FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2024 – 000563**
Property	**:**	**Equipoint, Coventry Road, Yardley, Birmingham B25 8AB**
Claimants (Operator)	**:**	**EE Limited (1)** **Hutchison 3G UK Limited (2)**
Representative	**:**	**Graham Read KC and James Tipler instructed by Womble Bond Dickinson (UK) LLP**
Respondent (Site Provider)	**:**	**AP Wireless II (UK) Limited**
Representative	**:**	**Wayne Clark KC instructed by Freeths LLP**
Application	**:**	**Electronic Communications Code**
Hearing	**:**	**7th – 9th April 2025** **Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**17th April 2025**

DECISION

Background

1. This Decision concerns a rooftop site at Equipoint in Yardley, Birmingham ('the site'). This distinctively shaped building was originally constructed as a 10 storey office block in the 1960's. The site is located in a prominent position on a busy roundabout on the A45 dual carriageway midway between the M42, Birmingham Airport and Birmingham City Centre. In 2021 the existing office block was converted into 247 one and two bedroomed apartments with the addition of an 11th penthouse floor.

2. In addition to the Claimants, Vodafone and Airwave have electronic communications apparatus installed on the rooftop. Initially it was proposed that the Claimants would have 7 antenna and 16 transmission dishes on the rooftop. Overtime many of the dishes became redundant and currently there are 4 dishes and 6 antennae.

3. On 24th March 2010 HXRUK (Midlands) Limited (1) and T-Mobile (UK) Limited and Hutchison 3G UK Limited (2) entered into a lease ("the Agreement") conferring rights to install and operate electronic communications apparatus at the site [173-216]. The initial rent payable was £42,000 p.a. subsequently revised to £47,377.70.

4. The Agreement was contracted out of 1954 Act protection.

5. The Agreement was for a term of 5 years and expired on 28th February 2015. It is common ground that Rent continued to be demanded, paid and accepted thereafter. Rent has been paid annually in advance by reference to the expiry date of the Agreement (i.e. for the period 1st March to 28th February).

6. On 27th January 2015, shortly before expiry of the Agreement the freehold of the site was acquired by St Francis Property Investments Limited (from 4th April 2017 known as Corbally Property Investments Limited) ('St Francis').

7. The Code came into force on 28th December 2017.

8. On 29th March 2018 Equipoint Developments Limited ('EDL') acquired the freehold of the site. EDL became registered freehold proprietor on 12th April 2018.

9. On 7th March 2023 the Claimants gave EDL a notice under Paragraph 20 of the Electronic Communications Code [235-283]

10. On 8th March 2024 the Respondent acquired a 'dispositionary' lease of the rooftop of the site from EDL [460-487]

11. A reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 6th August 2024 including an application for an order imposing an agreement for rights under paragraph 20 of the Electronic Communications Code requiring the parties to enter into a new agreement for the occupation by the claimants of land belonging to the respondent [1-13]

12. By Order dated 6th August 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.

13. On 24th September 2024, in order to determine whether or not the Tribunal has jurisdiction to impose a new agreement under paragraph 20 of the Code, I gave Directions [74-76] for the determination the following preliminary issues:

(1) On what legal basis do the Claimants occupy the Site:

(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?

(2) On the true construction of the Code, are the Claimants entitled to seek the imposition of a new agreement under Part 4 of the Code in light of the current legal basis of their occupation as determined by the Tribunal?

(3) If the Tribunal finds that the Claimants occupy as periodic tenants or licensees, were the Claimants prior to making the Reference first required to terminate any such periodic interest by serving a notice at common law?

(4) Whether the Claimants are entitled to rely upon the paragraph 20 notices in these proceedings where the notices were served prior to the introduction of the requirement to refer to ADR and did not refer to that requirement.

(5) Whether the Claimants are entitled to rely upon the Paragraph 20 notices in these proceedings where the wording of paragraph 16 differs from the wording in the notice prescribed by Ofcom?

14. The Preliminary Issues were heard over three days in Birmingham, 7th – 9th April 2025. I have considered a Bundle of documents [1-491]. I have also considered Claimant's Skeleton Argument prepared by Mr Read and Mr Tipler and Skeleton Argument of the Respondent prepared by Mr Clark dated 1st April 2025.

15. I received oral evidence from Noel Lester of Mobile Broadband Network Limited on behalf of the Claimants [81-142] and from David John Powell on behalf of the Respondent [143-172].

16. The parties have prepared a Statement of Agreed Facts [AF 1-32]

Issue (1) - On what legal basis do the Claimants occupy the Site?

17. During the first day of the hearing Mr Clark confirmed that the Respondent was no longer relying on legal basis 1(d). Accordingly I no longer need to determine

whether or not the Claimants were in occupation of the site as licensees under a periodic licence.

18. 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."*

19. In analysing the legal status of occupation I have had regard to:

(i) Demand, payment and acceptance of rent and the significance, if any to be attached, to demands marked "without prejudice".
(ii) Ongoing negotiations
(iii) Statutory framework either under 1954 Act, the Old Code or, after 28th December 2017, the Code.

In doing so 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."

Demand, Payment and Acceptance of rent

20. It is common ground that rent has been paid annually in advance since expiry of the Agreement. The annual rent is paid in advance by reference to the expiry date of the Agreement. Payment of rent is set out in Statement of Agreed Facts [AF9, 19 and 31]:

"9.1 The Claimants were invoiced on 3 January 2015 by Workman LLP acting as agents on behalf of St Francis for an apportioned rent between 3 January 2015 and 28 February 2015 in the sum of £7,398.76 (net of VAT).

9.2 The Claimants were invoiced by Workman LLP acting as agents on behalf of St Francis for the sum of £47,378 (net of VAT) for the period between 1 March 2015 and 29 February 2016 marked "Without prejudice to expiry on 28/02/2015". The sum of £47,377.70 plus VAT was paid.

9.3 The Claimants were invoiced by Workman LLP acting as agents on behalf of St Francis for the sum of £47,377.70 (net of VAT) in advance between 1 March 2016 and 28 February 2017 marked "Without prejudice to expiry on 28/02/2015".

9.4 On 21 December 2017 SMB on behalf of the St Francis invoiced the Claimants for the sum of for the sum of £47,377.70 (net of VAT) stating it as "Rent w/o Prejudice

19. On 10 December 2018, SMB, on behalf of EDL, issued a demand to the Claimants for £47,377.70 (net of VAT) marked "Rent w/o prejudice"

31. Since the expiry of the Expired Agreement on 28 February 2015, the Claimants have paid monies to the freeholder from time to time on an annual basis at the rate equivalent to the passing rent under the Expired Agreement at its expiry. However:

(1) Subsequent to the invoices already referred to in paragraph 9 above, for each year from 1 March 2018 up to and including the latest demand on 1 March 2024 (marked for the period 1 March 2024 to 29 February 2025) the invoice sent to the Claimants was marked "Rent w/o prejudice".

(2) No "rent" has been paid to APW as yet given the payment already made to EDL in respect of continued occupation to the end of February 2025."

21. It is not in dispute that there have been 4 annual demands by St Francis and subsequently 4 further annual demands by EDL. Without more, annual payment of rent by reference to the expiry date of the Agreement is not inconsistent with the Claimants remaining as tenants at will. Payment of rent does not give rise to a presumption of a periodic tenancy.

Without Prejudice

22. Rent demands are marked "without prejudice". At paragraph 63 of **Queens Oak Farm** Judge Cooke said:

"the presence or absence of the motto "without prejudice" or "subject to contract" on correspondence – as Mr Sims said, there is a tendency to use those terms unthinkingly and I do not take their presence or absence to indicate anything of significance in this case."

23. The demands at AF 9.2 and 9.3 covering the period 1st March 2015 to 28th February 2017 issued by Workman LLP on behalf of St Francis are marked "without prejudice – to expiry on 28/02/2015".

24. The addition of the words "to expiry on 28th February 2015" are significant. They go beyond unthinking use. I find that those additional words do not support the Respondent's case that a periodic tenancy has arisen.

25. In 2017 St Francis changed agents and instructed Stephens Mc Bride ('SMB'). SMB simply adopt "rent w/o prejudice". The mere repetition of the without prejudice mantra does not seem to me to be of significance. There are many examples of unthinking business practice which are not to be taken as a party's view on precise legal status. For example SMB use the terms 'landlord' and 'tenant' in their demands [343 and 344]. It cannot be suggested that the use of such terms is in any way determinative. Another example arose upon consideration of email correspondence from Mr Michael Ihringer of GVA Grimley (who will feature later in this decision). Mr Ihringer's emails contain a footer inexplicably marked "without prejudice and subject to contract" [456 and 458]. That is an example of unthinking business practice.

26. Demands by Workman LLP, marked "without prejudice – to expiry on 28/02/2015", for the period March 2015 to February 20217 do not support the Respondent's case. Subsequent demands issued by SMB, marked "rent w/o prejudice", do not assist me, one way or another, in looking objectively at all relevant circumstances.

Negotiations

27. The Claimants rely on AF8:

*"8. According to the GVA tracker provided by the Claimants, on 1 April 2014, in advance of the expiry of the Expired Agreement, GVA Grimley (**"GVA"**) were*

instructed by the Claimants to pursue negotiations in respect of a new lease of the Site. Thereafter:

*8.1 On 21 November 2016 GVA attempted to initiate the negotiation of a new lease with the Landlord's agents Stephens McBride ("**SMB**").*

8.2 Terms for a proposed new lease were forwarded by GVA to SMB on 21 November 2016.

8.3 On 19 October 2017, SMB indicated by email that "The building is in the process of being sold so we aren't able to progress the matter – however I will send the[Heads of Terms] and your contact details to the potential purchaser".

28. The agreement expired on 28th February 2015. However the Claimants waited over 18 months, until 21st November 2016 to attempt to initiate negotiations. Mr Read submits that there is no requirement for negotiations to be conducted with any particular intensity. 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."*

29. Mr Clark submits that the agreed facts [AF8] do not amount to negotiation. They amount to more than an attempt. The Claimants' overtures were met with a stonewall put up by EDL. To put it simply "*it takes two to tango*".

30. For the reasons given by Judge Cooke I have been cautious about the oral evidence I received at the hearing. I was told by Mr Lester that negotiations were conducted on the Claimants behalf by Michael Ihringer of GVA (subsequently Avison Young). The Claimants standard instructions to its agents were that it should report on progress by way of completing "Professional Services Tracker" ('the Tracker'). I am satisfied that the document produced [114] is a contemporaneous document created in the course of business and that I may safely rely on it. Of course its weight is limited because it is the wholly subjective opinion of the Claimants agent.

31. I set out the contents of the Tracker below as the spreadsheet at [114] is very difficult to read:

"06/03/2017 Unsurprisingly there has not been a response here given the drop in rent.
20/01/2017 chased agent but as below required rights will seriously impact on the rent.
06/01/2017 Agent slow to respond but expect that this will be tough to force or agree given the simple maths here as to why would they agree this.
19/12/2016 Nothing from the agent but rent proposal is quarter of what they get now.
05/12/2016 Agent is taking instructions but this one is probably going to be a hard sell given the proposed drop in rent here.

21 /11 /2016 Building has been sold and new owner is in place to discuss renewal. Agent has been appointed and making contact to move forward.
06/11/2016 No movement here as below.
19/10/2016 No movement and freely admitted that they will not do anything as the rent will fall.
19/09/2016 no movement and his client is not likely to move on this given drop in rent proposed.
07/09/2016 no movement from AC.
22/08/2016 Again not a priority for AC to deal with this.
22/06/2016 Not a priority for Andrew as clearly there will be a massive rent reduction owing to the number of redundant dishes. Cranston also questioning what was on site at the end of the lease.
18/01 /2016 with Cell:cm. Andrew Cranston dealing not Pentacom.
02/10/2015 This is with Pentacom now but waiting for Gary to confirm. Michael has pretty much confirmed he has left the building."

32. The Tracker supports Mr Clark's submissions that there were in fact no real negotiations. The reason is clear from the Tracker. "*Simple maths*" explains why EDL were uninterested in coming to the negotiating table when facing a "*massive rent reduction"*.

33. I find that there were no consensual negotiations during the period of ownership by St Francis and that the parties were not in negotiation for the grant of a new lease. The subjective intentions of the parties are not relevant. I therefore do not take into account the instructions given by the Claimants to GVA. However the Claimants wish to negotiate, once communicated to EDL on 21st November 2016, crosses the line and becomes a relevant circumstance. It is an objective fact that the Claimants wished to negotiate and were met by stonewalling from EDL. In view of the Claimants express wish to negotiate it is not possible for me to find objectively on the evidence that the parties had a common intention to enter into a periodic tenancy.

The 2018 Agreement

34. Events leading up to the 2018 Agreement are set out at [AF 12-14]:

*"12. On or about 26 April 2018 Peter Lynn and Partners, as solicitors for EDL, served upon the Claimants a purported notice under paragraph 31(1) of the Code ("**the 26 April 2018 Purported Code Notice**") seeking to terminate the Expired Agreement on redevelopment grounds.*

13. On 15 May 2018 DWF, the Claimants' solicitors, served, on EDL "entirely without prejudice" to whether the 26 April 2018 Purported Code Notice was valid, purported counter-notices under paragraph 20 of the Old Code.

14. On 20 July 2018 DWF served on EDL, "entirely without prejudice to our contention that [the 26 April 2018 Purported Code Notice] cannot constitute valid notice pursuant to paragraph 31(1) of the Code" purported counter-notices pursuant to paragraphs 32(1) and 32(3) of the Code on behalf of the Claimants."

35. It is common ground before me that both the Claimants and EDL were mistaken. There was no code agreement. The 26th April 2018 Notice was wholly misconceived. The 15th May 2018 Counter Notice was equally misconceived. It purported to be a notice under the Old Code which did not apply either.

36. Notwithstanding the mistaken belief of both sides that a code agreement existed the dispute proved capable of resolution [AF15]:

"By an email dated 5 October 2018, DWF indicated that following adjustment works to the Claimants' mast equipment located at the Site, EDL's agents had confirmed that the proposed redevelopment could proceed with the Claimants remaining in situ; and that the parties had therefore agreed that no Tribunal proceedings would be required.

37. In October 2018 the parties reached an agreement [AF17 and 18]:

"*By a letter dated 9 October 2018, the Claimants' solicitors recorded that the parties had reached agreement that the parties:*

(1) withdraw their respective paragraph 31 and 32 notices and counter-notices;

(2) agree continuation of the Code agreement pursuant to paragraph 32(2) of the Code; and

(3) acknowledge there is no requirement for the Claimants to issue proceedings under paragraphs 32(1)(b) and 34 of the Code.

The letter was signed by the Claimants to confirm agreement to the same. Subsequently, on 11 October 2018, it was signed on behalf of EDL confirming its agreement to the same."

38. I find that the effect of the 2018 Agreement was to conclude negotiations in respect of EDL's proposed redevelopment. A workaround was found and the matter was resolved. As to the future the parties:

"agree continuation of the Code agreement"

The subjective belief shared by both parties was that there was a Code agreement. Both parties were mistaken. Objectively the parties:

"agree continuation of the agreement"

39. An email of 12th October 2018 from DWF LLP acting for the Claimants to Peter Lynn and Partners acting for EDL records [416]:

"*The code agreement will simply continue as it did before on the terms of the lease."*

40. My finding is that the 2018 Agreement did not change the status quo ante. What was in existence beforehand continued. The parties believed that the Claimants had a Code agreement. In fact what the Claimants had was no more than rights under Part 6 of the Code to protect their ECA in response to a removal application. I find that the 2018 Agreement merely recognised the Claimants continuing occupation and their protection under the Code (albeit that the parties were mistaken as to the extent of that protection). Nowhere in the 2018 Agreement does it suggest that the Claimants were already in occupation under a periodic tenancy. Certainly no steps were taken by EDL to terminate the periodic tenancy it is now said by the Respondent to have existed. The intention of the parties, looked at objectively, was to deal with the situation in which they found themselves by way of continuation of their existing agreement governed by the terms set out in the expired Agreement.

41. If there is any doubt about that it should be noted that no rent was demanded by EDL until 10th December 2018 [AF19]. When EDL acquired the freehold on 29th March 2018 rent had already been paid in advance following the 17th December 2017 demand [AF9.4]. As no rent had been demanded by EDL as at October 2018 it cannot be said that the 2018 Agreement was entered into in circumstances where "*the old common law presumption of a tenancy from the payment and acceptance of a sum*" applied.

    For completeness it is not said by Mr Read that the 2018 Agreement is a Code agreement. For the purposes of Paragraph 11, although in writing and signed, the 2018 Agreement does not fulfil the requirements of Paragraphs 11(1) (c) and (d) as to duration and period of notice of termination.

42. Accordingly I find that the 2018 Agreement did not create a periodic tenancy.

43. Following the 2018 Agreement very little happened. Rent continued to be paid annually in advance [AF19].

44. Nothing further of consequence occurred for very nearly four years until 29th September 2022 when the Claimants instructed their agents, Waldon Telecom, to issue heads of terms for a new agreement [AF20]. On 7th March 2023 the Claimants gave EDL a notice under Paragraph 20 of the Electronic Communications Code [AF 23].

45. It is conceded by Mr Clark that no periodic tenancy was created post the Respondent's acquisition of its leasehold interest on 8 March 2024.

46. My finding is that post the 2018 Agreement, until service of the Paragraph 20 Notice the subject of these proceedings, the legal basis of the Claimants occupation of the site continued on the footing agreed in the 2018 Agreement namely, continuation of the existing agreement. No periodic tenancy arose.

Statutory Framework

47. 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."

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

49. The 1954 Act has some disadvantages for both sides. St Francis (aka Corbally) is, as its full name suggests a property investment business. EDL is a developments business. St. Francis owned the property for around 3 years, from 2015 to 2018. It realised its investment and sold to EDL who redeveloped a 60's office block into 247 apartments. One can readily appreciate why, from a landlord's point of view, the Agreement was contracted out of 1954 Act protection. A landlord would not want any investment potential/redevelopment fettered by 1954 Act control. The operators who entered into the Agreement were content to contract out of 1954 Act regime.

50. 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. As was said by Nicholls LJ application of the common law presumption where statutory control exists will be '*few and far between*'.

51. It is important to be clear about what protection the Claimants had under both the Old Code and the Code. Under the Old Code following expiry of the Agreement 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 and the ability to apply for conferral of new rights under Paragraph 5.

52. The Code came into force on 28th December 2017. The Claimants 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.

53. 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 post expiry of the Agreement is referrable to the statutory protections afforded to the Claimants by the Old Code and the Code. I am careful in my treatment of the 2018 Agreement because the views of the parties are subjective and mistaken as to the existence of a code agreement. Nevertheless the 2018 Agreement is evidence before me that the parties regarded their relationship as being governed by the Code. The absence of any reference whatsoever in correspondence or dealings between the parties to the 1954 Act and/or a periodic tenancy is also a relevant circumstance. Considering all the circumstances of the case, including the annual rental payments, I find that the parties had not reached an agreement for a periodic tenancy.

Evidence of Witnesses

54. Noel Lester is Regional Property Surveyor at MBNL. MBNL are the management company acting for the Claimants. Mr Lester's Witness Statement is dated 20th January 2025 [81-142]. Mr Lester was not the MBNL RPS for the site until he took over responsibility for the site in August 2024 when a colleague went on maternity leave.

55. Mr Lester explained that the Claimants instructed agents to conduct renewal negotiations on its behalf. Underlying the agreed facts at [AF8] is a "Professional Services Tracker". Mr Lester told me that there will have been other 'tracker' documents but in light of the passage of time these can no longer be located. The Tracker for the site between 2015 and 2017 was completed by the Claimants agent Michael Ihringer of GVA Grimley (subsequently Avison Young) [114]. The Tracker once completed by Mr Ihringer was sent to the Claimants by way of a regular progress update.

56. Mr Lester contacted Mr Ihringer by telephone to see what further information could be obtained. Mr Lester quite properly made a contemporaneous note of his conversation with Mr Ihringer immediately after their telephone discussion [454]. On 28th November 2024 Mr Lester sent Mr Ihringer an email confirming what was said during their telephone discussion [458]. Mr Ihringer replied on 1st December [457]: "*Apologies my memory from 6 years ago is a not clear perhaps it would be if I had to all my emails from AY.*"

57. I therefore do not rely on Mr Ihringer's recollection as relayed by Mr Lester but base my decision solely on the Agreed Facts and the comments in the Tracker.

58. Mr Lester also gave useful evidence as to the Claimants approach to permanent sites. Where a claimant wishes to retain a site and obtain a new agreement it will continue to pay rent post expiry of lease/agreement. Avison Young (previously GVA) have a 'treasury function' for the Claimants in relation to payments of rents etc. Their advice is that the default position must be to continue to pay rent. This is a pragmatic decision. If rent is not paid negotiations are unlikely to get off the ground. If a claimant stops paying rent it will never get anywhere. The Claimants persevere with negotiations, even those under the old Code where negotiations took a long time. The Claimants press negotiations to get a consensual deal. Rent continues to be paid to ensure the ultimate goal of a new agreement.

59. Mr Powell is Regional Asset Manager for the AP Wireless Group of which the Respondent is part. His Witness Statement is dated 21st January 2015 [143-172]. Mr Powell has no personal knowledge of the site and has visited only once on 14th January 2025. I am grateful to him for taking the time to come and give his evidence.

60. I make no criticism of the witnesses. They were put in an impossible position. Both Mr Lester and Mr Powell made it clear in their Witness Statements that they had no personal knowledge of the situation about which they asked to give evidence. Judge Cooke had already anticipated as much in **Queens Oak Farm** at paragraph 41.

61. The hearing was conducted in accordance with the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Nevertheless the guidance to CPR r.3.1(2)(j) is helpful. In **McLoughlin v Grovers (A Firm)** [2001] EWCA Civ 1743; [2002] Q.B. 1312 at [66], David Steele J gave the following guidance: (i) only issues which are decisive or potentially decisive should be identified; (ii) the questions should usually be questions of law; (iii) they should be decided on the basis of a schedule of agreed or assumed facts; (iv) they should be triable without significant delay, making full allowance for the implications of a possible appeal; (v) any order should be made by the court following a case management conference.

62. Mr Clarke also referred to another CPR case, **JD Wetherspoon plc v Harris and another** [2013] EWHC 1088 (Ch). It is not the function of a witness statement to provide a commentary on documents. At para. 33 Sir Terence Etherton C made it clear that witness statements should not contain "*a recitation of facts based on documents, commentary on those documents, argument, submissions and expressions of opinion…*"

63. On that basis I have decide these Preliminary Issues, essentially questions of law, on the basis of the Statement of Agreed Facts.

Issue (1) - Conclusions

64. Mr Clark Mr Clark submits that a periodic tenancy arose in one of three alternate circumstances:

(i) During the freehold ownership of St Francis following expiry of the Agreement (28th February 2015) until disposal to EDL on 29th March 2018 (registration 12th April 2018)
(ii) Following EDL's acquisition of the freehold on 29th March 2018
(iii) On the terms of an agreement reached between EDL and the Claimants in October 2018 ('the 2018 Agreement')

Mr Clark confirmed that it is not the Respondent's case that a periodic tenancy arose following the grant of its dispositionary lease on 8th March 2024.

St Francis – February 2015 – March 2018

65. The first period in which it is submitted that a periodic tenancy arose is that following expiry of the Agreement on 28th February 2015. This period covers ownership by St Francis who acquired the freehold on 27 January 2015 and sold to EDL in March 2018.

66. Rent was paid throughout this period. The first two demands (for annual payments 1st March 2015 – 29th February 2016 and 1st March 2016 – 28th February 2017) were both marked "without prejudice to expiry on 28/02/2015". AF8 sets out that the Claimants wished to pursue negotiations in advance of expiry of the Agreement. That is, of course, the subjective intention of the Claimants. However the Claimants express wish to negotiate, once communicated to EDL on 21st November 2016, is a relevant circumstance. The Claimants continuing occupation of the site after expiry of the Agreement is directly referrable to the protections afforded to the Claimants under the Old Code. Similarly the statutory regime of the Code which came into force on 28th December 2017 readily explains the continuing basis of occupation. I find that the Claimants remained tenants at will following expiry of the Agreement throughout the period of St Francis' ownership.

EDL - March 2018 – March 2024

67. As a matter of law the existing tenancy at will was terminated with effect from 29th March 2018 when St Francis (by then known as Corbally Property Investments Ltd) disposed of the freehold to EDL. Mr Clark helpfully refers me ***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."

68. Rent was paid annually in advance throughout this period [AF9.4 and 19]. At the time of EDL's acquisition of the site rent had already been paid in advance to St Francis having been demanded on 21st December 2017 [AF9.4]. The first demand by EDL was not made until 10th December 2018 [AF 19]. Accordingly no presumption of a periodic tenancy by reason of payment of rent could possibly have arisen until December 2018 at the earliest. Crucially this postdates the October 2018 Agreement.

69. On acquisition of the freehold EDL moved quickly to terminate of the expired Agreement on redevelopment grounds. To that end a paragraph 31 notice was served in April 2018 [388-9] and counter notices in July 2018 [404-409]. The overwhelming inference must be that the parties did not intend to enter into any intermediate contractual arrangement. The tenant continued to occupy on sufferance. The landlord wanted to get possession.

70. My finding is that for the period between EDL's acquisition of the freehold and the October 2018 Agreement nothing changed. The tenancy at will with St Francis terminated as a matter of law on EDL's acquisition of the freehold. However that does not mean that a periodic tenancy arose. By the time of the December 2018 demand both parties were operating under the (mistaken) belief that, following the coming into force of the Code, the Claimants had a code agreement that could only be terminated on redevelopment grounds. Looking objectively at all the relevant circumstances I find that the Claimants remained in occupation as tenants at will.

The 2018 Agreement

71. I repeat my findings at paragraphs 34 -42. The intention of the parties was that the legal basis of the Claimants occupation of the site would be governed by the statutory framework. As Mr Read submits that is the very antithesis of the parties intending to create a periodic tenancy (Claimants Skeleton Argument at paragraph 36). The 2018 Agreement did not create a periodic tenancy.

72. For the period following the 2018 Agreement I repeat my findings at paragraphs 43-46. The parties continued on the footing of the 2018 Agreement namely, continuation of the existing agreement subject to the protections afforded to the Claimants by the Code. No periodic tenancy arose.

Section 54 LPA 25

73. I now turn to a further argument advanced by Mr Tipler on behalf of the Claimants.

74. Section 54 of the Law of Property Act 1925 deals with "*Creation of interests in land by parol*". Absent any writing interests created by parol take effect as an "*interest at will only*". This is subject to section 54(2) which provides:

    " Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine."

    A term not exceeding 3 years includes a periodic tenancy. Best rent means market rent (**Fitzkriston LLP v Panayi** [2008] L&TR 26). The rent that has continued to be paid is £47,377. I am not persuaded by Mr Tipler's submission that £47,377 is not the best (or market) rent because it far exceeds rents payable under either the Code or on renewal under the 1954 Act.

75. The submission seems to me to be misconceived for two reasons. The first is that for a periodic tenancy to have arisen the parties must have reached an agreement for a tenancy. In doing so the parties must have agreed the rent payable and therefore the rent has been agreed in the market by two parties reaching agreement. The second reason is that Mr Tipler's submission is misconceived in light of the decision of the Court of Appeal in **Looe Fuels Ltd v Looe Harbour Commissioners** [2009] L&TR 40 in which section 54(2) was considered. At paragraph 31 Longmore LJ said:

"Although the judge did not have this specific sum in mind when he concluded that the contractual rent was the best rent which could reasonably be obtained he was entitled to conclude that the agreed rent (whatever it might in due course be calculated to be) almost certainly exceeded the annual market value for the land. That was a finding of fact which he was entitled to make and I do not consider that this court should interfere with it."

76. Accordingly even if the rent of £47,377 exceeds the annual market rent it is still "*the best rent which can be reasonably obtained without taking a fine*".

Section 43(4) LTA54

77. Mr Read for the Claimants advances a further argument based on section 43(4) of the 1954 Act. Section 43 (4) (as amended by the Digital Economy Act 2017) provides:

"(4) This Part does not apply to a tenancy—

(a) the primary purpose of which is to grant code rights within the meaning of Schedule 3A to the Communications Act 2003 (the electronic communications code), and

(b) which is granted after that Schedule comes into force."

78. Accordingly a periodic tenancy granted after 28th December 2017 will fall under the provisions of the Code rather than the 1954 Act if the primary purpose of the tenancy is to grant Code rights.

79. Code rights are set out at Paragraph 3 of the Code. Paragraph 9 provides that a code right can only be conferred by "*an agreement between the occupier of the and the operator*" (whether entered into voluntarily or imposed by the Tribunal). However Paragraph 11(1)(a) requires any agreement conferring Code rights to be in writing. Accordingly section 43(4) cannot assist the Claimants where a periodic tenancy has arisen following a period of holding over after the end of the term of an agreement in circumstances where the agreement is not in writing.

[For that reason, as set out at paragraph 41 above, the 2018 Agreement is not a code agreement.]

80. Mr Read seeks to argue that parliament always intended that post 28th December 2017 all agreements granting code rights, whether in writing or not, should be governed by the Code and not the 1954 Act. I am invited to construe section 43(4) in such a way that unwritten periodic tenancies "grant code rights". To do so would, in my judgement, do too much violence to the language of the statute. Parliament has chosen to draw the boundary between the Code and the 1954 Act in such a way that periodic tenancies fall outside the Code. Such an interpretation is consistent with my finding, below, that Part 4 of the Code is not available to operators who occupy under a periodic tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

Decision on Preliminary Issue (1)

81. I find that Claimants occupy the site as tenants under a tenancy at will.

Issue (2) - On the true construction of the Code, are the Claimants entitled to seek the imposition of a new agreement under Part 4 of the Code in light of the current legal basis of their occupation as determined by the Tribunal?

82. Yes. I have found that the Claimants occupy under a tenancy at will. The Tribunal has jurisdiction in such circumstances under Part 4.

83. On 2nd September 2024 I issued a decision in On Tower (UK) Limited and another v APW Wireless II (UK) Limited (LC – 2023 – 000852) (**Patricroft**) which I was invited to determine on the hypothetical assumption that the operator was in occupation pursuant to a periodic tenancy protected by Part II of the 1954 Act. In light of my findings that the Claimants occupy this site under a tenancy at will the issue no longer arises in this reference. However, in the event that I am wrong about a tenancy at will, I now deal with Issue (2). At the outset I make it clear that decisions of the FTT are not binding. I am not bound by my decision of 2nd September 2024 and there is no burden on either party asking me to depart from that decision.

84. I set out the relevant paragraphs 23-28 of **Patricroft**:

23. The starting point when considering periodic tenancies is that set out by Lady Rose when considering the Ashloch appeal in Compton Beauchamp [166-168]. Ashloch was the assignee of a lease that was not contracted out of the protection of Part 2 of the 1954 Act. Ashloch's tenancy was continued by section 24(1) of the 1954 Act. At [167] Lady Rose is crystal clear in agreeing with both the Upper Tribunal and the Court of Appeal that Ashloch did not have the option of renewing rights under Part 4 as it has a subsisting agreement protected under the 1954 Act:

"I find the reasoning of the Upper Tribunal and the Court of Appeal in Ashloch as to why an operator with a subsisting agreement protected under the 1954 Act should not have the option of renewing the rights under Part 4 of the new Code to

be persuasive. The intention of the Government, following the recommendation of the Law Commission, was that such an operator should not get the retrospective benefit of the new Code, in particular the substantial benefit of the no-scheme valuation of the rights."

24. At [168] Lady Rose then went on to consider the availability of Part 5:

"There is a difficulty here that, on the basis of the decision in On Tower, Cornerstone may not in fact have a subsisting agreement precluded by para 6 of the transitional provisions from the benefit of Part 5 of the new Code because its agreement is not in writing. The absence of writing does not, however, affect its continued ability to apply to the County Court to renew its tenancy under Part 2 of the 1954 Act. My understanding is that that option was and is open to Cornerstone in respect of this site. I do not consider that the fact that Part 5 of the new Code may not be available to Cornerstone for the reason that its agreement is not in writing should mean that it is in a better position than a tenant whose agreement is in writing but who cannot rely on Part 5 because of para 6 of the transitional provisions. Cornerstone must therefore use its rights under Part 2 of the 1954 Act to renew its lease; that lease will then be caught by section 43(4) of the 1954 Act so that when that lease expires, Part 5 will be available."

In short Part 5 is not available. Ashloch must use its rights under the 1954 Act.

25. Mr Kitson before me submits that the position is different in respect of any periodic tenancies which may have arisen following the expiry of a contracted out 1954 Act tenancy. In doing so Mr Kitson seeks to distinguish the position in Ashloch which as not contracted. Periodic tenancies arising on the expiry of a contracted out 1954 Act tenancy are not subsisting agreements because they are not in writing (see Queen's Oak at [84]) and therefore Part 5 is not available. 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."

26. Mr Watkin argues with some force that, with the 1954 Act celebrating its 70th birthday this year, parliament would have been well aware of the limitation imposed on periodic tenants when it enacted the new Code and the Transitional

provisions. The construction proposed by Mr Kitson cuts across the well established position that an operator should not get the retrospective benefit of the new code and that dual regimes should not coexist. Those doctrines have been recently reaffirmed by the Deputy Chamber President in Gravesham Borough Council v On Tower UK Limited [2024] UKUT 151 (LC) when considering Does the Code prohibit an operator which has exhausted its rights of renewal under the 1954 Act from making a further application under Part 4?

"…rights of renewal are available to an operator either under the Code, or under the 1954 Act, but not both" [32]

"Nowhere in her comprehensive renewal of the Code did Lady Rose suggest that the assignment of operators to one route of renewal or the other applies only until the right of renewal under the 1954 Act has been exhausted" [35]

"The Code allows each operator one route to the renewal of their rights. The policy choice to require those with security of tenure under the 1954 Act to seek renewal under its provisions necessarily entailed the possibility that any particular renewal might not succeed." [37]

27. In addition I am not persuaded that the Claimant in such circumstances is "left out in the cold". It has security of tenure. Its apparatus is on site and cannot be removed without the Landlord seeking to terminate under paragraph 25 at which point the tenant can apply for a new tenancy. Compton Beauchamp allows access to Part 4 for additional rights should that become necessary. The only disadvantage to the Claimant is that it cannot access "the greater prize" of the substantial benefit of the no-scheme valuation.

28. 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."

85. Mr Read relies on paragraph 166 of **Compton Beauchamp** where Lady Rose considered the choice available to an operator either to seek a new tenancy under the 1954 Act or imposition of Code rights under Paragraph 20. Mr Read distinguishes that situation from the present position of the Claimants. In the present reference, had I found that the Claimants were periodic tenants, they would not be able to request a new tenancy under section 26(1) of the 1954 Act. They simply have no choice but to make application under the Code. Under those circumstances, absent choice, and with no other remedy available, Mr Read submits, that the Claimants must be able to access Part 4. Such conclusion is entirely consistent with the observations of Lady Rose at paragraph 106 of **Compton Beauchamp**:

"*The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word 'occupier' so as best to achieve that goal.*"

It is also consistent with Fancourt J in **EE/H3G v Stephenson & APW** [2021] UKUT 167 (LC) at [53]:

"The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than open market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests. In both cases, there is an objective of providing security for the tenant/operator and continuity of operation."

86. Mr Read invites me to adopt a pragmatic solution: where a site provider serves a section 25 notice under the 1954 Act the gateway to Part 4 shuts. Under those circumstances the operator can apply to the County Court for a new tenancy under section 24(1)(a) of the 1954 Act and cannot access Part 4. However where a site provider decides not to serve a section 25 notice there is no dual route, only Part 4 is available to the operator.

87. Superficially Mr Read's argument is attractive. An operator under Mr Read's solution is not seeking to use Part 4 when it can achieve its renewal under the 1954 Act. However, such a solution would be unworkable in practice. For example what would happen if following a Part 4 reference a site provider issued a section 25 notice and subsequently a claim either for a new tenancy or termination in the County Court? The solution proposed by Mr Read would lead to a dual regime with both the Tribunal and County Court having jurisdiction over the same dispute with no mechanism to determine where priority lies. The Tribunal cannot allow its jurisdiction to be accessed based on the whim of a site provider as to whether or not it decides to issue 1954 Act notices.

88. A line has to be drawn somewhere. As Lewison LJ observed in **Ashloch** those holding under periodic tenancies protected by Part II of the 1954 Act who cannot take the initiative to renew their tenancies under that act may be "out in the cold". However as I observed in **Patricroft** the operator has protection of its ECA under Part 6 and can apply for additional rights under Part 4. The only disadvantage is that it cannot obtain a new rent on a no-network assumption.

89. It may be some comfort to the Claimants that the situations when they are left out in the cold are likely to be "few and far between".

Issue (3) - If the Tribunal finds that the Claimants occupy as periodic tenants or licensees, were the Claimants prior to making the Reference first required to terminate any such periodic interest by serving a notice at common law?

90. In view if my finding that the Claimants occupy the site under a tenancy at will no notice of termination is required.

91. If I am wrong about a tenancy at will and a periodic tenancy has in fact arisen, then notice of termination would be required for the reasons I gave in **Patricroft** at paragraph 31:

"However in **Gravesham Borough Council v On Tower UK Limited [2024] UKUT 151 (LC)** *the Claimant was barred from serving a valid notice under paragraph 20 whilst its tenancy was being continued by the 1954 Act [72]. Under such circumstances I find that a periodic tenant cannot access Part 4 without first having given notice to terminate the periodic tenancy and such notice having expired."*

92. Mr Read invites me to depart form my previous decision on this point. No notice is required because imposition of an agreement under Paragraph 20 operates as a surrender and regrant and the existing agreement will be terminated by operation of law. I discussed termination by operation of law in **Patricroft** at paragraphs 33-35 in a slightly different context. Whilst Mr Read's point is well made, I am bound by what was said by the Deputy Chamber president in **Gravesham** at [72]:

"On Tower was not entitled to serve a notice under paragraph 27 to secure temporary rights because its tenancy was still continuing. Even if I am wrong about the first ground of appeal, I would nevertheless hold that On Tower was also barred from serving a valid notice under paragraph 20 while its tenancy was being continued by the 1954 Act. On that basis its Part 4 claim was commenced without a valid request under paragraph 20 having first been made and without the required time for consideration of the request by the Council having elapsed."

Issue (4) - Whether the Claimants are entitled to rely upon the paragraph 20 notices in these proceedings where the notices were served prior to the introduction of the requirement to refer to ADR and did not refer to that requirement.

93. This issue was also considered in **Patricroft** at paragraphs 62-69.

94. Amendments to Paragraph 20 of the Code in respect of ADR were introduced by section 69 of the Product Security and Telecommunications Infrastructure Act 2022 with effect from 7th November 2023:

Section 69 of the Product Security and Telecommunications Infrastructure Act 2022 provides:

69 Use of alternative dispute resolution

(1) The electronic communications code is amended as follows.

(2) In ***paragraph 20*** *(power of court to impose agreement)—*

(a) after sub-paragraph (2) insert—

"(2A)The notice must also—

(a) contain information about the availability of alternative dispute resolution in the event that the operator and the relevant person are unable to reach agreement, and
(b) explain the possible consequences of refusing to engage in alternative dispute resolution.";

(b) after sub-paragraph (4) insert—

"(5)Before applying for an order under this paragraph, the operator must, if it is reasonably practicable to do so, consider the use of one or more alternative dispute resolution procedures to reach agreement with the relevant person.
(6)The operator or the relevant person may at any time give the other a notice in writing stating that the operator or the relevant person (as the case may be) wishes to engage in alternative dispute resolution with the other in relation to the agreement sought by the operator."

(4) In ***paragraph 96*** *(award of costs by tribunal), in sub-paragraph (2)—*

(a) the wording after "in particular" becomes paragraph (a), and
(b) at the end of that paragraph insert ", and
(b) ***any unreasonable refusal by a party to engage in alternative dispute resolution."***

95. Paragraph 20 of the Code provides:

(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—

a) to confer a code right on the operator, or
b) to be otherwise bound by a code right which is exercisable by the operator.

(2) The operator may give the relevant person a notice in writing—

a) setting out the code right, the land to which it relates and all of the other terms of the agreement that the operator seeks, and
b) stating that the operator seeks the person's agreement to those terms.

(2A) The notice must also—

a) contain information about the availability of alternative dispute resolution in the event that the operator and the relevant person are unable to reach agreement, and
b) explain the possible consequences of refusing to engage in alternative dispute resolution.

(3) The operator may apply to the court for an order under this paragraph if—

a) *the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or*
b) *at any time after the notice is given, the relevant person gives notice inwriting to the operator that the person does not agree to confer or be otherwise bound by the code right.*

96. The Respondent's case is that service of a valid notice is a precondition, under Paragraph 20(3) for the making of a reference to the Tribunal. Subparagraph 2A requires that a valid notice must contain information about ADR. The reference before me was made under Paragraph 20 on 6th August 2014 [1-13] [AF30]. It is common ground that the Notice relied on was served on 7th March 2023 [235-283] [AF 22] and did not contain information about ADR.

97. In **Patricroft** I held at paragraph 66:

"The Notices were valid when served. They did not become invalid on 7th November 2023. There is no concept of retrospective invalidity. Accordingly references could validly be made under Paragraph 20 after 7th November 2023 reliant on valid Notices served prior to that date."

98. I am grateful to Mr Read for referring me to **Lipton and another v BA Cityflyer Ltd** [2024] UKSC 24 an authority that was not cited in **Patricroft**. The amendments introduced by section 69 of 2022 Act do not require valid existing notices to be reserved. Statutory amendments are not to be construed as operating retrospectively without clear language to that effect. In **Lipton** Lord Lloyd-Jones said at [196]:

"My starting point is the general principle of the common law that conduct and events are normally governed by the law in force at the time at which they took place. As a result, subsequent legislative changes in the law are not generally given retrospective effect. Evidence of a clear contrary intention would be required before they could be given retrospective effect, for example by disturbing accrued rights. There is a general presumption at common law that legislation is not retrospective in the sense that it alters the legal consequences of things that happened before it came into force (Chitty on Contracts, 35th ed (2023), para 1-031A; Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), sections 7.13, 7.14). This general rule reflects public expectations and notions of fairness and legal certainty."

99. There is a further reason why the notice is not invalid. The leading authority on the consequences of failing to comply fully with statutory procedures concerning property rights is **A1 Properties (Sunderland) Limited v Tudor Studios RTM Co. Limited** [2024] UKSC 27. At paragraph 61 Lord Briggs and Lord Sales set out the correct approach:

"to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case,

having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement"

100. The purpose of subparagraph 2A is to provide information about ADR and to explain the consequences of refusing to engage. Both parties before me are sophisticated litigators with deep pockets and access to the very best legal advice. The parties will be aware of the provisions concerning ADR in FTT Rule 4. The most recent version of the OFCOM Code of Practice published 15th April 2024 specifically deals with resolving disputes and the role of ADR (see paragraphs 1.81 – 1.88). The Respondent is well aware of ADR and the costs consequences of failing to engage. I am quite satisfied that, to the extent I am wrong about retrospective invalidity, the Respondent has suffered no prejudice or injustice.

101. The Notice in the present reference was served on 7th March 2023. It did not become invalid on 7th November 2023. Accordingly a reference could validly be made under Paragraph 20 on 6th August 2024 reliant on the Notice served on 7th March 2023.

Issue (5) - Whether the Claimants are entitled to rely upon the Paragraph 20 notices in these proceedings where the wording of paragraph 16 differs from the wording in the notice prescribed by Ofcom?

102. This issue was also considered in **Patricroft** at paragraphs 55-61.

103. Paragraph 16 of the Notice dated 7th March 2023 served by the Claimants on EDL under Paragraph 20 of Code reads as follows [239]:

"16.If you agree to confer the Code Rights on us we ask you to sign the agreement attached at Annex 2. Similarly, if you agree to confer the Temporary Code Rights on us, we will also send you an agreement reflecting the terms set out in this notice and ask you to sign it. You would be entitled to seek independent legal advice in relation to these agreements."

104. Paragraph 16 of the form prescribed by OFCOM reads:

If you agree [to confer the Code Rights on us / to be bound by the Code Rights], [we will send you an agreement reflecting the terms set out in this notice and ask you to sign it] [we ask you to sign the agreement attached at Annex 2]. Similarly, if you agree [to confer the Temporary Code Rights on us / to be bound by the Temporary Code Rights], we will also send you an agreement reflecting the terms set out in this notice and ask you to sign it. You would be entitled to seek independent legal advice in relation to [this/these] agreement[s].

105. It is said by Mr Clark that the Notice is invalid because alternative wordings have been deleted rather than struck through.

106. On 12th December 2023 OFCOM guidance "Electronic Communications Code: Template Notices". "Update 2 March 2018: Template Notice clarification" contains the following relevant guidance:

"Deleting the appropriate text will not invalidate the notice. However, deletion best effected by striking through the non-relevant text or paragraph rather than removing it altogether."

107. On that basis I have no hesitation in finding that the deletions complained of do not invalidate the notice. The Notice is in the prescribed form. The Notice is valid for the purposes of Paragraph 88 of the Code.

Decision

108. The Claimants occupy the rooftop site at Equipoint as tenants under a tenancy at will. The Notice served under Paragraph 20 of the Code on 7th March 2023 is valid. The Tribunal has jurisdiction under Part 4 of the Code.

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.