FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023 – 000322 and 348**
Properties	**:**	**Land lying to the west of Burlington Gardens, Hullbridge, Hockley SS5 6BD (322)** **Meadowley and Fields Farm, 150A and 150B, Congleton Road, Sandbach CW11 4TE (348)**
Claimant	**:**	**On Tower UK Limited**
Representative	**:**	**Oliver Radley-Gardner KC instructed by Gowling WLG (UK) LLP**
Respondent	**:**	**AP Wireless II (UK) Limited**
Representative	**:**	**David Holland KC and Wayne Clark instructed by Freeths LLP**
Application	**:**	**Electronic Communications Code**
Date of Hearing	**:**	**6th October 2023** **Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**30th October 2023**

DECISION – PRELIMINARY ISSUE

Preliminary Issue

1. The Preliminary Issue falls for determination in two references, LC – 2023 – 322 ("Lubbards Lodge") and LC – 2023 – 348 ("Sandbach").

2. The Claimant's rights at Lubbards Lodge are contained in "Agreement for the installation of Telecommunications Equipment" made on 21st January 2022 between David Cousin Pinkerton and Andrew James Pinkerton (1) and Orange Personal Communications Services Limited (2) ("the 2002 Agreement").

3. The Claimant's rights at Sandbach are contained in "Agreement for the installation of PCN equipment – greenfield" dated 11th March 1997 and made between Orange Personal Communications Services Limited (1) and Mr N Thornhill (2) ("the 1997 Agreement") as amended by the provisions of Supplemental Agreement made 2nd November 2000 between the same parties.

4. For the purposes of determination of the Preliminary Issue the 1997 and 2002 agreements are almost identical in terms. However, for the avoidance of any doubt, I have considered each agreement separately and made my decision as to whether either is a lease or a licence without reference to the other.

5. As provided for in paragraph 1(4) of Schedule 2 to the Digital Economy Act 2017 both the 1997 Agreement and the 2002 Agreement are "subsisting agreement(s)" under the Electronic Communications Code: Transitional Provisions.

6. In both references the Claimant seeks termination of the existing agreements and an order that the parties enter into new agreements pursuant to an Order of the Tribunal under Paragraph 34(6) of Part 5 of the Code.

7. However, Paragraph 6(2) of Schedule 2 of the 2017 Act provides:

   (2) Part 5 of the new code (termination and modification of agreements) does not apply to a subsisting agreement that is a lease of land in England and Wales, if—
   (a) it is a lease to which Part 2 of the Landlord and Tenant Act 1954 applies, and
   (b) there is no agreement under section 38A of that Act (agreements to exclude provisions of Part 2) in relation the tenancy.

8. It is common ground between the parties that neither the 1997 nor the 2002 Agreement contains any provisions contracting out of the 1954 Act.

9. Accordingly, the Preliminary Issues for determination are:

   i. Is the 2002 Agreement a lease to which Part 2 of the Landlord and Tenant Act 1954 applies?
   ii. Is the 1997 Agreement as amended, a lease to which Part 2 of the Landlord and Tenant Act 1954 applies?

10. It follows that if I find that either agreement is a lease the Tribunal has no jurisdiction to consider the reference under Part 5 of the Code and I must strike out either or both references under Rule 9(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

The Law

11. It is trite law that lease/licence distinction does not depend upon the labels attached to the 1997 and 2002 agreements.

12. **In Street v Mountford** [1985] UKHL 4 Lord Templeman said:

"Parties cannot turn a tenancy into a licence merely by calling it one. The circumstances and the conduct of the parties show that what was intended was that the occupier should be granted exclusive possession at a rent for a term with a corresponding interest in the land which created a tenancy."

"My Lords the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy."

13. In **A Pye (Oxford) Ltd v Graham** [2003] 1 AC 419 HL two elements necessary for legal possession were identified:

    i. A sufficient degree of physical control ("factual possession"); and
    ii. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")

14. The "factual matrix" known to the actual parties at the time is crucial. In **Global 100 Ltd v Laleva** [2021] EWCA Civ 1835 Levison LJ said:

"As well as what is written on the page, the court may consider the circumstances in which the agreement was made. In AG Securities v Vaughan [1990] 1 AC 417, 458 Lord Templeman put it this way:

"In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation."

15. The arguments before me relate to the issue of exclusive possession and in the case of the 1997 Agreement whether or not there is a term certain. It is common ground that if an intention to grant exclusive possession is not established then neither the 1997 or

2002 Agreements are leases to which Part 2 of the Landlord and Tenant Act 1954 applies.

16. This issue arose in **EE Ltd v Edelwind** [2020] UKUT 0272 (LC). Upper Tribunal Judge Cooke who said at paragraph 54:

"*However, it is trite law that if an agreement does grant exclusive possession for a term, it is a lease even if the parties say it is not. A fork is a fork even when called a spade (as Lord Templeman put it in Street v Mountford [1985] UKHL 4). A lease is the grant of exclusive possession for a term, and if that is what the primary Code agreement did then it is a lease, despite the words quoted above and despite the fact that it is not in the form of a lease."*

17. In that case Judge Cooke held at paragraph 59:

" I take the view that there is no grant of exclusive possession of the roof…The operator can access the roof only within certain hours, and therefore, as Mr Clark says, the agreement cannot be said to be conferring a right to occupy the roof, let alone to grant exclusive possession of it…The contracting out of the Landlord and Tenant Act 1954 is no more determinative of the matter than is the declaration that the agreement is not a lease; the parties have expressed themselves both ways, but the substantive provisions of the agreement make it clear that this is a licence not a lease."

18. On the facts of the particular agreement that fell for determination, and applying **Street v Mountford**, the operator succeeded. However, I am not bound by those findings of fact as it is not said by either party that either the 1997 or 2002 agreements are in any way similar to the agreement in **Edelwind**.

19. In **AG Securities v Vaughan** [1990] 1 AC 417 Lord Jauncey said [at 469C]:

"Accordingly, although the subsequent actings of the parties may not be prayed in aid for the purposes of construing the agreements they may be looked at for the purposes of determining whether or not parts of the agreements are a sham in the sense that they were intended merely as "dressing up" and not as provisions to which any effect would be given."

Before me Mr Holland has very helpful conceded on behalf of the Respondent that neither agreement is a "sham". The Respondent's case is that none of the provisions of either agreement are "a pretence" – they clearly point to both conferring exclusive possession.

Witness Statement of David John Powell

20. Mr Powell is the Respondent's Regional Asset Manager. Mr Powell was not called to give oral evidence, but he has made a Witness Statement supported by a statement of truth signed on 19th September 2023. He began working for the Respondent in 2018 and although he cannot give direct evidence of the surrounding circumstances in 1997 or 2002, he can give a useful description of the sites.

21. On 23rd August 2023 Mr Powell visited Sandbach. He spoke to Mr Neville Thornhill who was the grantor in the 1997 agreement. Mr Thornhill told Mr Powell that the site was built in around 1992 and was originally fenced with a timber stock fence which was subsequently upgraded to the current wire fence topped with barbed wire. There were cows grazing in the field on the access route. Mr Thornhill had not, at any time, received a key to the double locked gates to the compound. There are 3 signs on the gate "NO ENTRY UNAUTHORISED PERSONS", "CAUTION RADIO TRANSMITTERS OPERATING" and "PLEASE OBEY ALL FURTHER SIGNAGE".

22. Mr Powell also attended at Lubbards Lodge on 6th September 2023. The Respondent does not have a key to the site. The site is protected by CCTV. Mr Powell was observed and challenged by the operator of the CCTV system by way of loudspeaker. As Mr Powell was not entering the compound no issues arose. There are a number of signs: "NO ENTRY UNAUTHORISED PERSONS", "CAUTION RADIO TRANSMITTERS OPERATING", "PLEASE OBEY ALL FURTHER SIGNAGE" "WARNING – CCTV SECURITY AND RESPONSE"

23. I now turn to deal with the factors identified by the parties which it is said point in the direction of either a lease or a licence.

Term Certain – 1997 Agreement

24. Clause D of the 1997 Agreement provides "The Minimum Term is 10 years from the date shown above". Clause 2.1 provides:

    "This Agreement shall come into effect on the date shown above and shall continue for no less than the Minimum Term. It may be terminated by either party giving to the other not less than 12 months' notice in writing to expire at any time on or after the expiry of the Minimum Term".

25. The initial term of 10 years is certain. As was said in **Berrisford (FC) V Mexfield Housing Cooperative Limited** [2011] UKSC 52 the periodic tenancy that arises on expiry of the Minimum Term without fetter on giving notice is also a term certain. I find that the 1997 Agreement is for a term certain.

Demise

26. There are no words of demise in either agreement. The demise is a central part of any lease as is the express grant of exclusive possession. Both are entirely absent in both the 1997 and 2002 Agreements. Instead, clause B in both agreements grant a bundle of "rights":

    1997 Agreement
    B (i) – install, operate, maintain, repair and renew PCN Equipment
    (ii) – connect electricity cable to the PCN Equipment
    (iii) – run a communications cable from the PCN Equipment
    (iv) – vehicular access to and from the Site

2002 Agreement

B (i) – install, operate, maintain, repair, renew etc. Telecommunications Equipment
(ii) – connect electricity supply to the Telecommunications Equipment
(iii) –bring onto the Premises a backup generator
(iv) – run a communications link from the Telecommunications Equipment
(iv) – vehicular access to and from the Site on 24 hours' notice

27. The absence of a demise of land points strongly to both agreements being licences. Of course, the labels used or in the case of "demise" not used are not determinative However, the operative part of both agreements is the grant of a bundle of rights in connection with PCN/Telecommunications Equipment. The 1997 and 2002 Agreements contain "Orange's Undertakings" at paragraph 5 and "Owner's Undertakings" at paragraph 6. Those undertakings focus on the equipment and the rights granted rather than the site. This is a further very strong indication of a licence and not a lease.

28. Sections 52 -54 of the Law of Property Act 1925 require a grant of a term of at least 10 years to be by deed. Neither agreement is a deed. This is a strong indicator that the parties did not intend to enter into the grant of a lease. Had that been the party's intention it is inevitable that both agreements would have been executed as a deed. The absence of a deed is an indicator of the party's intention. The fact that the agreements are not in the form of a lease is not, however, determinative.

Term and the 1954 Act

29. Both agreements are for a substantial term, set out in both agreements at clause D. The 1997 agreement is for a minimum term of 10 years. The 2002 agreement is for 20 years. Terms of that length are suggestive of a lease rather than a licence. Neither agreement, however, makes any reference to the Landlord and Tenant Act 1954*. As **Edelwind** makes clear express declarations are not determinative (see references LC – 2023 – 000323 and 332 at pages 1025 and 1036 of the Trial Bundle– neither agreement is by deed despite express declarations in relation to the 1954 and 1995 Acts). The Respondent's case is that the original grantee, Orange, was trying to "have its cake and eat it".

    *Except clauses 7.3 and 7.4 of the 2002 Agreement where section 42 is used for definition purposes in relation to group companies.

30. I am satisfied that Orange would have had access to the very best legal advice available at the time the agreements were entered into. It was entering into a long-term commercial contract involving very substantial capital outlay. If it was intended that Orange was to have the benefit of the 1954 Act it would have said so. A licence is not protected under the 1954. If Orange were indeed trying "to have their cake and eat it" there would be a real risk that either agreement might be construed as a licence and 1954 Act protection lost. Why would Orange take that risk jeopardising coverage? The site providers should not be left out of consideration either. Surely Messrs Pinkerton and Thornhill would have wanted clarity – would they be able to obtain possession at the end of the term or would they be left with a 1954 Act protected tenant? There are considerable risks of "unintended consequences" for both parties. The complete

absence of any reference to the 1954 Act, or indeed to any contracting out, points strongly to the intention of the parties to enter into an agreement for installation of telecommunications equipment rather than a lease subject to the 1954 Act. Orange would, of course, have been well aware of its rights to apply under paras. 5 and 21 of the Old Code on expiry of the term.

Plans

31. Both the 1997 and 2002 Agreements at clause A refer to the Site:

    "as identified in red on the attached plan" (1997)

    "shown for identification purposes only edged red on the attached plan" (2002)

    It is common ground that the 1997 Agreement originally had a plan attached. However, no copy of the plan can be found. Similarly, although both parties agree that the plans were edged red no coloured copy can be found.

    The purpose of the Supplemental Agreement made in 2000 was to amend the 1997 Agreement by the substitution of a New Plan. In fact, there are 3 plans. The first has been prepared by Creative Landscape and is described as "Detailed Landscape". The other two plans prepared by Mivan Telecoms are both described as "General Arrangement". Those plans, as is the plan to the 2002 Agreement, have been signed by the parties.

32. Most conveyances, transfers and leases have a plan showing the property edged red – usually for identification only. The plan functions to identify and demarcate the property being sold or leased. Plans usually show external features such as nearby roads or houses so that what is being sold/leased can be readily ascertained.

33. However, the 3 plans annexed to the Supplemental Agreement do not fulfil that function. It is impossible to tell where the site is in relation to the farms themselves itself let alone the wider landscape. That is because what are referred to as plans are not plans as understood by either the parties or a conveyancer. They do not identify or demarcate. Instead, they are highly technical drawings containing detailed specifications of landscaping, antenna, dishes, feeder cables and even a plan of the headframe complete with lighting finials and LNA Units. What the Respondent says are plans to demarcate the demise are in fact detailed technical specifications of the telecommunications equipment to be installed.

34. The same observations apply to the plan annexed to the 2002 Agreement. Granted it is described as "Site Plan", but it does not identify where the site is, nor does it demarcate it. Again, it is a technical specification of the telecommunications apparatus to be installed containing details such as electricity requirements, equipment schedule, final antenna key etc. (Again, the position in the two references before me is in contrast to the plans in references LC – 2023 – 000323 and 332 at pages 1027 and 1049 of the Trial Bundle.)

35. In **Edelwind,** at paragraph 54, Upper Tribunal Judge Cooke considered an agreement where a drawing rather than a plan is attached:

"*The Drawing shows the proposed location of the telecommunications equipment including antennae, cable trays and a cabinet, as well as the second respondent's plantroom and air-conditioning equipment. There is no indication that the operator is to have the use of an area shown on a plan…"*

36. The nature of the plans annexed to the agreement is inconsistent with a demise under a lease. Those plans strongly point towards a licence granting rights to install telecommunications apparatus.

Fencing

37. As long ago as **Seddon v Smith** [1877] 36 LT 168 it was recognised that "enclosure is the strongest possible evidence of …possession". However, "It may have been different if e.g., the act of fencing was to keep stock in and not people out".

38. It is common ground that the sites are fenced with barbed wire on top. Indeed, the technical drawings for Sandbach refer to replacement of existing electric stock proof fences and chain link compound being replaced with 1.8m high "Dirickx" fencing with three strands of barbed wire on top.

39. At Lubbards Lodge there is reference to existing electric fence, post and rail fencing as well as existing chainlink fence with three strands of barbed wire. This was to be replaced with 1.8m high "Dirickx" fencing.

40. Both compounds are gated. It does not appear that either the grantor or the Respondent has a key to the compound.

41. The obligations to fence contained in the following clauses:

    2002 Agreement (5.1.6) – "*following completion of the Works to erect a stock proof fence to fully enclose the Telecommunications Equipment and to maintain such fence in a good and safe state of repair and condition throughout the term".*

    1997 Agreement (5.1.8) – "*to erect a stock fence to fully enclose FCN Equipment and to maintain the stock fence in a good and safe state of repair and condition".*

42. The obligation in both agreements is to fence the equipment. It is not an obligation to fence the site. It is clear that the intention of the parties that it was the Equipment that was to be protected. The incidental consequence of course is that the site was enclosed. But that was not the intention of the parties. The operator wished to keep its valuable Equipment safe from the problem of "rural" crime and the site owner wished to ensure that livestock and potentially anyone walking in the fields was not injured by the presence of high voltage electrical Equipment. The circumstances are different from **Seddon v Smith**. The intention was not possession of the site but protection of the Equipment.

43. The absence of the provision of a key to the Respondent or its predecessor in title is a red herring. The factual background – the installation of electronic communications apparatus and business common sense are crucial. As the signs observed by Mr Powell

indicate "NO ENTRY UNAUTHORISED PERSONS" and "CAUTION RADIO TRANSMITTERS OPERATING". It would clearly be wholly inappropriate for unauthorised persons to have access to such highly technical and potentially dangerous equipment. The absence of a key is business common sense to protect the equipment from damage and persons from harm. It is not, as it would be in the case of a lease relating to a parcel of land, an unequivocal assertion of possession.

Quiet Enjoyment

44. The absence of a covenant for quiet enjoyment might be thought to be indicative of a licence. However, as Mr Holland rightly points out the absence is not significant as a covenant for quiet enjoyment is implied in a lease.

Inspection

45. There are differences between the two agreements:

    2002 Agreement (4.1) – *"Orange shall permit the Owner reasonable access to the Telecommunications Equipment by prior appointment for inspections purposes only".*

    1997 Agreement (4.2) – *Orange shall permit the Owner reasonable access to the Site by prior appointment for inspection purposes only".*

46. The difference is significant. Clause 4.1 of the 2002 Agreement relates to inspecting the Telecommunications Equipment. There is no reference to the Site. This points strongly to a licence agreement – see **Edelwind** [59] "*The right to inspect the equipment on notice is about inspection of the equipment, not about possession*".

47. Clause 4.2 of the 1997 Agreement restricts the owners access to the Site by prior appointment and for inspection purposes only. This is strongly redolent of landlord's right to inspect under a lease. As Mr Holland submits the "badge" of a lease is exclusive use.

Legal Title and Mortgagees Consent

48. I do not consider the owners warranties as to legal title and mortgagee's consent to be significant. Whilst neither are strictly necessary in the case of a licence the reality is that an operator is not going to bring valuable telecommunications apparatus on site unless it is quite satisfied that the person claiming to be the owner does indeed have legal title and that the equipment is not going to be susceptible to disposal by a mortgagee in possession. In **Edelwind** at [59] warranty of title was perfectly consistent with a licence.

Chattels and Gilpin v Legg

49. Counsel for the Respondent relies on the decision in **Gilpin v Legg** [2018] L&TR 6 Ch. in respect of the following clauses:

    1997 Agreement (7.5) – *"For the avoidance of doubt the PCN Equipment shall belong to Orange as if it were a tenant's fixture".*

    2002 Agreement (7.7) – *"For the avoidance of doubt the Telecommunications Equipment shall remain the property of Orange at all times".*

50. Mr Holland drew two propositions from **Gilpin v Legg.** In that case a beach hut was found to be a chattel. The first proposition is that "a chattel accretes to the realty". Mr Holland conceded that clauses 7.5 and 7.7 were neutral in that they protect the operators right to remove its equipment at the end of the term. However, the second proposition is that the placing of a chattel on land prevents that land being used for anything else. Mr Holland submits that is indicative of exclusive possession. As was said in **Gilpin v Legg**:

    "Accordingly, where a landowner grants the right to another person to site a hut or chalet of this kind …, moveable in practice only on termination of the right, on his land, he is in substance granting a right to exclusive possession".

    However, clauses 7.5 and 7.7 are also consistent with a bundle of rights to install electronic communications equipment as set out in the other terms of both agreements. The factual matrix is crucial. Under both the 1997 and 2002 Agreements there is a distinction between use of land in accordance with a bundle of rights and occupation of that land.

51. Mr Holland's argument based on **Gilpin v Legg** although indicative of a lease is not conclusive. As was said in In **EE limited and Hutchison 3G Limited v London Borough of Islington** [2019] UKUT 0053 (LC) at [45]:

    "On the other hand, the right to keep equipment installed on land does not necessarily involve a grant of exclusive possession. For example, the land on which an automated teller machine is located in a supermarket is capable of being concurrently in the occupation of the bank which owns the machine and the store which hosts it and to involve no grant of exclusive possession:"

Repair

52. Clause 5.1.3 of the 1997 Agreement requires the operator to maintain the PCN Equipment. Clauses 5.1.2. and 7.3 are "make good" and reinstatement clauses. Clause 5.1.10 of the 2002 Agreement requires the operator to "repair such contamination" and clean the site on termination.

53. The absence of a repairing covenant on either party is not significant – the site is no more than a small plot of farmland. There is simply nothing to repair.

Other equipment

54. Clause 8.1 of both Agreements provides:

    Nothing in this agreement shall prevent the Owner installing or granting consent to any third party to install any equipment [or structure – 2002 Agreement only] at the Premises (but not the Site) ….

55. This provision gives the owner a free hand to deal with the premises as he or she wishes subject to provisos which are not relevant for present purposes. However, he has no right to install anything nor permit a third party to do so in respect of the Site. The clear intention of the parties was that the owner could do what he liked but could not interfere with the telecommunications equipment. If the owner were allowed to do so that would amount to a derogation from the grant of the rights which is the whole purpose of both agreements. I find that this clause supports the Claimant's case that both agreements are licenses granting rights and not leases granting exclusive possession.

Relocation and redevelopment

56. Clause 2.3 of the 1997 Agreement provides for consultation about "suitable relocation … within the Premises" in the event of redevelopment of the Site. The provisions of clauses 2.4 and 2.5 of the 2002 Agreement provide for a "Diversion Notice" if the site owner wishes to redevelop. Relocation will be to "a location no less satisfactory to Orange".

57. Mr Holland concedes that "lift and shift" provisions of this kind would be unusual in a lease and are certainly not typical landlord's redevelopment break clauses. Para. 20 of the Old Code allows the site owner to alter and move ECA subject to payment of compensation.

58. I agree with Mr Radley-Gardner that this qualified right for the site owner to require relocation is inconsistent with exclusive possession.

Insurance

59. I do not find the obligation on the operator to maintain public liability insurance to be surprising (see 1997 Agreement clause 5.1.4 and 2002 Agreement 5.1.8). As both clauses go on to say any such liability can only arise out of the exercise by the operator of the rights granted. The Equipment contains high voltage electricity, it is dangerous, it is valuable, and it is left unattended in a remote rural location. It is unsurprising that the owner in granting rights would seek to place the expense and burden of public liability insurance on the operator. This does not in any way point towards either agreement being a lease. Significantly the obligation is in relation to public liability insurance and not insurance of the site.

Forfeiture

60. Mr Holland argues that clause 9.1 of both agreements is a forfeiture clause in all but name. The clause is headed "Breach" and provides:

"The owner shall be entitled to terminate this Agreement with immediate effect by giving written notice to Orange if …"

61. I find termination by "written notice" to be wholly different from a landlord's right of re-entry under a lease.

Rates

62. Clause 5.17 of the 1997 Agreement and clause 5.1.5 of the 2002 Agreement provide for the operator to pay rates "levied by reason of Orange's use of the PCN Equipment" [1997 Agreement] and additional rates levied "by reason of Orange's use of the Telecommunications Equipment on the Premises" [2002 Agreement].

63. Mr Holland submits that rating is a badge of occupation consonant with a lease and exclusive occupation. I do not agree. In **John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area** [1949] 1 KB 344 it was held that occupation *"must be exclusive for the particular purpose of the possessor"*. In **Westminster CC v Southern Railway** 1936 AC 511 it was held that *"it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."* The test for rating is not the same as exclusive possession in the **Street v Mountford** sense. Accordingly, neither clause is antithetical to either a lease or a licence.

Assignment

64. The agreements are not subject to any restriction on assignment. A licence is a purely personal contractual right. The Respondent submits that clauses 10.1 can only mean that the parties intended to create leases which would be assignable. In **Edelwind** there was a covenant not to assign which was held to be perfectly consistent with a licence.

65. In **Shell-Mex v Manchester Garages** [1971] 1 WLR 612 (at page 618 A-B) Sachs LJ held:

"If it is not assignable, then, as I ventured to point out in Barnes v. Barratt [1970] 2 Q.B. 657, 669, that is an element which may be taken into account when assessing whether any particular agreement results in a licence or a tenancy: for a tenancy involves an interest in land, and it is normally a characteristic of that interest that it is assignable."

66. Assignment therefore points towards a lease, but it is only one element to be taken into account.

Successors in title

67. Clause 10.1 of the 1997 Agreement provides:

"It is the intention of the parties that this agreement shall continue to bind their respective successors in title."

Clause 10.1 of the 2002 Agreement is in slightly different terms:

"This agreement shall bind the respective successors in title of the parties and those deriving title under them."

68. The starting point for Mr Holland's submission is **"Gencomp" (Vodafone Ltd v Potting Shed Bar and Gardens** [2023] EWCA Civ 825 at paragraph 60:

"Under the general law the assignment of a contract is effective to confer the benefit of the contract on an assignee but not normally the burden of the contract."

69. The general law is supplemented by the Old Code at paragraph 2 which ensures that the burden of licences passes to the grantor's assignees. The effect of this is that although an assignee of the grantor takes both benefit and burden any assignee of grantee only takes the benefit. It is therefore the Respondent's case that any assignee of the code operator (Orange) would not be bound by the obligations in the agreement (i.e. the burden of the contract).

70. Mr Holland therefore submits that clauses 10.1 are meaningless because assignees cannot bind successors in title to the code operator. Put even more simply the expressions "bind" and "successor in title" simply have no place in a licence. For the reasons given by Mr Holland clause 10.1 is meaningless other than in the context of a lease.

71. Mr Radley-Gardner points out that for practical purposes none of this is a problem. If Orange cannot assign the burden of the licence it remains "on the hook". The site owner therefore has the comfort of knowing that in the event of a default by the present operator he/she can look to Orange (now EE). On a point of pure law an assignee cannot take the benefit without the burden under the principle of conditional benefit and burden (see **Tito v Wardell (No. 2)** [1977] Ch. 106).

72. I find that the clause in both agreements referring to binding successors in title is indicative of a lease.

Sharing and upgrading

73. Clause 7.4 of the 1997 Agreement allows for upgrading on the Site and allows any third party to share the Site. Clause 7.4 allows for any third party "to share the Site and exercise the Rights". Clause 7.5 of the 2002 Agreement allows for upgrading subject to what is in effect an "equipment cap" in Schedule 2.

74. The Respondent's case is that the reference to "the Site" is indicative of exclusive possession. I disagree. Sharing and upgrading are terms of art used widely in telecommunications agreement. So is equipment cap, albeit not expressly so called. Both parties will have understood what was meant by sharing and upgrading and intended that both could take place. The context of that intention is a telecommunications agreement not exclusive possession of land.

Conclusions

75. As was said in **Street v Mountford** sometimes it may appear from the surrounding circumstances that the right is "*referable to a legal relationship other than a tenancy*". Lord Templeman gives examples of a number of situations in which "*Legal relationships to which the grant of exclusive possession might be referrable, and which would or might negative the grant of an estate or interest in land*".

76. In **EE limited and Hutchison 3G Limited v London Borough of Islington** [2019] UKUT 0053 (LC) the Upper Tribunal considered the way in which rights under the Electronic Communications Code could be granted. The Upper Tribunal was considering the provisions of the new Code, but the observations are equally apposite to the Old Code:

"43. We agree with Mr Wills that the Code rights described in paragraph 3 of the Code do not include the right to acquire an interest in land, but equally we can find nothing which is inconsistent with Code rights being conferred by an agreement which, because of its other characteristics, creates a lease or tenancy.

44. As Mr Read argued on behalf of the claimants, the circumstances in which Code rights may be required are diverse, and it is not surprising that Parliament should not have adopted a prescriptive approach to the form in which they may be granted. At one end of the spectrum Code rights may involve going on to land for a short period to cut back trees or to carry out a survey (which was the full extent of the Code right sought in Cornerstone Telecommunications Infrastructure Ltd v The University of London) for which it would not be necessary to acquire an interest in land. At the other end Code rights may involve keeping cabinets, masts and other electronic communications apparatus installed on land for a period of years, thereby effectively excluding the owner of the land from the area required. It may not be essential that such extensive rights be granted by lease, but the evidence of practice under the old code demonstrates that it will often be convenient.

45. On the other hand, the right to keep equipment installed on land does not necessarily involve a grant of exclusive possession. For example, the land on which an automated teller machine is located in a supermarket is capable of being

concurrently in the occupation of the bank which owns the machine and the store which hosts it and to involve no grant of exclusive possession:"

77. In the case of the 1997 and 2002 Agreements I am not concerned with residential accommodation where there is, for the very good reason of providing protection for a person occupying property as their home, often a bright line between lease and licence. In the context of this reference, I am concerned with "a legal relationship other than a tenancy". That does not mean that that other legal relationship must be a purely personal contractual right. The 1997 and 2002 Agreements are long term arrangements for the installation and operation of electronic communications apparatus. Bearing in mind the rapid speed of development of electronic communications it is entirely understandable that the parties intended that those long term agreements should be assignable and bind successors in title. Indeed, that is exactly what has happened to both agreements. The provisions allowing for sharing and upgrading are standard terms in telecommunications agreements. They are vital to enable the parties to meet the challenges of a rapidly developing technology. To seek to use the lease/licence distinction, to say that an agreement is either one or the other is simply inappropriate in the modern world of electronic communications. Lord Templeman speaking in 1985 could not possibly have anticipated the technological changes that have taken place since that time. He did however leave the door open to legal relationships other than a tenancy. As the Upper Tribunal observed in **Islington** there is a diverse spectrum of telecommunications rights which can be granted. Sometimes a lease is the most convenient way forward equally there are situations where there is no grant of exclusive possession.

78. In order to discover the intention of the parties I have considered the totality of rights and obligations contained in both the 1997 and 2002 agreements separately. In doing so I have considered the surrounding circumstances at the time the agreement was entered into. As set out above some clauses point towards exclusive possession, others are more consistent with a legal relationship other than a tenancy. I have disregarded any labels attached by the parties.

79. As in **Edelwind** "the parties have expressed themselves both ways". Length of term, inspection (1997 Agreement only), chattels (per **Gilpin v Legg**), assignment and successors in title all point strongly to exclusive possession and a lease. Other terms such as absence of covenant for quiet enjoyment, warranty of title, repair, rates and insurance are neutral.

80. My decision is finely balanced. There are clearly clauses to be found in "Terms and Conditions" attached and incorporated into the 1997 Agreement and contained in Schedule 1 to the 2002 Agreement which are resonant of a lease. However, those terms and conditions are, in my judgement, outweighed by clause B to both Agreements. The intention of the parties was that the operator would be granted a bundle of rights in connection with the installation and operation of PCN/Telecommunications Equipment. There is no grant of exclusive possession with a corresponding interest in land. The "lift and shift" provisions provide a qualified right for the site owner, in consultation with Orange, to move the Site to another location within the Premises (of which the Site forms a part). The Plans attached to the agreement do not demarcate the site. The Plans are in fact technical drawings of the PCN/Telecommunications Equipment. The quite extraordinary fencing and the almost "Orwellian" security observed by Mr Powell are not intended to demarcate the site or to keep the landlord

out. Fencing and security is present to protect the PCN/Telecommunications Equipment. The spotlight shines brightly on the PCN/Telecommunications Equipment in both the 1997 and 2002 Agreements. The Site is secondary.

81. I find that neither the 1997 nor the 2002 Agreement grant exclusive possession. That does not mean that they grant purely personal contractual rights either. Both are telecommunications agreements. Such agreements are not leases to which Part 2 of the Landlord and Tenant Act 1954 applies.

Decision

82. The 2002 Agreement is not a lease to which Part 2 of the Landlord and Tenant Act 1954 applies.

83. The 1997 Agreement as amended is not a lease to which Part 2 of the Landlord and Tenant Act 1954 applies.

84. The Respondent's application to strike out references LC – 2023 – 322 and LC – 2023 – 348 is refused.

85. The Respondent shall pay the Claimant's costs of the Preliminary Issue summarily assessed in the sum of £32,000 within 28 days of the date of this Decision.

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.