FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	**LC – 2023 – 000854 and 857** **LC – 2024 – 000009**
Properties	**:**	**Dalkeith Farm (854),** **Sandy Lodge Golf Club (857)** **and Thackley Football Club (0009)**
Claimant	**:**	**On Tower UK Limited (1)** **On Tower UK 2 Limited (2)**
Representative	**:**	**Justin Kitson KC instructed by** **Pinsent Masons LLP**
Respondent	**:**	**AP Wireless II (UK) Limited**
Representative	**:**	**Wayne Clark KC and Fern Schofield instructed by** **Freeths LLP**
Application	**:**	**Electronic Communications Code**
Hearing	**:**	**10th – 12th June 2025** **Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**25th June 2025**

DECISION

Background

1. This is the second Decision I have given in respect of Preliminary Issues arising in connection with three telecommunications sites occupied by the Claimants.

2. Dalkeith Farm and Thackley Football Club are occupied by the First Claimant. Sandy Lodge Golf Club is occupied by the Second Claimant. I have previously directed that all three references should be heard together under FTT Rule 6(3)(b).

3. The leases at all three sites were contracted out of the protections contained in the Landlord and Tenant Act 1954. The contractual terms at all 3 sites expired in early 2017. At that time the tenant of the sites at Thackley Football Club and Dalkeith Farm was Arqiva Limited ("Arqiva"). As a result of the acquisition of Arqiva by Cellnex the sites at Thackley football Club and Dalkeith Farm were assigned to the First Claimant in 2019 and 2020 respectively.

4. The Claimants have served Notices under Paragraph 20 of the Code seeking new Code agreements. The Notice for Thackley Football Club was served in 2020 and Notices in respect of Dalkeith Farm and Sandy Lodge Golf Club in 2023.

5. The Respondent has an intermediate leasehold interest at all sites and is for present purposes the Claimants' landlord.

6. The First Preliminary Issues were heard by me on 13th-15th August 2024. My Decision is dated 2nd September 2024. The Claimants' case was that they are holding over following the expiry of a 1954 Act contracted out lease as tenants at will. The Respondent's case was that the Claimants occupy the sites either under 1954 Act continuation tenancies or in the alternative under periodic tenancies or periodic licences. Accordingly, the Respondent submits that Part 4 of the Code is not available to the Claimants and that the Tribunal does not have jurisdiction to impose a new agreement under Paragraph 20 of the Code. In addition, the Respondent argued that the lease at Dalkeith Farm was not effectively contracted out of 1954 Act protection. The Respondent further argued that the Paragraph 20 Notices were not valid.

7. As I explained at paragraph 5 of my Decision of 2nd September 2024:

"The wording of the Preliminary Issues has been drafted with care. I am invited to proceed on the ***assumption*** *that the Claimant occupies under either a periodic tenancy or a periodic licence. I am not at this stage invited to make findings of fact as to lease/licence or whether the agreements are tenancies-at-will or periodic tenancies (depending on whether or not it was the intention of the parties that occupation was with an intention to enter into a formal written agreement). I have been invited to deal with Preliminary Issue in that way because it is said by the Claimant, even if the Respondent is right and either periodic tenancies or periodic licences have arisen, Part 4 of the Code is still available to it. The Claimant says that the status of the legal relationship between the parties is not of any consequence at any of the sites because Part 4 is available whatever the Claimant's status. Under those circumstances I do not need to make findings of fact as to tenancies-at-will/bare licences or periodic tenancies/periodic licences."*

8. My determination of the First Preliminary Issues is set out at paragraphs 70 - 77 of my Decision:

"70. On the assumption that the Claimants occupy the sites pursuant to periodic tenancies protected by Part II of the Landlord and Tenant Act 1954 I find that the Claimants are not entitled to seek Code rights pursuant to Part 4 of the Code.

71. On the assumption that the Claimants occupy any of the sites pursuant to periodic licences I find that the Claimants are entitled to seek Code rights pursuant to Part 4 of the Code.

72. A periodic tenant cannot serve a valid notice under Part 4 without first having given notice to terminate the periodic tenancy and by virtue of such notice having expired.

73. The service of notices pursuant to section 25 of the 1954 Act does not preclude entitlement on the part of the Claimants to seek code rights in accordance with Part 4 of the Code.

74. On the assumption that the Claimants occupied each of the sites pursuant to a periodic licence, the Claimants, prior to making any Reference, are not first required to terminate any such periodic licence by first serving a notice at common law and by virtue of such notice having expired.

75. ….

76. The agreement for Dalkeith (854), if a lease, was effectively contracted out of the 1954 Act.

77. The Paragraph 20 Notices served by the Claimants for all sites are valid Notices given by operators for the purposes of Paragraph 88 of the Code."

9. The Claimants' contention that "*the status of the legal relationship between the parties is not of any consequence at any of the sites because Part 4 is available whatever the Claimant's status"* proved, in my judgement to be mistaken. Accordingly, it has proved necessary for me to hold a Second Preliminary Issues hearing to make findings of fact as to the legal basis of the Claimants' occupation of the sites. Accordingly on 29th October 2024 I issued further Directions:

*"In order to determine whether or not it has jurisdiction to impose a new agreement under paragraph 20 of the Code, the Tribunal will determine the following preliminary issues (the "**Preliminary Issues 2**"):*

On what legal basis do the Claimants occupy Thackley (009), Dalkeith Farm (854) and Sandy Lodge (857)?

(a) as tenants under a tenancy at will;
(b) as periodic tenants without security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954;
(c) as periodic tenants with security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954; or, alternatively
(d) as licensees under a periodic licence?"

At the outset of the hearing counsel for both parties helpfully confirmed that neither side contends that the Claimants are in occupation under a periodic licence. Accordingly, by agreement, I am not asked to consider legal basis (d).

10. The Second Preliminary Issue was heard by me in Birmingham on 10th – 12th June 2025. I have considered Skeleton Argument dated 4th June 2025 prepared by Justin Kitson KC who appeared on behalf of the Claimants. I am also grateful to Wayne Clark KC and Fern Scofield who appeared for the Respondent for their Skeleton Argument dated 4th June 2025. At the hearing I received oral evidence from Timothy Holloway (Senior Regional Surveyor for the Claimants – Witness Statements 25th April 2025 and 13th May 2025 [790-1400]) and David Powell (Regional Asset Manager for the Respondent – Witness Statement 24th April 2025 [1401-1483]).

11. The parties have helpfully prepared Statement of Agreed Facts [AF 1-5] and Agreed Chronology of Facts. I have also considered a Bundle of Documents [1- 1483].

Dalkeith Farm

12. The site at Dalkeith Farm was demised by a Lease dated 12 March 2002 and made between (1) Listers (Sussex) Limited and (2) One 2 One Personal Communications Limited as varied by a licence to assign and vary dated 3 July 2014 and made between (1) Listers (Sussex) Limited (2) EE Limited and Hutchison 3G UK Limited and (3) Arqiva Limited. The lease was contracted out of the protections contained in sections 24-28 of the Landlord and Tenant Act 1954 by Order of Huntingdon County Court dated 3rd January 2002. The lease was for a term of 15 years from the commencement date of 3rd January 2002 and the contractual term therefore expired on 2nd January 2017.

13. The tenant's interest was assigned to T Mobile UK Limited and Hutchison 3G UK Limited on 4th March 2009 and to Arqiva Limited on 3rd July 2014. Subsequently Arqiva Limited assigned to Arqiva Service Limited (the former name of the First

Respondent) on both 30th April and 13th May 2020 (the reason why there were two assignments remains unclear).

14. The Respondent has an intermediate leasehold interest over the site pursuant to a lease dated 4 July 2016 and made between (1) Listers (Sussex) Limited and (2) AP Wireless II (UK) Limited registered at HM Land Registry under title number: CB414801.

15. On 13th October 2023 Notice under Paragraph 20 of the Code was served on the Respondent.

16. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 28 December 2023 including an application for an order under paragraph 20 of the Electronic Communications Code imposing a new agreement for rights under the Code in respect of land belonging to the respondent and already in the occupation of the claimant following the expiry of a previous agreement. By Order dated 2nd January 2024 the reference was transferred to the First-tier Tribunal (Property Chamber) under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

Sandy Lodge Golf Club

17. The site at Sandy Lodge Golf Club was demised by a lease dated 20th September 2002 and made between (1) Sandy Lodge Golf Club and (2) Gridcom Limited. Gridcom is the former name of the Second Claimant. The lease was contracted out of the protections contained in sections 24-28 of the Landlord and Tenant Act 1954.The lease was for a term of 15 years from the commencement date of 1st April 2022 and the contractual term therefore expired on 31st March 2017.

18. The Respondent has an intermediate leasehold interest over the site pursuant to a lease dated 3rd April 2017 and made between (1) Sandy Lodge Golf Club Ltd and (2) AP Wireless II (UK) Limited registered at HM Land Registry under title number: HD563154. It should therefore be noted that the Respondent was granted its

intermediate lease shortly after the expiry of the 2002 lease on 31st March 2017. Accordingly, the Respondent was never the Second Claimant's landlord under the 2002 lease.

19. On 28th November 2023 Notice under Paragraph 20 of the Code was served on the Respondent.

20. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 28 December 2023 including an application for an order under paragraph 20 of the Electronic Communications Code imposing a new agreement for rights under the Code in respect of land belonging to the respondent and already in the occupation of the claimant following the expiry of a previous agreement. By Order dated 2nd January 2024 the reference was transferred to the First-tier Tribunal (Property Chamber) under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

Thackley Football Club

21. The site at Thackley Football Club was demised by a Lease dated 15 April 1997 and made between (1) Stewart Leslie Willingham, Geoffrey Scott, Stephen Paley and Andrew Smithurst as Trustees of the Thackley Football Club and (2) Ionica PLC. The lease was contracted out of the protections contained in sections 24-28 of the Landlord and Tenant Act 1954 by Order of Bradford County Court dated 9th January 1997. The lease was for a term of 20 years from 15th April 1997, and the contractual term expired on 14th April 2017.

22. The tenant's interest was assigned to One 2 One Personal Communications Limited on 24th September 1999, to T Mobile (UK) Limited and Hutchison 3G UK Limited on 18th March 2010 and to Arqiva Limited on 28th August 2014. Subsequently Arqiva Limited assigned to Arqiva Service Limited (the former name of the First Respondent) on 30th September 2019.

23. The Respondent has an intermediate leasehold interest over the site pursuant to a lease dated 1 July 2016 and made between (1) Stuart Leslie Willingham, Geoffrey Scott, Stephen Paley and Andrew Smithurst as the Trustees of Thackley Football Club and (2) AP Wireless II (UK) Limited registered at HM Land Registry under title number: YY70651.

24. On 9th March 2020 Notice under Paragraph 20 of the Code was served on the Respondent.

25. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 8th January 2024 including an application for an order under paragraph 20 of the Electronic Communications Code imposing a new agreement for rights under the Code in respect of land belonging to the respondent and already in the occupation of the claimant following the expiry of a previous agreement. By Order dated 9th January 2024 the reference was transferred to the First-tier Tribunal (Property Chamber) under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

The law of implied grant of a periodic tenancy

26. The issue of whether a tenancy at will or periodic tenancy arises on expiry of a fixed term lease was considered by the Upper Tribunal in **Queens Oak Farm** (**Arqiva Services Limited v AP Wireless II (UK) Limited [**2020] UKUT 0195 (LC)). At paragraph 37 Upper Tribunal Judge Cooke said:

"The law on this point is well-established and is not in dispute. It is tempting to assume that when a fixed term lease expires and a tenant holds over, paying the same rent, it does so under a periodic tenancy on the same terms as those of the expired lease. But that is not necessarily the case and there is no presumption of a periodic tenancy. Rather, the parties' conduct has to be considered objectively so as to ascertain their intentions.

The law is summed up by Patten LJ in ***Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd*** *[2014] 2 P&CR 4, CA:*

"23. When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent.

The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances.

The most obvious and most significant circumstance in the present case, as in ***Javad v Aqil****, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease.*

The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see ***Cardiothoracic Institute v Shrewdcrest Ltd*** *[1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."*

27. The same issue also arose in the context of a claim for statutory compensation for the compulsory acquisition of land under powers conferred by the Network Rail (Thameslink 2000) Order 2006 in **Smoke Club Limited and others (1) v Network Rail Infrastructure Limited** [2021] UKUT 0078 (LC). The law of

implied grant of a periodic tenancy was reviewed by Fancourt J at paragraphs 110 and 111:

"110. It is ultimately a question of fact whether the grant of a periodic tenancy should be inferred. The applicable law is not complex or disputed.

111. Generally, in view of the prevalence of security of tenure in modern landlord and tenant relations, it is less likely than it was in the first half of the 20th Century that the grant of a tenancy will be inferred from possession and payment of periodic rent. Exclusive possession and payment of rent are factors, possibly strong factors, but there may be a different explanation for possession or payment, or both, which makes them at best equivocal. If the circumstances and conduct of the parties negate any intention to enter into a periodic tenancy agreement, the law does not infer a grant. Thus, for example, if the parties are negotiating the terms of an intended lease and the putative lessee goes into possession and starts to pay rent, it is likely to be wrong to attribute to them the intention to create some different interest. That is particularly so if the negotiation is for a lease to be excluded from security of tenure. The test of what the parties are to be taken to have intended is an objective one; it is not a question of their actual, subjective intentions."

The facts of **Smoke Club were** "*unusual and markedly different from the facts of* ***Javad v Aqil*** *and the* ***Erimus Housing***" [122]. Firstly "*no one had any objection in principle with the express grant to SCL of a periodic tenancy as an interim interest*" and secondly there was "*no issue at any stage about creating an interest – whether a tenancy or a lease – with security of tenure*".

28. I keep firmly in mind what was said by Judge Cooke in **Queens Oak Farm** at paragraphs 40 and 41:

"40. I bear in mind that in determining the status of the claimant after the expiry of the 1997 lease I must consider the evidence objectively; the subjective intentions of the parties are not relevant.

41. Because the evidence has to be considered objectively, I regard the evidence of witnesses of fact with some caution."

29. Accordingly, I have attached very little weight to the evidence of the witnesses. Neither spoke from personal knowledge. **JD Wetherspoon plc v Harris and another** [2013] EWHC 1088 (Ch) makes it clear that it is not the function of a witness statement to provide a commentary on documents. A witness statements should not contain "*a recitation of facts based on documents, commentary on those documents, argument, submissions and expressions of opinion…*" per Sir Terence Etherton C at [33].

    The hearing was conducted in accordance with the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Nevertheless, the guidance in CPR r.3.1(2)(j) is helpful. I have followed the guidance in **McLoughlin v Grovers (A Firm)** [2001] EWCA Civ 1743 and sought to determine this Preliminary Issue on the Agreed Facts and by reference to the documents contained within the Bundle.

Demand, Payment and Acceptance of rent

30. The contractual term at Dalkeith Farm expired on 2nd January 2017. Rent was demanded thereafter on 3rd January for the years 2017 – 2025. Rent has been demanded annually in advance by reference to the expiry date of the contractual term [667-686]. Payment of rent has been made by the First Claimant (and its predecessor Arqiva Limited) and accepted by the Respondent up to 2nd January 2026 [AF3.10].

    The first payment following expiry was due on 3rd January 2017. The Arqiva Payment Advice [665] is dated 28th April 2017. No copy of the demand has been produced. Mr Holloway in his evidence explained that Arqiva's Rent Payment Team uses an automated system which automatically generates a Rent Payment Advice. It would appear, as the Respondent acquired its interest on 4th July 2016, that Arqiva did not update its system because the lease was due to expire. The documents in the Bundle indicate that a holdover instruction was required [319-322]. This may explain the late payment of the annual rent in the first year following expiry.

Mr Powell in his Witness Statement filed on behalf of the Respondent confirms, at paragraph 23, that the Claimant has paid all rent as it fell due since expiry of the lease with the exception of the payment for 2022 which was paid late on 8th February 2022.

31. The contractual term at Sandy lodge Golf Club expired on 31st March 2017. Rent has been demanded twice yearly in advance by reference to the expiry date of the contractual term on 1st April and 1st October [687-765]. In addition, payments have been made in respect of sharing with EE, Three, MBNL and CTIL. Payment of rent has been made by the Second Claimant and accepted by the Respondent [AF4.8].

    Mr Powell in his Witness Statement confirms at paragraph 38 that the Claimant has paid all rent as it fell due.

32. The contractual term at Thackley Football Club expired on 14th April 2017. Rent was demanded thereafter on 15th April for the years 2017 – 2024. Rent has been demanded in advance by reference to the expiry date of the contractual term [766- 789]. Payment of rent has been made by the First Claimant (and its predecessor Arqiva Limited) and accepted by the Respondent [AF 5.9].

    Mr Powell in his Witness Statement confirms at paragraph 50 that the Claimant has paid all rent as it fell due, apart from the payment due on 15th April 2019 which was paid late on 18th June 2019.

Assignment of tenancy at will

33. There have been purported assignments of Arqiva's interest at both Dalkeith Farm and Sandy Lodge Golf Club following the expiry of the contractual terms. There has been no assignment of the lease at Sandy lodge Golf Club (the original tenant, Gridcom Limited is the former name of the Second Claimant).

34. Following expiry of the contractual term the tenant's interest at Dalkeith Farm was assigned by Arqiva Limited to Arqiva Services Limited (the former name of the First

Claimant) on both 30th April and 13th May 2020 (the reason why there were two assignments remains unclear).

35. Following expiry of the contractual term the tenant's interest at Thackley Football Club was assigned by Arqiva Limited to Arqiva Services Limited (the former name of the First Claimant) on 30th September 2019.

36. The background to the assignments is explained by Mr Holloway at paragraph 5 of his second Witness Statement [1358]:

"In 2019, there was a bulk assignment of sites between Arqiva Limited and Arqiva Services Limited (now On Tower UK Limited) which were (at the time) under the same corporate umbrella ("the Arqiva Assignment Programme"). The Arqiva Assignment Programme was an element of the purchase of Arqiva Services Limited by Cellnex UK Limited (Cellnex) in 2020. It was only Arqiva's telecoms business, being Arqiva Services Limited, that was sold to Cellnex and this meant that all telecoms sites were to be assigned to Arqiva Services Limited (while all broadcasting sites remained with Arqiva Limited)."

37. It is accepted that the purported assignment of a tenancy at will terminates it. Mr Clark helpfully refers me to Doe ***d Davis v Thomas*** (1851) 155 ER 792:

"The law upon the subject is, that if an assignment or conveyance of the reversion takes place behind the back of the tenant, it does not affect him until he has notice of it; but if he has knowledge from the assignee of the reversion, or has himself acquired the same information, it is a determination of the will."

38. The Respondent consented to the purported assignment at Dalkeith Farm by signing a copy of a letter dated 27th February 2020 from Arqiva (albeit incorrectly headed as to the term of the tenancy) [852 and 853]. No consent was sought at Thackley Football Club. The lease is marked "*Deed of Assignment – MSSL Leasehold Properties (Not Requiring Landlord Consent)"* [955]. It was accepted before me that consent was not required as the assignment was between connected companies.

39. Mr Clark did not seek to argue that the Assignments could be construed as acceptance by the First Claimant that it had a proprietary interest at both sites which was capable of being assigned. In my judgement the purported assignments are not, of themselves, significant. If, at the date of assignment, Arqiva Limited was a periodic tenant at either site, the assignment would be effective in respect of such tenancy. If, however, Arqiva Limited was a tenant at will at either site, at the date of assignment, the effect of the assignment would be to terminate the tenancy at will. Following assignment the First Claimant (then known as Arqiva Services Limited) was a tenant at sufferance until the Respondent consented to possession. In respect of Dalkeith Farm the Respondent gave consent by countersigning the letter of 27th February 2020 and accordingly the First Claimant became a tenant at will. At Thackley Football Club the Respondent consented to possession by demanding and accepting rent and the First Claimant became a tenant at will. Payment of rent does not give rise to a presumption of a periodic tenancy. Termination of a tenancy at will does not mean that a periodic tenancy arises in its place.

Negotiations

Dalkeith Farm

40. Renewal Negotiations for Dalkeith Farm are set out at AF 3.11- 3.13:

"3.11. On 3 May 2017, shortly after the expiry of the fixed term of the Dalkeith Farm Original Agreement on 2 January 2017, APW (acting through its agent, the Phone Mast Company), sent Arqiva Limited (acting through its agent WHP Telecoms) "Heads of Terms for Agreement Renewal" with a term commencement of 3 January 2017.

3.12. In emails sent between 14 and 15 June 2017, APW (acting through its agent, the Phone Mast Company) and Arqiva Limited (acting through its agent WHP Telecoms) were negotiating proposed terms for a renewal agreement.

3.13. On 18 September 2018, after the Communications Code came into force, Arqiva Limited (acting through its agent Needham Haddrell) sent APW a letter enclosing terms for the renewal of the Dalkeith Farm Original Agreement."

41. The lease expired on 2nd January 2017. Arqiva Limited occupied the site until 30th April 2020 when it assigned its interest to the First Claimant. The Bundle contains evidence of Arqiva's internal discussions shortly after expiry of the lease. On 23rd January 2017 Arqiva's agents Needham Haddrell emailed Paul Williams at Arqiva seeking removal of Dalkeith Farm from the "Code Challenge List" [977]. The Claimants' witness Mr Holloway was unable to tell me exactly what was meant by "Code Challenge List". However, it is safe to assume that this was a list of sites where existing agreements had expired and some form of renewal contemplated. Mr Williams replied on 25th January 2017 [977]:

"Yes, lets park it and hold off making contact. Given it's unprotected, we might gain a periodic tenancy and can think again when new Code or contacted by APW."

Mr Holloway, when cross examined about Mr William's email, confirmed that this practice was "*prevalent within Arqiva*".

42. The first evidence of inter parties' negotiations is an email of 3rd May 2017 from Andrew Chinn of The Phone Mast Company Limited ("PMC") acting for the Respondent to Mark Barlow at WHP Telecoms Limited ("WHP") acting for Arqiva. PMC had been instructed been the Respondent to issue Heads of Terms. In his email of 3rd May 2017 [1022-1023] Mr Chinn indicates that HOTS "*were served a few months ago*" and requests that the sites be allocated to surveyors "*to get matters moving*." Internal emails between Frederick Ansell, Paul Williams and Tim Holloway at Arqiva [1022] indicate that Arqiva surveyors and external consultants (Needham Haddrell) were instructed.

43. HOTS are at [1001- 1004]. The Respondent's proposals include a 15 year term with a landlord's redevelopment break after 5 years, rent at £8,000 p.a. with 1954 Act protection to be excluded.

44. Arqiva's internal response to HOTS is at pages [1024 – 1026]. Frederick Ansell sets out Arqiva's negotiating position in an email to his colleagues of 14th June 2017 [1024]:

"*Ultimately if the lease is protected we are entitled to the same terms as the existing lease, if we lose these it must be reflected in the rent as you say. If the lease is unprotected we still have a very strong hand as AP Wireless will not want to walk away from the site. Of course our negotiations can always be undermined by urgent site works or unfavourable precedents set by other tenants of APW.*"

45. On 14th June 2017 Paul Williams at Arqiva responded to Andrew Chinn at PMC [1027] setting out Arqiva's response to HOTS. Andrew Chinn replied the following day, 15th June 2017 [1029 -1030]. The parties had reached agreement on a number of terms including 1954 Act, alterations and lift and shift. On 16th June Paul Williams thanked Andrew Chinn for his comprehensive reply and indicted that the Arqiva would be instructing Needham Haddrell to "*pick these up*" [1029].

46. There is then a gap of 15 months until 18th September 2018 [1047] when Needham Haddrell wrote directly to the Respondent, "without prejudice save as to costs", enclosing HOTS [1049-1053]. Needham Haddrell indicated that:

"Arqiva believes the terms of this offer, which remain open for 28 days from the date of this letter, to be substantially more generous than would likely be achieved should the matter be determined at Tribunal."

No response was made by the Respondent to that letter.

47. In summary the existing agreement at Dalkeith Farm expired on 2nd January 2017. Rent continued to be paid by reference to that expiry date. The Respondent initiated negotiations by issuing HOTS on 3rd May 2017. The parties were in discussion between 3rd May and 16th June 2017. There was no further site-specific contact between the parties for 15 months until 18th September 2018, after the Code came into force, when Arqiva issued its own HOTS. There was no response by the Respondent. Rent continued to be paid annually thereafter.

Sandy Lodge Golf Club

48. Renewal Negotiations for Sandy Lodge Farm are set out at AF 4.9 and 4.10:

"4.9. On 7 April 2017, shortly after the expiry of the fixed term of the Sandy Lodge Original Agreement on 31 March 2017, APW (acting through its agent, Telemaster), sent Arqiva Limited (acting through its agent Needham Haddrell) an email about renewal of the Sandy Lodge Original Agreement.

4.10. On 9 June 2018, after the Communications Code came into force, Arqiva Limited (acting through its agent Needham Haddrell) sent APW Heads of Terms, and on 5 October 2018, a letter negotiating terms for the renewal of the Sandy Lodge Original Agreement."

49. The agreement expired on 31st March 2017. The Respondent acquired its leasehold interest 3 days later on 3rd April 2017 and within 4 days initiated negotiations. On 7th April 2017 the Respondent's agents Telemaster Limited emailed Arqiva [1058]:

"We have been instructed to pick up the renewal on behalf of AP Wireless …"

A response was received from Second Claimant's agents Needham Haddrell on 10th April 2017 [1057]:

"Rent is clearly over market value - will your client be accepting a rent reduction please? Market Values at circa £3,000 pa. "

On 11th April Telemaster responded *[1056]: "I can confirm that our client is not willing to agree a reduction in the passing rent."*

50. Telemaster chased for a reply on 3rd May 2017 [1056] but nothing was heard from Needham Haddrell until 9th October 2017 [1055] who proposed a *"£4000 p.a. commencing rent*".

On 20th October 2017 Telemaster replied [1055]:

"AP Wireless would be prepared to enter into a new lease … The lease is contracted out and very outdated in its drafting so we would need some tweaks to bring it up to date but I don't foresee any major issues."

On 24th October Needham Haddrell responded that they could proceed on a without prejudice basis and asked for HOTS to be sent [1054]

Needham Haddrell sent a further email on 15th November 2017 [1054]:

"We discussed earlier and I note you are awaiting instructions from your client given the new Code is coming in shortly…"

The Code did indeed come into force the following month, 28th December 2017 and there was no further correspondence between the parties until the summer of 2018.

51. On 9th June 2018 Needham Haddrell issued HOTS to Cell.cm who were at that time acting for the Respondent. On 5th October 2018 Needham Haddrell wrote to Cell.cm again [1064]. That letter was an attempt to negotiate on Code terms. The rental offer of £1000 p.a. was based on Paragraph 24 consideration and compensation. The letter contained an ultimatum:

"If you continue to ignore our requests to engage in meaningful negotiations, Arqiva's only option will be to refer the matter to the Tribunal for determination."

There was no response by the Respondent.

52. In summary the existing agreement expired on 31st March 2017. The Respondent acquired its leasehold interest 3 days later and within 4 days thereafter initiated negotiations. Negotiations continued sporadically from 7th April 2017 until November 2017 when they paused in anticipation of the imminent introduction of the Code. The Second Claimant then restarted negotiations in June 2018 very much on Code terms.

No progress was made and an ultimatum was issued on 5th October 2018. The Respondent did not respond. Thereafter Paragraph 20 Notice was not issued for 5 years (13th October 2023).

Thackley Football Club

53. Renewal Negotiations for Thackley Football Club are set out at AF 5.10 and 5.11:

"3.1. Prior to the expiry of the fixed term of the Thackley FC Original Agreement on 14 April 2017, APW (acting through its agent, the Phone Mast Company), sent Arqiva Limited Heads of Terms for the renewal of the Thackley FC Original Agreement.

3.2. Between 10 and 20 April 2017, APW (acting through its agent, the Phone Mast Company) and Arqiva Limited (acting through its agent WHP Telecoms) negotiated terms for a lease renewal."

54. Arqiva Limited occupied the site until 30th September 2019 when it assigned its interest to the First Claimant. The Bundle [1090 – 1083] contains correspondence passing between WHP Telecoms Limited acting for Arqiva and The Phone Mast Company ("PMC") acting for the Respondent between 10th April 2017 and 20th April 2017.

HOTS had clearly been issued by 10th April 2017 [1090] which was prior to the expiry of the existing agreement on 14th April 2017. HOTS [1091-1095] issued by Respondent's agents, PMC, propose a 10 year agreement at £6,000 p.a. The 1954 Act is described as "not applicable". It was accepted before me that meant the security of tenure provisions were to be excluded.

WHP for Arqiva responded substantively to the HOTS on 11th April 2017 [1088]:

"I do have some issues with the HOTS supplied however:

Rent : This is way out, I would suggest £4,500 …"

There then follows the back and forth of negotiation. Between 13th April and 20th April, the parties' agents exchanged comparables and discussed rent. At [1084] WHP set out Arqiva's position:

"The majority of comps I have would suggest a fair market rent of £5,500 for a mast of this type in this location …."

On 20th April 2017 PMC for the Respondent set out their comparables "*all above £7k*" [1083] but then propose a compromise:

"However, if we you could find your way to a compromise figure of £6500 per annum, I would be willing to put this forward to my client."

55. At this point the Bundle switches to internal correspondence between Arqiva and its agent WHP [1082 -1075].

On 24th April 2017 WHP advised their client [1082]:

"Please see below, passing rent is £3486 pa, which is in reality under rented for a mast of this size in this location."

There are further internal discussion culminating in an email of 1st August 2017 [1075] from WHP enclosing Property Management Approval Form ("PMAF") [1101-1102]

In their email [1075] WHP advised their client:

"Please see attached PMAF and HOTS this time for a 10 year term with a break from the 5th anniversary on 12 months' notice. It is the best I can achieve here I am afraid."

The recommendation in the PMAF [1102] was:

"Recommendation – This does not represent a great deal in our opinion, but it is as far as we can take this. We have been advised if it is not agreed the LL is likely to serve notice, though this is likely to be just a threat."

56. In summary negotiations commenced on 10th April 2017 prior to expiry of the existing agreement on 14th April 2017. There is clear evidence of the back and forth of negotiation between 10th and 20th April 2017. However, the sticking point was rent. The Arqiva's internal evidence suggests that they realised that the site was "*under rented*" and their agent advised that "*this does not represent a great deal"*. Accordingly, I find that there were short lived negotiations in April 2017 which were not pursued by Arqiva thereafter.

The Framework Negotiations

57. Mr Holloway for the Claimants gave evidence that the parties had begun negotiating a framework agreement for all sites within the APW/OTUK portfolio in late 2018. On that basis site specific negotiations were paused pending wider framework discussions. I treat Mr Holloway's evidence with caution. He gave his evidence based upon the documents exhibited to his Witness Statement and his knowledge of "the APW portfolio". As a surveyor within the Claimant's business, he was aware of discussions but was not personally involved.

58. Mr Holloway refers to correspondence contained in Exhibit TCH2 to his first Statement [1103 onwards]. The possibility of a framework agreement was first mentioned in an email between Arqiva and Cell.cm (acting for Respondent) dated 27th November 2018 [1104]. It appears that email was sent following a meeting between the parties and/or their representatives on 8th November 2018:

"Further to our recent meeting, as promised please find attached our proposed Hot's, to manage sites at both a framework and individual site level.

Very happy to run through any queries you may have on these, so please let me know if required.

I look forward to hearing back from you, but in the meantime, I'd appreciate it if you could send through the current estate and payable agreements list that you mentioned – 237 site leases & 92 site shares." [1104]

The attachment to the email contains:

"FRAMEWORK AGREEMENT HEADS OF TERMS
SUBJECT TO CONTRACT & WITHOUT PREJUDICE SAVE AS TO COSTS" [1105-1109]

59. Arqiva further emailed Cell.cm on 21st December 2018 enclosing updated HOTS [1117]. No response was received to that letter, nor did the Respondent reply to further letters of 18th January and 13th February 2019. Accordingly on 1st March 2019 Arqiva wrote again to Cell.cm [1118-1119]:

"We were given the impression at the meeting which took place on 8th November 2018 between Cell.cm and Arqiva that both Arqiva and APW were keen to enter into a Framework Agreement to enable more efficient and straightforward working relationships. However I would reemphasise that we are willing to negotiate terms for each site on an individual basis if that is AP Wireless's preference…"

It is clear that letter was sent in the context of the Code. It refers to both Paragraph 20 and the Tribunal. However, Arqiva indicates it would *"very much like to avoid this course of action."*

It should be noted that Arqiva's position was not always entirely consistent. A good example is a site at Lower Eden, South Brent, Devon where a 28 day letter before action was sent 3rd July 2019 despite the parties being ostensibly in negotiations for a framework agreement at that time [1120].

60. Following the letter of 1st March 2019 the parties met on 12th June 2019. An email from the Respondent to Arqiva of 4th July 2019 [1128-1129] refers both to the November

2018 meeting and to the further meeting on 12th June 2019. The Respondent was clear that negotiations had been ongoing:

"I would comment on a more general matter. In the opening paragraph of your letter, you refer to a meeting with Philip Morris of CellCM on the 8th November 2018. In the third paragraph of your letter, you go on to mention that 'we have received no substantive comments on the terms we have proposed…'. This is simple untrue and a clear misrepresentation of the discussions and negotiations that have occurred over the past six months. I would refer you to the following engagements:

1. *Email thread – you wrote to Richard Nelson by email on 1st March 2019, Richard promptly responded on 4th March 2019 and subsequent to that, there were 9 further email between you and Richard regarding cost undertaking and negotiation of Heads of Terms for a Framework Agreement for the renewal terms of expired leases.*
2. *Richard Nelson email to Ali Williams – Richard wrote to Ali Williams on 21st May 2019 confirming that the latest Heads of Terms fall short of APW's expectation and suggested a meeting between Ali and Myself."*
3. *Meeting – you will recall that we met in Ariqva's Romsley office on 12th June 2019 along with Ali Williams."* [1129]

61. The email of 4th July 2019 also sets out the Respondent's position in respect of the framework agreement:

"When we met on 12th June we engaged in a positive professional dialogue and we agreed that we the new ECC had created a great deal of uncertainty in the market and at this time it may be difficult to agree mutually acceptable commercial terms for the framework agreement. During our meeting, we did also discuss that Arqiva may have to look to the Tribunal to settle renewal terms given the parties differing views on the Code."

62. On 17th July 2019 Arqiva clarified:

"I would like to clarify that it was not my intention to, as you put it, 'purposefully omit' any detail around negotiations in correspondence. To clarify, I intentionally have not referred to details of the without prejudice exchanges which have taken place to date to which you refer, as I was nervous about waiving any privilege afforded to this but am happy to set the record straight." [1128]

63. There is then a gap in negotiations of over 3 years. There were no further discussions in respect of a framework agreement until 2022. On 12th October 2022 Cellnex (OTUK) wrote to APW [1130]:

"It feels like an appropriate time for us to regroup on our ongoing renewal discussions, now that we have had some very useful direction from the court on the appropriate terms we should be agreeing.

As we hoped they would, the decisions in On Tower v AP Wireless II (UK) Limited (LC 2021 240 & 309)(Audley House) and On Tower v AP Wireless II (UK) Limited and On Tower v AP Wireless II (UK) Limited(H00BM926) (New Zealand Farm) have provided much needed clarity on the terms on which we should occupy the communications sites and an appropriate level of rent. I was also very pleased to hear that we were able to reach out of court settlements on the three cases scheduled to be heard this Autumn.

In the more recent hearings I understand that the Court takes the view that we now have enough guidance to conclude the renewal agreements between us. I am confident we can find a way forward with the large group of sites that require a code renewal where you are now our landlord."

64. By spring of 2023 Cellnex on behalf of the Claimants indicated that it was preparing to issue renewal proceedings on a number of sites [1135, 1137 and 1179]. However, framework agreement discussions were again mooted in summer 2023:

"We had hoped that, following our communications in the latter part of 2022 and early 2023, you would be in a position to make a proposal for renewal of all sites where you are our landlord in the UK. However, we appreciate you being open with

us that you are not currently able to make such an agreement. Neither do you think that such an agreement is likely to be reached…." See Cellnex to APW 6th July 2023 [1143]

"We had hoped that you would have understood this position and resisted commencing further proceedings and incurring unnecessary costs in circumstances where it may well be possible to have global/portfolio discussions within a few months (before a resolution will be obtained in the tribunal) and at minimal costs for the parties" See APW to Cellnex 19th July 2023 [1145]

65. In summary there were negotiations in respect of a framework agreement between November 2018 and July 2019. The parties held meetings on 8th November 2018 and 12th June 2019. The Respondent was keen to confirm in correspondence that there had been ongoing negotiations. However, it also appears that the Arqiva was at the same time contemplating Tribunal proceedings in respect of at least one site. In July 2019 framework agreement discussions ceased for over 3 years and it was not until October 2022 that the Claimants again sought portfolio discussions. Throughout that 3 year cessation of negotiations rent was paid at all sites without qualification.

66. The relevance of the framework agreement and site-specific negotiations was discussed in **Queens Oak Farm** at [61]:

"I find that work on the travelling draft ceased in September 2017, not because the parties had stopped negotiating, nor because their intentions about the Queens Oak site had changed, but because the Code was about to come into force and a new approach was needed. To that end negotiations specific to this and other sites were paused pending the negotiation of a framework agreement that would apply to all of them. Only then would terms specific to the individual sites be settled. But the intention remained to agree a new lease for the Queens Oak site. Had there been no intention to agree new leases for the individual sites then there was no point negotiating a framework agreement. And while the framework agreement was being discussed there was no point in site-specific negotiations."

I pause at this point to make it clear to the parties that I am not bound by what was said by Judge Cooke to the extent that she makes findings of fact. It is trite law that findings of fact are inadmissible in subsequent proceedings (Rogers **v Hoyle** [2015] Q.B. 265).

67. My finding is that there were framework negotiations between November 2018 and July 2019. Meetings between representatives for the parties took place on 8th November 2018 and 12th June 2019 in respect of a framework agreement. I further find that it was the intention of both parties that site specific negotiations would, in most cases, be put on hold pending wider framework discussions.

Statutory Controls

68. The starting point is Javad **v Aqil** [1991] 1 WLR 1007 [1016H to 1017D] per Nicholls LJ:

"Ormrod L.J. observed [in **Longrigg Burrough & Trounson v Smith** (1979) 251 EG 847], at p. 849:

"The old common law presumption of a tenancy from the payment and acceptance of a sum in the nature of rent dies very hard. But I think the authorities make it quite clear that in these days of statutory controls over the landlord's rights of possession, this presumption is unsound and no longer holds. The question now is a purely open question; it is simply: is it right and proper to infer from all the circumstances of the case, including the payments, that the parties had reached an agreement for a tenancy? I think it does not now go any further than that . . . The question is whether the proper inference from all the circumstances is that the parties had agreed upon a new tenancy ..."

Ormrod L.J.'s statement of the relevant question does not differ from what I have sought to set out above. The thrust of his trenchant observation, that the authorities make it clear that the "presumption is unsound and no longer holds," was, if I understand him aright, that the circumstances in which the presumption will operate

will seldom, if ever, arise in present day conditions. Whether the correct view is that, having regard to the statutory controls, the so-called "old common law presumption" no longer exists, or is that the cases in which it will operate in practice are very few and far between, seems to me to be a peculiarly arid issue on which it is not necessary to express an opinion."

69. The importance of statutory controls was also emphasised by Fancourt J in **Smoke Club at** [111]:

"Generally, in view of the prevalence of security of tenure in modern landlord and tenant relations, it is less likely than it was in the first half of the 20th Century that the grant of a tenancy will be inferred from possession and payment of periodic rent."

70. There are two potentially relevant statutory regimes. Firstly the 1954 Act and secondly the Code.

71. It is clear that when negotiating the Agreement, the original contracting parties had taken care to contract out of the protections of the 1954 Act. It seems surprising that the parties would subsequently acquiesce to a periodic tenancy which would be protected. A Tribunal will require some persuasive evidence to find that parties to a contracted out agreement subsequently agreed to 1954 Act protections after expiry of that agreement.

72. Mr Clark submits that a periodic tenancy with 1954 Act protection would be of benefit to the Claimants in terms of statutory protection, stability, certainty and commercial leverage if the Respondent wished to redevelop any of the sites. The evidence of Mr Holloway was that the Claimants' agreements with its MNO customers were typically for 15 -20 years. The Claimant as an operator would require a long fixed term agreement for investment and business certainty. As a periodic tenant an operator cannot initiate a 1954 Act renewal. Typically, an operator would also require an agreement on updated telecoms terms. In short, the Claimants interests as operators are undoubtedly best served by a long term Code agreement granting Code rights.

The Respondent as site owner would, of course, be much better served by a periodic tenancy rather than a 10 or 15 year agreement. The Respondent would have control over the 1954 Act renewal process and crucially its ability to utilise any of the sites and to obtain vacant possession for redevelopment would be unimpeded. Sample HOTS for Dalkeith Farm, prepared by the Respondent's agents (PMC), contain a landlord's break after the 5th year for sale or redevelopment, tenant to vacate site if no alternative accommodation is available [1001] and exclusion of 1954 Act protection [1002]

73. It is important to be clear about what protection the Claimants had under both the Old Code and the Code. Under the Old Code (i.e. the period prior to 28th December 2017) following expiry, the Claimants no longer had an agreement in writing conferring rights for the statutory purposes under Paragraph 2. What they did have was protection under Paragraph 21 when faced with an application for removal of their electronic communications apparatus, the ability to apply for conferral of new rights under Paragraph 5 and temporary rights under Paragraph 6(2) pending determination. In fact, as Mr Clark rightly points out the consequence of the 2015 decision of the County Court sitting in Cambridge in **Crest Nicholson (Operations) Limited v Arqiva Services Limited** is that an operator had dual protection in that a site provider must first terminate any 1954 Act tenancy before serving a Paragraph 21 notice.

74. The Code came into force on 28th December 2017. The Claimants then had protection against removal of ECA under Paragraph 40(8), pending determination of a Paragraph 20(3) application for the imposition of a new agreement. In addition, the Claimants could apply for temporary code rights under Paragraph 27(1)(c). However, the Claimants did not have a code agreement.

75. The protections enjoyed by the Claimants are therefore essentially defensive in nature. Nevertheless, those protections are substantial. I am satisfied that the conduct of the parties is referrable to the statutory protections afforded to the Claimants (and Arqiva) by the Old Code and the Code.

Filling the gaps

76. Mr Clark relies heavily on what was said by Nicholls LJ in **Javad v Aqil** [1991] 1 WLR 1007 at 1012D (with my emphasis added):

"As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. ***In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable****. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification "failing more." Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so, however large or small may be the amount of the payment."*

77. In **Cardiothoracic Institute v Shrewdcrest Ltd** [1986] 1 WLR 368 at 378B Knox J said;

"In the typical case where the giving and receiving of rent leaves the court to infer the existence of a periodic tenancy it is on the footing that this is the interpretation which best fills the vacuum which the parties have left."

78. **Walji & others v Mount Cook Land Limited** [2002] P&CR 13 is helpful Court of Appeal Authority. Charles J who gave the only judgement, with which Mance LJ and Aldous LJ agreed said at paragraph 30:

"...this is not a case like Javad Mohammed v. Aqil where a person was let into occupation in anticipation of terms being agreed. In my judgment the position is closer, although not wholly analogous to a tenant without statutory protection holding over at the end of a lease and paying rent on a quarterly basis."

Further at paragraph 27:

"In my judgment it follows that arguments ... do not found a conclusion that it would not be sensible and reasonable for the law to fill the gap in the agreement reached between the parties by implying a periodic tenancy from what they did agree and all the surrounding circumstances."

79. One can readily understand why the Court in **Walji** found it sensible and reasonable to fill the gap and assist the hapless sureties in that case. However, on the facts before me the position of the Claimants is materially different. The Claimants are operators pursuant to a direction given by OFCOM under section 106 of the Communications Act 2003. The Claimants are not seeking the assistance of the Tribunal to fill the vacuum. The Code already fills the gap.

80. Further it would not be sensible and reasonable to imply a periodic tenancy for the reasons I gave in my Decision of 2nd September 2024 on the first Preliminary Issues at paragraph 25:

"*A periodic tenancy is protected under Part 2 of the 1954 Act and has security of tenure. However the right to renew such a tenancy is qualified. A request for a new tenancy can only be made under section 26(1) where the current tenancy is a tenancy granted for a term of years certain exceeding one year. Accordingly a periodic tenant can only apply to the court for an order for the grant of a new tenancy if the landlord has given notice under section 25 to terminate the tenancy (see section 24(1)(a)). Mr Kitson therefore argues that as the Claimant, under the assumed protected periodic tenancy, cannot initiate renewal under the 1954 Act and cannot access Part 5 it must, a fortiori, be able to access Part 4. A "black hole" is, Mr Kitson*

submits, contrary to the policy of the Code. This follows what was said by Lewison LJ in ***Ashloch*** *in the Court of Appeal at [105]:*

"The effect of the definition of "subsisting agreement" in the transitional provisions may have left some operators out in the cold: notably those who occupy under tenancies at will not recorded in writing; and possibly those holding under periodic tenancies protected by Pt II of the Landlord and Tenant Act 1954 who cannot take the initiative to renew their tenancies under that Act."

81. It would not be sensible and reasonable to imply a periodic tenancy because to do so would indeed leave the Claimants "*out in the cold*". The Claimants could not access either Part 4 or Part 5 of the Code nor could they initiate a renewal under the 1954 Act.

The Code and related litigation

82. I attach considerable to weight to the Code which came into force on 28th December 2017. Both parties, as significant players in the telecoms market, will have been aware that changes were afoot as long ago as 2013 when the Law Commission published "The Electronic Communications Code" (Law Comm. No. 336). The Digital Economy Act which introduced the Code received Royal Assent on 27th April 2017 very shortly after the expiry of the agreements at all 3 sites. It would, in my judgement, be unrealistic to ignore the effect of this significant legislative change on the parties' contractual intentions.

83. The introduction of the Code was followed by extensive litigation in which both the Claimants and the Respondent played a significant part:

    3rd April 2019
    CTIL v Compton Beauchamp Estates Ltd [2019] UKUT 107 (LC)

    22nd October 2019
    CTIL v Compton Beauchamp Estates Ltd [2019] EWCA Civ 1755

8th November 2019
CTIL v Ashloch Ltd and **APW** [2019] UKUT 338 (LC)

19th June 2020
Arqiva v **APW [**2020] UKUT 0195 (LC) "Queens Oak"

15th December 2020
OTUK v JH & FW Green Ltd [2020] UKUT 348 (LC) "Dale Park"

29th January 2021
CTIL v Ashloch Ltd and **APW** [2021] EWCA Civ 90

7th December 2021
OTUK v JH & FW Green Ltd [2021] EWCA Civ 1858 "Dale Park"

17th June 2022
OTUK v **APW** [2022] UKUT 152 (LC) "Audley House"

26th August 2022
OTUK v **APW** 1954 DCP sitting as Judge of the County Court
"New Zealand Farm"

22nd June 2022
CTIL v Compton Beauchamp, CTIL v Ashloch and **APW** and **Arqiva** v **APW**
[2022] UKSC 18

84. The litigation between April 2019 and June 2022 is an important objective factor in determining the parties' contractual intentions. The litigation introduced a significant degree of uncertainty within the telecoms industry as to how the Code was intended to work. It was only following conclusion of that litigation that it was possible for both parties "*to regroup*". In addition, to use Mr Kitson's colourful language there was "*an explosion of litigation*" and "*the fight was on*". Looked at objectively against the background of such intensive litigation, I find it inconceivable, that a periodic tenancy could have arisen during the period 2019 to 2022.

The wider relationship between the parties

85. At paragraph 3 of his first Witness Statement Mr Holloway gives details of the Claimants' portfolio [791]:

"On Tower is part of the Cellnex Telecom group of companies. Cellnex is Europe's leading independent operator of wireless telecommunications infrastructure, with a total portfolio of over 100,000 sites. Within the UK, through ON Tower and Cellnex UK Limited, Cellnex owns or controls over 9,000 telecommunications sites, providing telecommunications infrastructure for the use by emergency services organisations, private business and the UK Mobile Operators ("MNOs") such as EE, H3G, Vodafone and Telefonica."

86. Mr Powell at paragraph 1 of his Witness Statement speaks only of his own involvement rather than the wider group of which the Respondent is a part [1401]:

"I am employed by AP Wireless (UK) Limited and act in the capacity of a Regional Asset Manager within the AP Wireless group of which APW forms part. I provide asset management support for over 350 sites in the APW portfolio."

In **Queens Oak Farm** at paragraph 2 Judge Cooke sets out in a little more detail the extent of the Respondent's presence in the UK telecoms market:

"It is a wholly-owned subsidiary of AP Wireless UK Limited which owns and manages over 3,000 mast sites in the UK, and many more worldwide."

87. It is therefore clear that the parties each own a large number of telecoms sites in the UK and across the world. They are direct competitors.

88. There are approximately 240 sites, occupied by the Claimants and where the Respondent is the immediate landlord, which are the subject of potential renewals [1149]:

"1. Agreements expiring prior to 28 December 2017 without statutory protection = 26 sites
2. Subsisting agreements that are not 1954 Act leases = 84 sites
3. 1954 Act leases requiring renewal under Part 2 of the Landlord and Tenant Act 1954 = 130 sites"

An alternative number of sites is given as part of the framework agreement discussions: *"237 site leases & 92 site shares" [1104]*

The parties have not been able to reach any agreement at all in respect of those renewals other than at a handful of sites:

"We are nearly 6 years on from the introduction of the Code with not one consensual renewal completed". Email 22nd September 2023 Cellnex to Respondent [1169]

"It is important that I flag a few inaccuracies in your email. Since the enactment of the Code, we have reached consensual deals, albeit mainly prior to the involvement of Cellnex." Email 26th September 2023 Respondent to Cellnex [1168]

89. The relationship between the parties to this reference is therefore wholly different to that of the parties in **Erimus Housing**, **Javad v Aqil** et al. I am not looking at a landlord and tenant relationship between two otherwise unconnected parties in respect of a single property. The reality is that the parties each own a vast number of telecoms sites across the world and are direct competitors.

90. I remind myself of what Fancourt J said in **Smoke Club**:

"*If the circumstances and conduct of the parties negate any intention to enter into a periodic tenancy agreement, the law does not infer a grant".*

Looking at the wider relationship between these two parties, I am drawn to the inescapable conclusion that both sides are simply unwilling to reach any agreement.

That is not intended to be a criticism of either party. It is simply the obvious inference to be drawn from the fact that they are in direct competition in the telecoms market.

Conclusions

91. In order to satisfy me that the Tribunal has jurisdiction to determine these references the burden rests on the Claimants to do so. However, the Second Preliminary Issue arises from allegations in the Respondent's Statement of Case that the Claimants occupy the sites as periodic tenants and accordingly the burden of proving that allegation rests firmly on the Respondent. That being the case one would expect the Respondent to be able to say with a reasonable degree of certainty when the periodic tenancies arose at each the sites. Mr Clark and Ms Schofield have endeavoured to do so in their Skeleton Argument and at Annex 2: List of issues:

Dalkeith Farm – "Given the cursory negotiations during the holding over period, most likely Arqiva Limited occupied pursuant to a periodic tenancy. Even if, however, Arqiva Limited was a tenant at will, that tenancy at will determined upon assignment to OT in 2020" (para. 45). Periodic tenancy arising approximately January 2017 (Annex 2: List of issues)

Sandy Lodge Golf Club – "a periodic tenancy arose in approximately April 2017; or, at latest, in November 2017" (para. 29) Periodic tenancy arising April 2017, or, at latest, November 2017 (Annex 2: List of issues).

Thackley Football Club – "Most likely, a periodic tenancy is also the correct inference with respect to Arqiva's occupation. Even if Arqiva was a tenant at will, however, that tenancy determined on 30 September 2019 upon assignment to OT" (para. 57). Periodic tenancy arising approximately April 2017 (Annex 2: List of issues)

However, I accept that the contents of Mr. Clark and Ms. Schofield's Skeleton Argument are informative only and not a formal pleading. I am not limited in my deliberations to the dates alighted upon.

92. I have considered the following objective factors:

(i) Payment of rent
(ii) The effect of the purported assignments
(iii) Negotiations – site specific
(iv) Negotiations – framework agreement
(v) Statutory control – 1954 Act and the Code
(vi) Related Litigation
(vii) The party's wider relationship

93. The original agreements all expired between January and April 2017. Eight years have passed since expiry at all three sites and the Claimants (and Arqiva Limited the first Claimant's predecessor at Dalkeith Farm and Thackley Football Club) have paid rent throughout that 8 year period without reservation or qualification.

As was said in the **Javad v Aqil** in the passage quoted at paragraph 76 above, I have to consider all the circumstances: "*the payment of rent on a periodical basis is only one, albeit a very important one".*

In **Smoke Club** at paragraph 111 Fancourt J said, *"Exclusive possession and payment of rent are factors, possibly strong factors, but there may be a different explanation for possession or payment, or both, which makes them at best equivocal."*

However, as Patten LJ observed in **Erimus Housing "***the payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances".*

94. The sites at Thackley Football Club and Dalkeith Farm were the subject of purported assignments from Arqiva Limited to the First Claimant on 30th September 2019 and 30th April 2020 respectively. If Arqiva Limited was by those dates a periodic tenant at either site, the First Claimant would have taken an assignment of such a tenancy. If, however, Arqiva Limited was a tenant at will the effect of the assignment would be to determine that tenancy. However, the fact of the assignment does not mean that a periodic tenancy arose. At Dalkeith Farm the respondent consented to possession by

signing a consent and did so at Thackley Football Club by demanding and accepting rent. The First Claimant then became a tenant at will at both sites. Accordingly, I find that the Respondents case, in respect of Thackley Football Club and Dalkeith Farm, that *"even if Arqiva was a tenant at will, that tenancy determined upon assignment to OT*" fails because a periodic tenancy did not arise on determination of either of the tenancies at will.

95. The existing agreement at Dalkeith Farm expired on 2nd January 2017. It appears that rent was not paid until 28th April 2017 (see paragraph 30 above). Very shortly thereafter, on 3rd May 2017 the Respondent initiated negotiations. Negotiations continued for a short period until 16th June 2017. There was no further attempt at negotiation until 18th September 2018 when Arqiva issued its own HOTS. There was no response by the Respondent. The Respondent's primary case is "*periodic tenancy arising approximately January 2017*". The payment of rent on 28th April 2017 gives rise to no presumption of a periodic tenancy in the context of negotiations as evidenced by Arqiva's internal discussions and the correspondence between PMC and WHP. I find that from 3rd January 2017 to 2nd January 2018 Arqiva occupied Dalkeith Farm as a tenant at will pending negotiations for a new lease.

96. Negotiations commenced at Thackley Football Club on 10th April 2019 prior to expiry of the existing agreement on 14th April 2017. There is clear evidence of the back and forth of negotiations between 10th and 20th April 2017. However, Arqiva chose not to pursue negotiations as the site was under rented. Rent was paid on 15th April 2017. The Respondent's primary case is "*periodic tenancy arising approximately April 2017*". In the context of the back and forth of negotiations the payment of rent on 15thApril 2017 gives rise to no presumption of a periodic tenancy. Arqiva occupied Thackley Football Club as tenant at will pending negotiations from 15th April 2017 to 14th April 2018

97. The existing agreement at Sandy Lodge Golf Club expired on 31st March 2017. The Respondent acquired its leasehold interest 3 days later and within 4 days thereafter initiated negotiations. Negotiations continued sporadically from 7th April 2017 until 15th November 2017.There was no further contact until Arqiva's agents wrote on 9th June 2018 and 5th October 2018. There was no response from the Respondent. Rent

was paid on 1st April 2017 and 1st October 2017. The Respondent's primary case is "*a periodic tenancy arose in approximately April 2017 or, at latest, in November 2017*". In the context of continuing negotiations, the payments of rent on 1st April and 1st October 2017 give rise to no presumption of a periodic tenancy. The Second Claimant occupied Sandy Lodge Gold Club as tenant at will from 1st April 2017 to 31st March 2018.

98. Negotiations in respect of a framework agreement took place between November 2018 and July 2019. During that period rent continued to be paid. At Dalkeith Farm payment was made on 3rd January 2018 and 3rd January 2019, at Thackley Football Club on 15th April 2018 and 15th April 2019 and at Sandy Lodge Golf Club on 1st April and 1st October 2018 and on 1st April 2019 and 1st October 2019.

99. Negotiations, both site specific and framework, can be summarised as follows:

Dalkeith Farm

- expiry 2nd January 2017
- site specific negotiations 3rd May – 16th June 2017
- Digital Economy Act – 27th April 2017
- Code – 28th December 2017
- letter of 18th September 2018 – no response
- framework discussions November 2018 – July 2019

Thackley Football Club

- expiry 14th April 2017
- site specific negotiations 10th – 20th April 2017
- Digital Economy Act – 27th April 2017
- Code – 28th December 2017
- framework discussions November 2018 – July 2019

Sandy Lodge Golf Club

- expiry 31st March 2017
- site specific negotiations 7thApril – 15th November 2017

- Digital Economy Act – 27th April 2017
- Code – 28th December 2017
- letters of 9th June and 5th October 2018 –no response
- framework discussions November 2018 – July 2019

There are clearly significant periods of time when nothing appears to have happened. At Dalkeith Farm there is a gap of 15 months, at Thackley nearly 18 months and at Sandy Lodge Golf Club 8 months. In **Erimus Housing** Patten LJ said at para. 24:

"The Judge interpreted the reference by Nicholls LJ [in Javad v Mohammed Aqil] to the throes of negotiation as importing some requirement for a particular intensity of negotiations. But in my view, it means no more than that the negotiations should be continuing in the sense that both parties remain of the intention that there should be a new lease on terms to be agreed."

My finding is that it was the intention of both parties that site specific negotiations would, in most cases, be put on hold pending wider framework discussions. The reason for the pause in negotiations between mid 2017 and late 2018 is that the Digital Economy Act 2017 received Royal Assent on 27th April 2018 and on 28th December 2018 the Code came into force. As Judge Cooke observed in Queens Oak Farm *"a new approach was needed*"

I find that the further payments of rent in 2018 and 2019 did not give rise to a periodic tenancy at any of the sites because Negotiations were continuing in the sense identified by Patten LJ.

100. In my judgement the correct analysis, for the period following the coming into force of the Code, is that the parties, all sophisticated players in the telecoms market, looked to the statutory controls introduced on 28th December 2017 to regulate their relationship. The continued occupation of the site by Arqiva and the Claimants is explained by the Code.

101. It would not be sensible and reasonable for the Tribunal to infer the existence of a periodic tenancy for the period after 28th December 2017, notwithstanding the continued payment of rent without reservation or qualification. The Code fills the gap and does so in a way that the Claimant is not "*left out in the Code*" unable to access Part 4 or 5 or to initiate renewal under the 1954 Act.

102. The Tribunal is required to fill the vacuum the parties have left from what "*was agreed*" (**Javad v Aqil**) and "*the agreement reached by the parties*" (Walji **v Mount Cook Land**). I find the arguments advanced by Mr Kitson that the parties were unwilling to reach agreement to be persuasive. The evidence before me is that only a handful of consensual renewal agreements have been reached, all of which were prior to Cellnex's acquisition of Arqiva in 2019/20. The parties are direct competitors and were active participants in the litigation that occurred during 2019 - 2022. Absent any agreement between the parties there is no agreed basis from which Tribunal can infer or imply a periodic tenancy during the period 2019-2022.

103. On the facts of all 3 references, I find that the Claimants do not occupy any of the three sites as periodic tenants. I find that the contractual intention of the parties, looking objectively at all relevant circumstances, was that the Claimants remained in occupation as tenants at will pending negotiation of a new Code agreement.

Decision

104. The Claimants occupy the telecommunications sites at Dalkeith Farm, Sandy Lodge Golf Club and Thackley Football Club as tenants under a tenancy at will.

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

Dalkeith Farm LC – 2023 – 000854

Land at Dalkeith Farm, Thurning Road, Winwick, Cambridgeshire, PE28 5PW

Sandy Lodge Golf Club LC – 2023 – 000857

Sandy Lodge Golf Club, Sandy Lodge Lane, Northwood, Middlesex, HA6 2JD

Thackley Football Club – LC – 2024 – 000009

Thackley Football Club, Ainsbury Avenue, Thackley, Bradford, BD10 0TL