of the 2017 Act precludes the Claimant from renewing the lease under Part 5 of the Code. It can instead seek renewal under Part II of the 1954 Act.

6. The preliminary issue for the Tribunal is therefore whether the Claimant occupies premises under a lease that is protected by Part II of the 1954 Act.

7. A hearing of this issue took place on 7 March 2025. The Claimant was represented by Mr James Tipler of counsel The Respondent was represented by Mr David Stockill also of counsel. Both filed helpful skeleton arguments and made further representations and argument at the hearing. A point that had not been addressed in the parties' statements or legal arguments was whether the Claimant's broader network comprised an additional dominant tenement capable of enjoying some of the rights granted by the lease. The parties were given additional time to submit written submissions on this point and both have.

8. There is no dispute about the express terms of the lease. It demises an area of land identified on the lease plans as 'edged red' and referred to as the "Demised Premises".



9. The 'Rights' granted in Schedule 1 Part II of the Lease are expressed as follows:

> *Rights enjoyed with demise*
>
> *Subject to the Tenant observing and performing all of its covenants and obligations herein and making all or any payments due from it hereunder:*

1. To erect maintain renew and replace the Radio Base Station on the Demised Premises in accordance with plans and specifications previously approved in writing by the Landlord

2. To erect the Tenant's Apparatus on the Building in the position shown on the Drawings (as regards the cross polar antennae) or as otherwise agreed with the Landlord (such agreement not to be unreasonably withheld or delayed) and to connect the same with the Base Station

3. To enter the Building for the purpose of alteration maintenance or repair of the Tenant's Apparatus at all reasonable times after giving to the Landlord written notice (except in emergency) and exercising such right in a reasonable manner and making good any damage caused to the Building forthwith

4. Full and free right of access on foot only as appropriate to and from the Demised Premises and the Tenant's Apparatus over and along the land owned by the Landlord upon and comprising the Building in common with all others' similarly entitled at all times and for all purposes

5. To install upon the Building in such locations and by such means as shall first be agreed with the Landlord (such agreement not to be unreasonably withheld or delayed) such/ handrails climbing ladders and safety harness connection points as the Tenant shall reasonably require for the purpose of obtaining safe access to the Tenant's Apparatus

10. The Drawings attached to the lease show cabinets at the base of the Clocktower and antenna on roof and walls of Clocktower. The location of safety rails and equipment is also shown.

11. What the parties envisaged on execution of the lease did not fully come to pass. The proposed radio Base Station was never constructed on the Demised Premises. There are no physical boundaries identifying the extent of the Demised Premises which is currently indistinguishable from the surrounding open land. That appears to have been the case for some time.

12. The apparatus and equipment were however installed in approximately the positions shown on the Drawings. The proposed connection to the Base Station was obviously not installed. The antennae and cabinets remain in situ and have presumably been maintained and repaired over the years using the installed safety ladders and equipment. Access to the Clocktower is over the remainder of the servient tenement which is defined as the land edged blue on the Lease plan and comprises the large D shaped area of land surrounding the Clocktower.

13. The relevant argument put forward by Mr Tipler on behalf of the Claimant can be broadly summarised as follows:

    a. The Lease is not a subsisting agreement that is protected by sections 24 to 28 of the 1954 Act due to the operation of section 23(1) of that Act, which provides that "*this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes*."

b. Put simply, although capable of being occupied, the Demised Premises is not currently occupied and appears never to have been physically occupied by the tenant for any purpose, let alone for the purposes of a business. As actual occupation of some part of the premises comprised in the tenancy is a pre-requisite to the application of Part II this presents an insurmountable obstacle to the Respondent's argument that the Lease is a protected tenancy.

c. As to whether any of the Schedule 1 Part II 'Rights' comprise 'premises' occupied by the Claimant for the purposes of its business, Mr Tipler submits not because:

   i. The rights of way in paragraphs (3) and (4) cannot be 'occupied' for the purposes of section 23. Furthermore, they are granted for the purpose of benefitting the tenant's apparatus on the Clocktower rather than accommodating any dominant tenement.

   ii. The paragraph (1) 'right' to erect a base station on the Demised Premises is not capable of being an easement because the grantee already owns an interest in possession. It is just a contractual right to approve the plans prior to construction.

   iii. The paragraph (2) right to install apparatus, and the paragraph (5) right to install equipment on the retained land cannot be easements because there is no identifiable dominant tenement capable of enjoying those rights. They are tantamount to easements in gross which (other than profits a prendre) are not recognised in law. Furthermore, the rights effectively confer exclusive occupation of the areas occupied by the Claimant's apparatus and equipment which deprives the owner of any reasonable use. This is extensive enough to oust the servient owner from any reasonable use of the servient land which is inconsistent with the rights being classed as an easement.

Law

14. Part II of the 1954 Act provides security of tenure for business, professional and other tenants.

Section 23 Tenancies to which Part II applies.

(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.

(2) ...

(3) In the following provisions of this Part of this Act the expression "the holding", in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies.

15. To determine whether the lease falls within the protection of Part II one must first start with identifying what property is *prima facie* comprised in the 'holding'. I use the term prima facie because the date at which a court must decide what property constitutes the "holding" is the date when the current tenancy comes to an end. If the tenancy is a protected tenancy it can only be ended by service of a section 25 or 26 notice under Part II 1954 Act. As no notice has been served the tenancy is continuing the statutory holdover. When considering the extent of the holding I have assumed the premises currently occupied by the Claimant will continue unchanged.

16. Premises is not defined in the Act, but case law makes clear that the term should not be construed narrowly. What section 23(3) refers to as a 'holding' includes the whole subject matter of the tenancy. Provided that some part of the property comprised in the tenancy is occupied by the tenant for the purpose of a business carried on by it, the holding will extend to all other parts of the property occupied by it. The property comprised in the tenancy is not restricted to corporeal hereditaments demised by the lease but has been held by the Court of Appeal in *Pointon York Group Plc v Poulton* [2007] 1 P&CR 6 to include incorporeal hereditaments that are capable of occupation. In the *Pointon* case the discontinuous use of a carparking space used in connection with the tenant's business was held to be premises capable of occupation notwithstanding the tenant having ceased to occupy the offices demised by the lease. Rights of way are generally not considered to be capable of occupation, but they can be protected if there are other premises comprised in the tenancy that are protected.

17. In my view the holding includes the parts of the Respondent's retained land on which apparatus and equipment has been installed pursuant the paragraph (2) and (5) rights in Schedule 1 Part II. There has been considerable argument concerning whether these rights constitute legal easements, mostly in connection with identification of a dominant tenement that can be accommodated by the rights. An additional point on ouster has been raised by Mr Tipler in relation to the space occupied by the Claimants apparatus.

18. *Pointon* confirms that the meaning of 'premises' in section 23 can include incorporeal rights. The issue under section 23 is whether the rights granted under the tenancy are capable of being occupied. The issue is not whether those rights comprise an incorporeal hereditament that meets all the criteria for a legal easement. Easements, profits and rent charges are examples of incorporeal hereditaments' but what can constitute an intangible property right in land is not restricted to those examples, an incorporeal right can include any right, privilege, or benefit in, over, or derived from land.

19. The rights of way in paragraph (3) and (4) are not capable of being occupied. If the tenant did not occupy any premises comprised in the tenancy, section 23 could not be engaged in relation to these rights. It is undisputed that the Demised Premises are not occupied. However, the rights in paragraph(2) and (5) are incorporeal rights that are capable of occupation and are being occupied. The Clocktower continues to house Claimants' apparatus and equipment installed pursuant to those rights. If those parts of the Clocktower are occupied for the purposes of the Claimants business (and there was no argument that the apparatus and equipment were not being so used) then following *Pointon*, they should be protected irrespective of whether the Demised Premises are occupied.

20. I have indicated that the argument concerning whether the paragraph (2) and (5) Rights create valid legal easements is a 'red herring' and not relevant to determining whether section 23 is engaged. However, in case I am wrong about this I will comment on the arguments put forward.

21. The Schedule 1 Part II 'Rights' are expressly granted as "*Rights enjoyed with demise*". They are not expressed as being granted exclusively for the benefit of the Demised Premises. The lease anticipates that the proposed use of the Demised Premises will come into existence at some point in the future. Easements are often granted to facilitate development. The normal use can therefore be a contemplated use. (*Moncrieff v Jamieson* [2007] 1 WLR 2620, per Lord Neuberger of Abbotsbury, at paras 132-133).

22. Two principal questions were posed by Mr Tipler (i) whether the broader telecoms network of the tenant can be identified as a dominant tenement that can be accommodated by the paragraph (2) and (5) rights and (ii) whether the paragraph (2) and (5) rights are so extensive as to oust the landlord from the retained land (the ouster argument),

23. I don't propose going through the leading cases on creation of valid easements, just the disputed characteristics, which in this case which are the identification and accommodation of a dominant tenement and whether the rights are too extensive to qualify as a valid easement.

Accommodation of an identifiable dominant tenement

24. The rights are expressly granted to accommodate the proposed use of the Demised Premises for the purposes of the tenant's business. The Demised Premises clearly qualifies as a dominant tenement (irrespective of whether it fails to comprise part of a 'holding' for the purposes of Pat II of the 1954 Act).

25. The tenant's broader network (i.e. its electronic communications code network) is not expressly mentioned in the lease. But neither does the lease expressly restrict to the Demised Premises, the property that can be accommodated by the apparatus installed pursuant to the paragraph (2) and (5) rights.

26. *Bate v Affinity Water Ltd* [2019] EWHC 3425 confirms that the deed itself does not need to expressly identify the dominant tenement, the identification of which can be inferred from the facts and circumstances which must have been known to the parties at the time, and it is certainly possible for there to be more than one dominant tenant.

27. The lease requires the tenant to pay (or contribute) to all rates and outgoings assessed on the Demised Premises and the retained land that relate to the tenant's telecoms apparatus and to contribute to the costs of repair and maintenance of the retained land. The landlord covenants at paragraph 5.2 of the lease not to move, interfere or tamper with the tenant's apparatus, and at paragraph 5.4 of the lease to enter into wayleaves with electricity companies or public telecoms companies reasonably required by the tenant for the purpose of installing electricity and telecoms cables, in a form reasonably acceptable to the landlord.

28. There are 2 other telecoms operators in occupation of parts of the retained land. Both occupy land on which radio or other telecoms buildings have been erected and both also own and maintain telecoms apparatus on the Clocktower. The lease includes provisions for arbitration of disputes between the operators.

29. It is likely therefore that the landlord knew that the tenant's telecoms apparatus would be connected to its broader network, not least because it was contractually required to facilitate wayleaves with other telecoms companies. Also, there is nothing in the lease that indicates the Clocktower apparatus would not be installed until a radio base station had been constructed on the Demised Premises. It can be inferred therefore that right to install apparatus on the Clocktower was intended to benefit not just the base station on the Demised Premises (when built) but also the tenants broader telecoms network.

30. As to whether the Claimant's electronic communications code network is a dominant tenement which can be accommodated, Mr Tipler argues not. He refers to cases where the status of the statutory rights of undertakers have received judicial consideration in connection with ratings and similar. The difficulty in identifying a dominant tenement in these cases meant that usually no easement was created. However, the nature of the rights as between the undertaker and the owner does not appear to have been considered, presumably because it was not relevant in these types of case where the issue was the distinction between ownership and easement. The cases are of only limited relevance when considering this type of case which involves the express grant of rights to a telecom's infrastructure provider within a lease.

31. The principal case cited in relation to whether a dominant tenement could be found in the "undertaking" of a statutory water undertaker is *Re Salvin's Indenture* [1938] 2 All E.R. 498. The case concerned an express grant of a right to lay mains and water pipes through the grantors land. The dominant tenement was held to be not just the land the water authority acquired in order to perform its functions but also the incorporeal rights acquired to lay mains and pipes in the land of third parties. The undertaking does not need to be physically contiguous with the servient land provided the right is capable of being and intended to be used in connection with the dominant tenement. In this case the rights for the tenant to install and use the telecoms apparatus and the equipment to access it safely, are rights capable of being used in connection with the tenant's broader telecoms network and is being used for that purpose.

32. *Re Salvin* was considered more recently in the 2019 High Court case *Bate v Affinity Water Ltd,* a decision of HHJ Matthews. The case concerned a deed of grant to a statutory water undertaker's predecessor in title to lay, maintain and use a water main located on private property. The dominant tenement was not expressly identified in the deed but comprised an area of land that contained a borehole and pumping equipment clearly intended to be accommodated by the rights. An additional argument relied on by the undertaker was that its whole water undertaking could also comprise a dominant tenement. Having identified the borehole land as the dominant tenement the Judge did not need to determine the fall-back argument but, as it had been argued before him (and in case he was wrong on that point), he proceeded to express a view.

33. Matthews J could find no reason to consider *Re Salvin* wrongly decided and determined that it should be followed. He did however consider subsequent authority that was inconsistent with *Re Salvin*, namely a passage in *Newcastle under Lyme Corporation v Wolstanton Ltd* [1947] Ch 92 - at 103-14,

which was approved by the majority of the *Court of Appeal* [1947] Ch 427, and also approved by the *High Court of Australia in Commissioner of Main Roads v North Shore Gas Co Ltd* (1967) 120 CLR 118, 133-34.

34. The *Newcastle* case concerned gas pipes (which all agreed made no difference). They were laid pursuant to a statutory power rather than pursuant to a deed or agreement and the arguments centred on the intention (and competence) of parliament to confer or create easements without regard to the requirements incidental to an agreement inter-party.

35. Commissioner of Main Roads v North Shore Gas Co Ltd was a case in which the court considered how far the gas undertaker's statutory rights amounted to an interest in land for the purposes of statutory compensation for the construction of an expressway. Matthews J pointed out that neither case referred to *Re Salvin* and the dicta in *Newcastle* was not directed to the question whether the undertaking of the statutory undertaker can amount to a dominant tenement for the purposes of creating an easement. The arguments concerned the status of the statutory rights and whether of themselves they created a property right. It did not decide the question whether an express grant of an easement would fail because there is no identified dominant tenement.

36. Mr Tipler relies on another case in which he says *Re Salvin* was not followed. It is a decision by the Supreme Court of Victoria in *Harada v Registrar of Titles [1981] VR 743.* This case concerned a notice of intention served by the state electricity commission of its intention to acquire an easement pursuant to its statutory powers. Harada purchased the property without knowledge of the notice to treat which was later endorsed on the title. Harada sought various declarations and reliefs. The court held that the rights sought under the notice to treat were not proprietary in nature and did not fall within the category of a common law easements as they were not sufficiently relevant to the use of any other land to justify them being regarded as appurtenant to a dominant tenement, but so extensive as to amount to a right of joint user. One criticism was that the notice did not include a sufficient description of the nature of the easement. The service of the notice appears to be a first step in either purchasing by agreement or taking compulsorily, land required for the purposes of the relevant Act. The notice is presumably noted on the register to alert prospective purchasers. The issue appears to be whether the registrar was justified in noting on the register, what was clearly an intention to acquire a (poorly described) easement, as an easement.

37. The issues in *Harada* were not whether an express grant of an easement would fail for failure to identify a dominant tenement. However, Mr Tipler submitted that on the point of general principle of whether an "undertaking" can form a dominant tenement, the reasoning of King J in *Harada* is to be preferred to that of Farwell J. I am not convinced that King J was expressing a point of general principle. His comments were directed quite specifically to the particular facts in that case.

38. If there is a general point of principle it is the distinction between the treatment statutory easements and express grants of easements inter-party. Where reliance is placed on rights acquired by statute the arguments focus more on process and the extent of the proprietary rights parliament intended to confer by the statute. Where there is an express grant of rights (whether or not pursuant to statutory

powers) then consideration will focus on the deed itself. The decisions in *Re Salvin* and *Bate v Affinity Water*, both of which concern the express grant of rights, confirm that in an appropriate case, the dominant tenement for an easement to lay, maintain and use pipes could consist of the undertaking itself, i.e. the corporeal and incorporeal property rights on and with which the business is carried on. King J was in my view saying no more than the *Harada* case was not an appropriate case on which to make that finding.

39. Mr Tipler submitted that a further distinction could be drawn between the traditional water undertakers and the more recent telecoms undertakers. The argument appears to be that water undertakings almost entirely comprise physical structures such as pipes, reservoirs and pumping stations, all of which connect with each other to form a daisy chain network. Telecoms, he submits is different. ECA is harder to frame as benefitting an identifiable dominant tenement because is not directly connected to other ECA or to the end users. The frequencies, and technologies deployed are subject to constant change over time, software is used to send and receive signals. What may work for a gas pipeline does not necessarily follow for a communications network.

40. While it is true that mobile infrastructure largely consists of phone masts and their associated equipment, such as antenna, they also require access to a power supply and a high-capacity fibre broadband or radio link to connect the mast to the main network. As with water, gas and electricity undertakings, no two sites are the same but what all have in common is a connection to a broader network which distributes the service to the end user in various ways. The sites do not operate in isolation. In this case no information concerning the Claimant's broader infrastructure was provided. Possibly because it would undermine the Claimant's case. If this was a stand-alone site that did not connect to a broader network I am sure that argument would have been made.

Ouster

41. This argument is new, in that it did not form part of the Claimant's case at the hearing. However, Mr Stockill has not objected to the introduction of a new point and instead has offered his own views on it. Mr Tipler now argues that the paragraph (2) and (5) rights effectively grant to the Claimant exclusive use of spaces occupied by the apparatus and equipment installed on the Clocktower, depriving the owner of any reasonable use of the land.

42. Lopes LJ in *Reilly v Booth* (1890) 44 Ch. D. 12 at 26 said:

"*The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land*."

43. The principle being that a servitude should not prevent any reasonable use of the servient land that is inconsistent with beneficial ownership. Every easement will prevent some ordinary use of the servient land. Whether it deprives the servient owner of any reasonable use of the servient land is a question of degree. The Claimant has not provided any authority or argument about the legal status of the rights if the landlord is effectively ousted. They could amount to no more than a bare contractual licence. It is equally possible that they could amount to the demise of additional premises. Neither counsel have offered a view on the alternative status of the rights if they are extensive enough to oust the landlord.

44. The servient land includes the entire D shaped piece of land surrounding the Clocktower. No submissions have been made concerning what part of the servient land should be considered in relation to ouster. However, I have not considered the argument against the retained land in its entirety, just the Clocktower itself. The landlord is not excluded from the Clocktower, it remains in control of it subject to the rights granted. The landlord's right to access the Clocktower is unfettered save for an obligation not to tamper with or interfere with the tenant's apparatus (other than in the case of emergency). The paragraph (5) rights are not exclusive to the tenant. There is nothing to stop the landlord using the handrails and climbing ladders. The tenant has a right to relocate the apparatus with the landlord's consent. In my view the landlord has a sufficient degree of access to and control of the Clocktower to avoid any finding that the rights effectively oust it from the retained land.

Summary of Decision

45. For the reasons set out above I find that the lease is a tenancy that includes premises which are occupied by the Claimant for the purposes of its business. Part II of the 1954 Act therefore applies to the tenancy created by the lease.

46. Specifically, the Claimant occupies premises on and around the Clocktower situated on the landlord's retained land for the purposes of its business. The Claimant has continually occupied those premises pursuant to the rights sets out in Schedule 1 paragraph (2) and (5) of the lease by installing and maintaining the apparatus described in Schedule 2 of the lease, and ancillary access and safety equipment. The landlord does not have any right to remove the apparatus or exclude the Claimant from the premises.

47. The Claimant is not in occupation of the Demised Premises and if that remains the case on expiry of the continued term, those premises will not form part of the holding for the purposes of section 23.

48. However, as the lease is currently a lease that falls within the protection of Part II of the 1954 Act, it cannot be renewed under part 5 of the Code (Schedule 2 paragraph 6 of the 2017 Act; and paragraph 29 of the Code). It can only be renewed under Part II of the 1954 Act.

49. The Tribunal therefore has no jurisdiction to consider an application under Part 5 of the Code and this reference should be struck out. I therefore make the following order.

ORDER

(1) This Reference is struck out under Rule 9(2)(a) of the Tribunal Procedure (First-tier) (Property Chamber) Rules 2013.

(2) If any party wishes to seek an order for costs it must do so by, no later than 4 July 2025 filing with the tribunal an explanation of why the claiming party is entitled to

an order for costs, supported by a detailed statement of the costs incurred and an explanation of why they are said to have been reasonably incurred and proportionate.

(3) A copy of the claim must be sent to the responding party who must no later than 25 July 2025 send to the tribunal and the claiming party a response identifying which parts of the claim are disputed and why.

(4) The tribunal will then issue a written determination as to whether costs should be awarded and in what amount.

D Barlow
Deputy Regional Judge